Family Law Conference

'17

Oregon Family Law:

CHANGE
CHALLENGE
OPPORTUNITY

March 16-17, 2017

Pre-conference March 15, 2017 - Birth Through Three Training

Salem Convention Center
200 Commercial St SE
Salem, Oregon

JUDICIAL DEPARTMENT
STATE OF OREGON

FAMILY LAW PROGRAM
Juvenile and Family Courts Programs Division

Oregon Family Law: Change, Challenge, Opportunity
March 16-17, 2017
Salem Convention Center

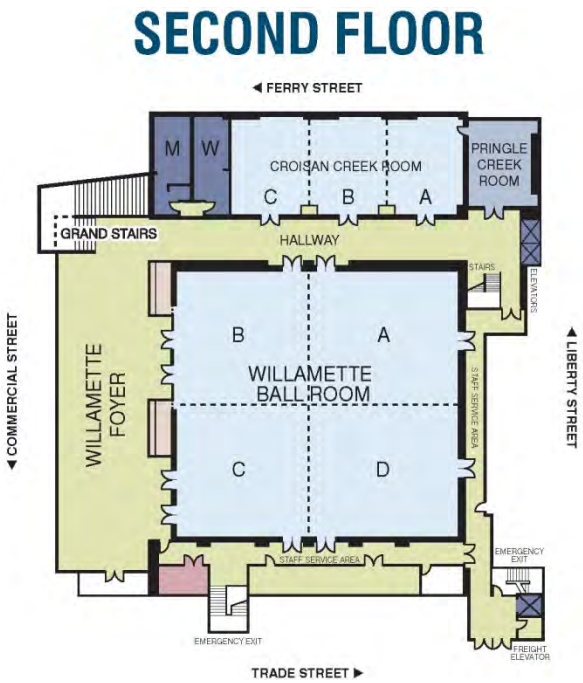
Thursday, March 16, 2017

8:00 – 8:45	**Registration** {Willamette Foyer – 2nd Floor}			
8:45 - 9:00	**Opening and Welcome** *Hon. Paula Brownhill, Chair, State Family Law Advisory Committee* *William J. Howe, III, Vice-Chair, State Family Law Advisory Committee* {Willamette Ballroom}			
9:00 - 10:15	**Navigating Uncharted Territory: The Changing Terrain of Family Life** *Stephanie Coontz, Keynote Speaker*			
10:15 - 10:30	Break			
Workshop Rooms	Willamette Ballroom	Croisan A	Croisan B	Croisan C
10:30 - 12:00	**The Roadmap Back: Supporting Children's Reintegration with Estranged Parents** *Hon. Valeri Love, Caitlyn Jackson, Sara Rich, Adam Shelton*	**Conducting Informal Domestic Relations Trials: The View from the Bench** *Hon. Wells Ashby, Hon. Beth Bagley*	**Limited Scope Representation and Family Law: Ethics and a View from the Bench** *Hon. Timothy Gerking, Samantha Benton, Helen A. Hierschbiel, Joshua Kadish*	**Oregon Law and Surrogacy Arrangements** *Hon. Beth Allen, Sam Walton*
12:00 - 1:30	Lunch: **Presentation of the Wallace P. Carson Outstanding Achievement Award** *The Honorable Thomas A. Balmer, Chief Justice, Oregon Supreme Court* {Willamette Ballroom}			
1:30 - 3:00	**The Future of the Legal Profession: Dealing with Change** *William J. Howe, III*	**Protective Orders Ratatouille** *Hon. Maureen McKnight*	**"What's the Problem Here?" How to Serve the Best Interest of the Child in "High Conflict" Custody Cases** *Hon. Karrie McIntyre, Dr. Vicky Curry, Lorena Reynolds, Judith Swinney*	**Race, The Power of an Illusion: The House We Live In** *Mariann Hyland*
3:00 - 3:15	Break			
Discussion Room	Croisan A	Croisan B	Croisan C	
3:15 - 4:00	**Proposed Legislation and Family Law** *Ryan Carty*	**Court Staff and Legal Advice** *Lindsey Detweiler, Samantha Benton*	**Is it Time to Update Oregon's Mediator Qualification Rules?** *Leola McKenzie, Amy Benedum*	
4:00 - 4:15	Break			
4:15 - 5:00	**Tribal and Family Court Issues** *Hon. Jeremy Brave-Heart*	**Guide and File Forms** *Holly Rudolph*	**Recommended Practices for Domestic Relations Court-Connected Mediation** *Lauren Mac Neill, Lisa Mayfield*	
5:00 - 6:00	Networking Time {Willamette Foyer – 2nd Floor}			
6:00 - 8:00	Dinner: **Courting Fun: Why Laughter and Play are Vital for Living with Less Stress** *Leigh Anne Jasheway, Dinner Speaker* {Willamette Ballroom}			

Materials are posted on the Family Law Website at:
http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/SFLAC-Events.aspx

Oregon Family Law: Change, Challenge, Opportunity
March 16-17, 2017
Salem Convention Center

Friday, March 17, 2017				
7:30 - 8:15	Breakfast {Willamette Foyer – 2nd Floor}			
8:15 - 8:30	**Welcome** *Hon. Paula Brownhill, Chair State Law Advisory Committee (SFLAC)* {Willamette Ballroom}			
8:30 - 10:00	**Through a Trauma Lens: Trauma Informed Practice for the Courtroom** *Mandy Davis, Plenary Speaker*			
10:00 - 10:15	Break			
Workshop Rooms	Willamette Ballroom	Croisan A	Croisan B	Croisan C
10:15 - 11:45	**Procedural Fairness: The Court's Foundation for Family Law Practice** *Hon. Maureen McKnight, Jenny Woodson*	**Firearms & Domestic Violence: State and Federal Laws** *Debra Dority, Erin Greenawald*	**What's New and Shiny in the Oregon Child Support Program?** *Kate Cooper Richardson, Dawn Marquardt, Vera Poe, Michael Ritchey, Claudia Garcia Groberg, Carol Anne McFarland*	**The Intersection of Probate Court and Family Court: Guardianship and Conservatorship** *Murray Petitt, Mark Williams*
12:00 - 1:30	Lunch: **Closing** *Samantha Benton, Colleen Carter-Cox* {Willamette Ballroom}			
1:30 - 4:30	SFLAC Meeting {Croisan A}			



SFLAC Members:

- The Honorable Paula Brownhill, Judge, Clatsop County Circuit Court, Chair
- William J. Howe, III, Family Law Attorney, Vice Chair
- The Honorable David V. Brewer, Justice, Oregon Supreme Court
- Stephen Adams, Attorney and Mediator
- Amy Bonkosky, Trial Court Administrator, Crook & Jefferson County Circuit Courts
- Colleen Carter-Cox, Family Court Coordinator, Lane County Circuit Court
- Ryan Carty, Family Law Attorney
- Debra Dority, Family Law Support Unit Attorney, Oregon Law Center
- Dr. Adam Furchner, Clinical Psychologist and Mediator
- Linda Hukari, Trial Court Administrator, Benton County Circuit Court
- Laurie Hart, Family Law Attorney
- Lauren Mac Neill, Director, Clackamas County Family Court Services
- The Honorable Maureen McKnight, Judge, Multnomah County Circuit Court
- Rebecca Orf, VAWA Program Staff Counsel, Oregon Judicial Department
- The Honorable Keith Raines, Judge, Washington County Circuit Court
- Kate Cooper Richardson, Director, Oregon Child Support Program

Please express your thanks to the SFLAC Conference Planning Subcommittee Members:

- Colleen Carter-Cox, Family Court Coordinator, Lane Circuit Court, Chair
- Samantha Benton, Program Manager, Family Law Program, OJD
- Amy Bonkosky, Trial Court Administrator, Crook & Jefferson County Circuit Courts
- The Honorable Gregory Baxter, Judge, Baker County Circuit Court
- The Honorable Cynthia Easterday, Judge, Yamhill County Circuit Court
- The Honorable Bethany Flint, Judge, Deschutes County Circuit Court
- The Honorable Jenefer Grant, Judge, Columbia County
- Hope Hicks, Child Support Analyst, Family Law Program, OJD
- Linda Hukari, Trial Court Administrator, Benton County Circuit Court
- Caitlyn Jackson, Program Supervisor, Lane County Family Mediation
- Leola McKenzie, Director, Juvenile & Family Court Programs Division, OJD
- Rebecca Orf, VAWA Program Staff Counsel, Oregon Judicial Department
- Terry Svay, Management Assistant, Family Law Program, OJD
- Adam Shelton, Family Law Attorney

Please recycle this agenda.

#FLC17

Sixth Family Law Conference
Oregon Family Law: Change, Challenge, Opportunity

The Roadmap Back: Supporting Children's Reintegration with Estranged Parents

Presenters:

The Honorable Valeri Love, Lane County Circuit Court Judge

Judge Love was appointed to the bench in 2011. Judge Love's practice included both criminal and civil litigation. She began her legal career as a judicial law clerk to the Honorable Darryl L. Larson in 1995. She has previously worked as a Deputy District Attorney for the Lane County District Attorney's Office where she primarily handled domestic violence and financial fraud cases. Her civil litigation experience includes work as an attorney with Kelly L. Andersen, P.C. and with Gleaves Swearingen Potter & Scott immediately prior to her appointment to the bench. A Native Hawaiian, Judge Love moved to Oregon in 1986 after graduating from Punahou School in Honolulu. She obtained her Bachelor's Degree from Linfield College and her Master of Management and Law degrees from Willamette University. Throughout her legal career Judge Love has been involved with numerous organizations and activities including the Lane County Bar Association, Oregon Asian Pacific American Bar Association, and Oregon Women Lawyers. Judge Love served as the primary Juvenile Court judge from 2014 through 2016. She received the Chief's Justice's Juvenile Court Champion Award in August 2014. She returned to the downtown courthouse in January 2017. In addition to her general trial assignment, Judge Love is also a member of the criminal team.

Caitlyn Jackson, Program Supervisor and Family Mediator, Lane County Family Mediation

Caitlyn supervises and evaluates the activities of the Family Mediation program and staff. She coordinates delivery of program services including: custody and parenting time mediations, Family Check-Up, supervised parenting time, post-adoption communication mediations, Adverse Childhood Experiences, Springfield Restorative Justice, custody evaluations, small claims clinic, and the intended Batterer Intervention Program. She mediates and co-mediates parenting time and custody mediations while meeting agreement rate goals. She teaches the court-connected parent education class, Focus on Children. She develops concise and articulate written reports and agreements for post-adoption communication agreements, custody and parenting time evaluations, parenting time and custody mediations. She developed and implemented the Springfield Restorative Justice, a youth diversion project.

Sara Rich, Family Therapist, Private Practice, Eugene, Oregon

In her private practice, Sara works with individuals and families on mental health and relationship issues. She facilitates and supervises visitation, provides co-parent coaching, and coordination for high conflict families. She serves as an Adjunct Professor for the Substance Abuse Prevention Program at the University of Oregon. Sara teaches classes Alcohol and Drug Prevention, Interpersonal Violence, Case Management and Documentation, Healthy Workplace Relationships. She is also a contracted Family Support Specialist, with Department of Human Services, working with children and families on safety goals, implementing behavior modification plans, complete monthly case notes on clients, assess family, build social and work relationships, mentor families on daily living issues. Collaborating with and referring families to community service providers and the court system.

Adam Shelton, Attorney at Law, Arnold Law Office

Adam is a family law attorney primarily based out of Portland, whose practice focuses on complex custody matters and large estate dissolutions. He also has years of experience in juvenile dependency matters and various hours in mediation training. He began his career as a solo practitioner in Eugene, followed by a one year stint with a larger Portland family law firm, before returning to Eugene in 2013 to join Arnold Law. As of 2017, he manages a statewide case load from the Arnold Law office in Portland. Adam enjoys numerous outdoor endeavors, board games, various sports, podcasts, and is a passionate Brazilian Jiu Jitsu practitioner.

The Road Map Back: Supporting Children's Reintergration with Estranged Parents

Honorable Valeri Love, Caitlyn Jackson, M.A.
Adam Shelton, J.D., & Sara Rich, M.S.W.

Introductions

The Who and Why

- *Families entrenched in conflict*
- *Domestic/Sexual Violence*
- *Mental Illness*
- *Substance Abuse*
- *Child Welfare Involvement*
- *Incarceration*
- *Distance/Geographical Issues*

Reunification

Research says that children do better when they have positive and consistent contact with both parents. However, reunification is not always appropriate.

What do the Statutes Say?

Case Study #1

Group Questions

** Does your group think this family is ready for reunification? If so, how?*

Views From The Bench

- *Determining if reunification is appropriate*
- *Determining the reunification process is the best outcome for the child*
- *Defining success: how is successful reunification defined in a variety of cases.*
- *Court Orders: What to include to support successful reunification and to decrease re-litigation*

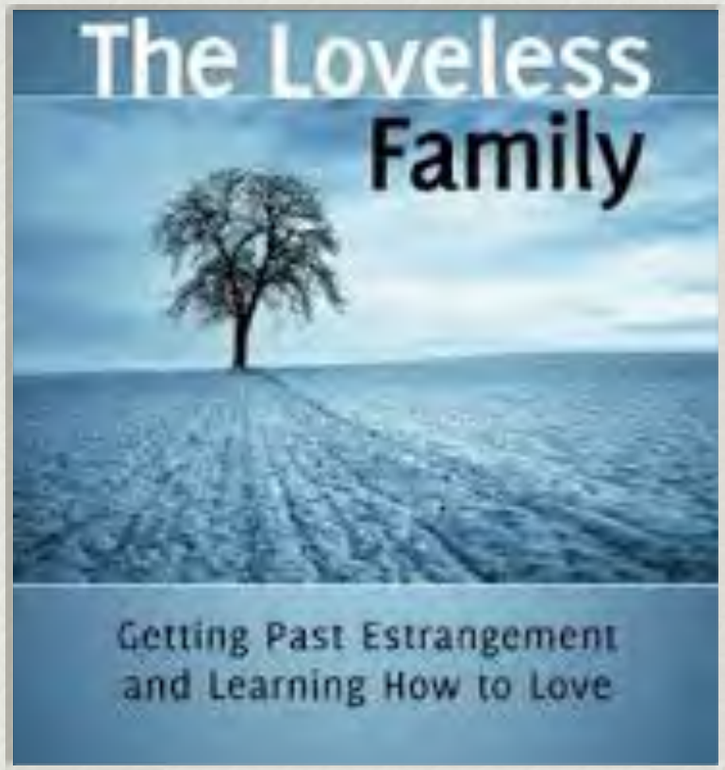
Approaches to Reunification

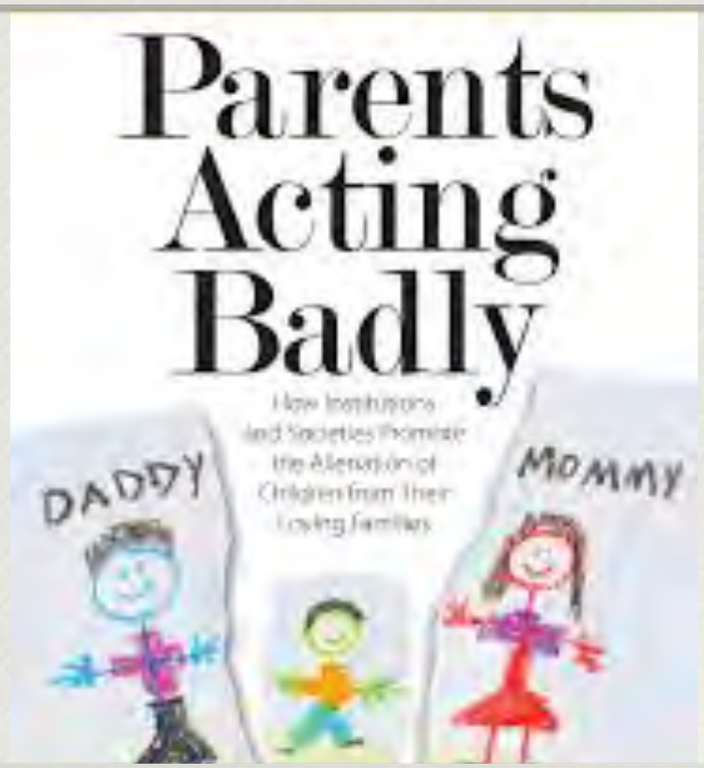
- *Progressive Stages*
- *Supervised Parenting Time*
- *Supervised Starts and Stops*
- *Supervised Exchanges*
- *Unsupervised Parenting Time*
- *Co-Parent Coaching*
- *Parent Coordinators*
- *In Conjunction With Therapists*
- *Letters*
- *Skype Sessions*
- *Residential Reunification*

Case Study #2

- *Every family is different*


30 Years to 30 Days
Seeds to Estrangement
PATTY ANN
ESTRANGED
COPING
STRATEGIES
FOR
(GRAND)
PARENTS
PATTY ANN
The Estrangement Arrangement
Twisted Lessons in Love
PATTY ANN
ALMOST PERFECT STRANGERS
An
PATTY ANN


The Loveless Family
Getting Past Estrangement
and Learning How to Love


Parents Acting Badly
DADDY
MOMMY

"Type a quote here."

–Johnny Appleseed

OUTCOMES OF FAMILY COUNSELING INTERVENTIONS WITH CHILDREN WHO RESIST VISITATION: AN ADDENDUM TO FRIEDLANDER AND WALTERS (2010)

Janet R. Johnston & Judith Roth Goldman

Preliminary findings on the outcomes of family-focused counseling interventions for alienated and estranged children are presented based upon data from a longitudinal study of children in chronic custody disputes who were interviewed as young adults and from the clinical records of long-term therapy with these children who were resisting visitation.

Our family counseling intervention model[1] is a dynamic, family systems and developmental approach to visitation resistance and includes both parents and child in therapy that is contract bound and court ordered.[2] It is based upon our prior research studies of children in high conflict custody disputing families that found that in a large portion of cases, children who reject a parent are not singularly alienated by an angry, vindictive ex-spouse, rather they are also often young, emotionally vulnerable children who are simultaneously enmeshed with the preferred parent and realistically estranged by inadequate, problematic, or abusive parenting on the part of the rejected parent.[3] Hence, our assessments and interventions are tailored to the dynamics of the specific and often multiple factors in each case.

In this brief paper we report on outcomes of our family counseling approach from two sources. The first source was a long-term follow-up study of children of highly conflicted custody disputing families interviewed 15–20 years later, comprising 37 young adults aged 20–30 years from 22 families. All of these subjects had been provided with 20–30 hours of family-focused counseling at the time of the custody dispute when they were ages 4–14 years and subsequently, 1/4 of them had been in therapy of various kinds by court order or parent stipulation.[4] The second source was the authors' records of therapy with 42 children from 39 families who were resisting or refusing visitation during their treatment in the context of a custody or access dispute with an average duration of almost a decade. The children's ages ranged from 2–17 years when first seen and from 9–29 years when last seen in therapy. In view of the descriptive nature of the studies and small samples, a cautionary note: the outcomes reported below should be viewed as preliminary and speculative hypotheses requiring further research, rather than conclusive findings.

The goals of our counseling interventions are broader than parent–child reunification. Whereas restoring a child's regular contact with a rejected parent is the simplest to assess objectively, the quality of that relationship may still be problematic and variable. Children may resume contact with a parent but their negative attitude towards and beliefs about that parent may not shift, their behavior toward that parent might remain unpleasant or avoidant, and the truce between parent and child can be short lived. Our multiple goals of treatment,

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FAMILY COURT REVIEW, Vol. 48 No. 1, January 2010 112–115

therefore, include remedying the child's developmental deficits, transforming the child's distorted "good/bad" views and polarized feelings towards both parents into more realistic ones; restoring appropriate co-parental, parenting roles in the family; and establishing the kind of parent–child contact that benefits the child and matches the parent's capacities to provide.[5]

The minority of young adults in our longitudinal study (about 1/4, both men and women) remembered that they had predominantly negative feelings towards one parent during their elementary school age years. This was mostly consistent with our counselor's ratings at the time. During their early teenage years, an astonishing 60 percent recalled developing strong negativity towards one parent that was, to varying degrees, acted out in a range of ways from passive avoidance, to resistance, to contact, to outright refusal of visits. Negative feelings towards fathers were about twice as likely compared to mothers. Attitudes towards both parents then improved steadily through high school and afterwards to their current status where the majority reported feeling "positive" or "very positive," albeit with more moderate views of their parents' strengths and limitations.

Virtually all of the youth who had actively resisted or refused visitation subsequently, on their own accord, initiated reconciliation with the rejected parent some time during their late teens and early twenties, often after they reached 18 years, a milestone that symbolizes their emancipation. Whereas some gradually normalized their relationships, others did so precipitously. Some expressed remorse for their hateful stance and regret for lost opportunities; others offered no explanation for their previous rejecting behavior. By and large the young adults indicated that they had repaired their relationships with their parents voluntarily without the help of a counselor. Whereas a supportive relationship with a long-term therapist was seen as beneficial in general, resistant offspring who had been forced by court orders to see a successive array of therapists for reunification counseling were, as young adults, contemptuous and blamed the court or rejected parent for putting them through this ordeal.

It would appear that an alienated stance that emerges for the first time during the early teenage years is a common hazard in high-conflict divorced families, but it is unlikely to last (in most cases it ranges from a few months to a couple of years). We speculate that it serves developmental functions such as relieving intolerable loyalty conflicts, helping adolescents distance themselves from a demanding parent or separate/individuate from a relatively good one. This suggests the strategy of supportive voluntary counseling and/or backing off and allowing the youth to mature and time to heal the breach. Specifically, when teenagers feel more empowered and their autonomy respected, they are more able to distance themselves from the polarizing parental conflict and more likely to reinitiate contact with the rejected parent.

On the other hand, an enduring rejection of a parent seems to be rooted in earlier, more chronic family dysfunction and realistic concerns the child has about that parent. In our longitudinal study, a minority during their young adult years expressed strong negative feelings toward one parent (19%) and continued to refuse all contact. All but one of these had sustained this antipathy for most of their growing up years. For these individuals, attempts at reconciling with the rejected parent during their late teens or early twenties had ended in disappointment. They were estranged by a parent's violent, alcoholic, or abusive behavior, or alternatively, provided convincing accounts of the parent's more subtle forms of emotional manipulation and control or lack of empathy and respect for them as a person, mostly in accord with counselors' observations many years previously. Interestingly, whereas young adults invariably refused any contact with a father for whom they had strong

negative feelings, if it was the mother who had been rejected, they kept some semblance of contact despite feeling very negative towards her. By and large, grown children of custody disputes suffered high levels of emotional distress and had difficulties forming secure attachments. However, those who refused contact with one of their parents were not among the most poorly functioning and their capacity for attachments with intimate adult partners ranged over the spectrum.[6]

Our observations of visitation resistant children in therapy indicate that a range of outcomes for parent–child relationships can be anticipated through the late teen and young adult years. Generally, it is prudent to have modest expectations for change with about 1/2 achieving positive outcomes in terms of the multiple goals of intervention (as listed above). Highly successful outcomes are achievable with a minority of families and are more likely with early intervention and preventive measures, before the child's stance and family dynamics becomes immutable and bogged down in litigation. Also, the prognosis is good when the aligned parent is appropriately protective, the rejected parent is calm and patient in forming a bond with the child, and both actively encourage the child to separate/individuate from one parent and reunify with the other. Good outcomes are likely for teenagers where their negative stance is primarily reactive to a recent divorce or serves their developmental needs (as discussed above).

In families where rejected parents have parenting limitations within a chronically conflicted family (the bulk of cases in our samples), positive outcomes occur when children are helped to achieve a strategic or emotionally safe distance from the more difficult or demanding parent where contact is brief or less frequent and limited to structured and mutually enjoyable activities (attending a movie, a sporting game, or family celebration together) where their discomfort and antipathy is muted. As they grow older, these youth learn to manage what continues to be a somewhat difficult relationship with limited expectations on both sides.

Amongst those with poor outcomes in terms of our goals, most involve a rejected parent with serious parenting deficits, often one who loses patience or interest and walks away from the situation or carries on the battle in court. In this event, family dynamics solidify, aligned parents do not relinquish their worries or fears, and the youngster's negative stance becomes more entrenched. It is our experience that, rather than persist with court orders for reunification with children who are primarily estranged by a parent's behavior, under these conditions the children, especially the teenagers, should be invited to "get on with life" with help from a supportive therapist if useful, and make the choice of contact at a later date. Provided that the young person is functioning relatively well with peers and in other family relationships, this may ultimately be a productive outcome. Nondirect access through letters, cards, or e-mail, monitored or facilitated by a therapist, may be all that is possible.

Where a careful evaluation indicates that the aligned parent is mentally ill or is a seriously character-disordered individual who blatantly avoids, refuses or sabotages any therapeutic intervention, sometimes relocating—virtually abducting the child, children need to be rescued by court orders that change custody, either to the better functioning parent or to a third party with the capacity to provide a healthier family environment. Another small subset of those who might benefit from placement to a third party include adolescents who repeatedly reverse their allegiance, rejecting the previously aligned "all good" parent and embracing the previously rejected "all bad" parent. Unfortunately, the currently favored parent alternatively endorses and the currently rejected parent alternatively condemns these flip flops and both continue to blame each other as well as therapists and the family court for their offspring's problems. The long term prognosis for these youth is particularly poor. In

our studies, during their late teens and early twenties they were diagnosed with a bipolar or obsessive-compulsive mental illness, borderline personality disorder and often had serious substance abuse problems; some were placed in residential treatment.

NOTES

1. The model was first described by Janet Johnston, Marjorie Gans Walters, & Steven Friedlander, *Therapeutic Work With Alienated Children and Their Families*, 39 FAM. CT. REV. 316 (2001), and updated and elaborated in Steven Friedlander & Marjorie Gans Walters, When a Child Rejects a parent: Tailoring the Intervention to Fit the Problem, 48 FAM. CT. REV. 97 (2010).

2. Parents either stipulate or family court orders them into counseling. If parents then choose our service, with the help of involved professionals, a detailed contract for the nature of the intervention is developed. Since the service is confidential, no information other than whether the family members have attended is provided to the court.

3. *See* Janet Johnston et al., *Is it Alienating Parenting, Role Reversal, or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. EMOTIONAL ABUSE 191 (2005).

4. In the longitudinal study, follow-up data were gathered 15–20 years later from a representative one third of 90 custody-disputing families, initially referred by family courts between1989–1993. Both parents and the grown children of the disputes, when able to be located, were interviewed by the same counselor (the first author) who had seen them originally, yielding a 70% response rate. The young adults also completed standardized measures of their emotional functioning and intimate relationships as well as the quality of relationships and feelings towards their parents over their growing up years. Children's rejection of a parent was defined as predominantly negative attitudes and beliefs about and aggressive, resistant or avoidant behaviors towards a parent and measured by ratings on scales that were completed by their counselor, validated by a second independent counselor and subsequently cross-validated by the child's self report. *See* JANET JOHNSTON ET AL., IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (2d ed., 2009). In the second sample the authors collaborated on a systematic qualitative review of their pooled therapy records of children who resisted visits in order to come to the descriptive conclusions reported here.In the second cross sectional sample the authors' collaborated on a systematic qualitative review of their pooled therapy records of children who resisted visits.

5. It is argued that longer-term outcomes of these more complex multiple goals need to be evaluated. *See also* Friedlander & Walters, *supra* note 1, at 97.

6. Johnston et al., *supra* note 4.

Janet R. Johnston Ph.D. is a professor in the Department of Justice Studies, San Jose State University. She has specialized in counseling, mediation and research with high-conflict, litigating divorcing couples and their children with special attention to domestic violence, child abduction and alienated children.

Judith Roth Goldman, PhD. is a psychotherapist, child development specialist and mediator in private practice in Santa Monica California where she specializes in separation, divorce, high-conflict post divorce parenting, child bereavement and trauma.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Conducting Informal Domestic Relations Trials: The View from the Bench

Presenters:

The Honorable Wells Ashby, Deschutes County Circuit Court Judge

Judge Ashby was elected to the bench in 2010 and handles criminal, civil and family law cases. Judge Ashby is a member of the Oregon Uniform Trial Court Rules Committee, the Deschutes County Family Law Advisory Committee and the Deschutes County Domestic Violence Council. He also serves as the presiding judge for the Deschutes County Domestic Violence Deferred Sentencing Program. Prior to joining the bench, Judge Ashby practiced law in Oregon, Idaho and Colorado as a prosecutor, criminal defense attorney and civil litigator. Judge Ashby graduated from the University of Colorado, Boulder, earning his Bachelor's degree in 1992 and his Juris Doctorate in 1997.

The Honorable Beth Bagley, Deschutes County Circuit Court Judge

Judge Bagley was elected to the bench in 2013. Judge Bagley was initially assigned to the specialty domestic relations docket, and now hears all case types. Prior to taking the bench, Judge Bagley was a prosecutor for 13 years, and a criminal defense attorney handling indigent defense cases for 2 years. Judge Bagley received her undergraduate degree from the University of California—Santa Barbara in 1994, and her law degree from the University of Minnesota Law School in 1997. Judge Bagley has lived and practiced law in Oregon since 1997.

OREGON'S INFORMAL DOMESTIC RELATIONS TRIAL: A NEW TOOL TO EFFICIENTLY AND FAIRLY MANAGE FAMILY COURT TRIALS

William J. Howe III and Jeffrey E. Hall

The Informal Domestic Relations Trial (IDRT) process adopted by the Deschutes County, Oregon, Circuit Court is described, evaluated, and compared to simplified family law procedural rules of other jurisdictions. The IDRT process has been created by local court rule, and will soon be adopted statewide in Oregon. The IDRT rule allows parties to choose a simplified trial or hearing format where the parties speak directly to the judge with no direct or cross-examination, nonparty witnesses are limited to experts, the traditional rules of evidence are waived, and all exhibits offered by the parties are admitted. IDRT cases are typically docketed more quickly than traditional trials; last just a couple of hours; and decisions are rendered promptly, usually the day of the hearing or trial. The court retains jurisdiction to modify the process as fairness requires and to divert cases where domestic violence or other reasons render IDRT inappropriate.

Key Points for the Family Court Community:

- Self-represented litigants are generally not capable of effectively presenting their family law case at trial because of the complexity of evidentiary rules and trial procedures.
- When conducting traditional trials involving self-represented family law litigants, judges are challenged by the requirement to remain passive, when more active engagement of the court is necessary in order to achieve fairness because few self-represented litigants understand the rules of evidence and trial procedure.
- A simplified trial and hearing process is necessary to accommodate these realities and the increasing number of self-represented family law litigants.
- The perception of procedural fairness of self-represented litigants is premised on their feeling that they were able to tell the judge their story.
- Five states and some jurisdictions outside the United States have adopted informal procedures for certain family law cases, and this trend is growing.
- Attorneys are increasingly recommending the IDRT process to clients where either only narrow issues are presented for trial or where their clients cannot afford full representation at trial.

Keywords: *Domestic Relations Trials; Family Law Trials; Informal Custody Trials; Informal Domestic Relations Trials; Pro Se Litigants; Procedural Fairness; and Self-Represented Litigants.*

INTRODUCTION

Creating a family is easy; reconstellating a family after divorce or separation is hard. No judge is required to approve a couple's cohabitation or procreation. However, in the United States only a court can grant a divorce, separation, or a judgment resolving child custody, parenting time, and support issues. So each year courts are crowded with litigants seeking resolution of their family law disputes.[1]

These customers of our courts are rejecting the traditional litigation model to resolve their issues. Premarital agreements, until fairly recently considered void as against public policy, are now common.[2] These agreements are designed to avoid most judicial involvement if the parties' marriage ends. Alternative dispute resolution models designed to minimize court involvement are widely available. The avalanche of self-represented litigants (SRLs)[3] seeking to navigate traditional court procedures is the most dramatic challenge to courts seeking to provide fair and efficient resolution of family law disputes.

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Various innovations have been developed to address the huge challenge presented by the self-represented phenomenon. These include encouraging lawyers to offer unbundled legal services and providing greater access to self-help resources, forms, and programs, such as the Center for Out-of-Court Divorce located in Denver, Colorado.[4] This innovation was birthed by the Institute for the Advancement of the American Legal System (IAALS).[5] IAALS convened a Summit of the national family law bar in November 2015 with the goal of generating specific and creative proposals for family justice system reform. The report, "The Family Law Bar: Stewards of the System, Leaders of Change,"[6] summarizes the outcome. These recommendations are predicated on the goal of making the family dispute resolution system more client focused and customer friendly.

This article describes a successful innovation piloted by Deschutes County, Oregon, Circuit Court, which is now being recommended for expansion statewide in Oregon—the Informal Domestic Relations Trial (IDRT). The IDRT rule allows parties to choose a simplified trial or hearing format. In Deschutes County, when a family case is at issue, the parties are offered a choice; they may proceed using the traditional trial or IDRT.

If the parties elect the IDRT procedure and a hearing becomes necessary, the judge actively controls the process. The parties speak under oath directly to the judge with no direct or cross-examination. The judge may ask questions, but lawyers and parties may not, unless the court permits. Nonparty witnesses are limited to experts. All traditional rules of evidence, including prohibitions on hearsay testimony, are waived. Any exhibits offered by the parties are admitted, and the court determines the evidentiary weight of such exhibits.

All matters of property division, support, and children's issues may be heard and decided. Typically, IDRT cases are docketed more quickly than traditional trials, last just a couple of hours, and decisions are rendered promptly, usually the day of the hearing or trial.

This article will explore the informal process in more detail and also compare IDRT to simplified proceeding rules of other jurisdictions.

IMPACT OF SRLs ON FAMILY COURTS

In some courts, eighty to ninety percent of family cases involve at least one SRL.[7] The figure is slightly less in Oregon, based on estimates of local judges. Unfortunately, as in most jurisdictions, the percentage of SRLs is impossible to accurately determine because of the record-keeping practices. However, almost everywhere, their numbers are very large and growing. Estimates in Oregon pegged the number of cases in which at least one party was unrepresented at some point in the proceeding at forty-two percent in 1995 and between seventy and eighty percent today.[8]

Most litigants self-represent because they cannot afford full-service representation. These individuals either did not qualify for free or reduced-cost services or unbundled legal services are unavailable in their jurisdiction or, if unbundled legal services were available, these litigants are often unaware of this option. Over ninety percent of SRLs in a recent study by IAALS indicated that financial issues were influential to their decision not to hire a lawyer.[9] This includes forty percent of the sample whose annual income was between $40,000 and $100,000.[10]

In the IAALS study, a significant subset of litigants chose to self-represent even though they could have afforded a lawyer, and they cited the following reasons for doing so:[11]

1. They felt the involvement of lawyers would make the dispute more adversarial and thereby corrode the ability of the parties to cooperate in the future.
2. They wished to have a larger voice in the process, to tell their story and retain more control of the process than they perceived would be possible if lawyers were involved.
3. They felt they could navigate without lawyers (perhaps part of our increasingly self-help-driven culture). Of those citing this reason seventy-eight percent possessed some college education.

This avalanche of SRLs has clogged the family court system in many jurisdictions whose rules and procedures are ill equipped to manage litigants unfamiliar with and unsophisticated in managing the requirements of the traditional trial model. In addition, judges are often conflicted about how far they may go to assist SRLs in presenting their case. If the judge offers no assistance, unfairness too often results. However, for the court to assist one or both parties, for instance by guiding the offer of critical evidence to the court, the judge might risk violating our model of judicial neutrality.

HISTORY AND DEVELOPMENT OF IDRT

Initially IDRT was conceived as a process to more efficiently manage the crushing family court docket and also as a way to relieve judges of the discomfort and concern over whether relaxing the rules of evidence or assisting in the preparation of judgments would violate judicial ethics rules.

It immediately became obvious that the benefits of IDRT were far greater than judicial economy and avoiding judicial ethics heartburn. This process was greeted by litigants as affording access to justice in a way that SRLs, even more than represented litigants, felt was more understandable. Furthermore, procedural fairness was advanced, as litigants felt and experienced being heard directly by the person who possessed the power to resolve the dispute.[12]

Deschutes County Circuit Court proposed a Supplemental Local Rule (SLR 8.015) establishing IDRTs in 2012.[13] The court did so in collaboration with Oregon's Statewide Family Law Advisory Committee (SFLAC).[14] Since 1997 the SFLAC has generated many of Oregon's family law reforms and innovations. SFLAC was assisted in the IDRT innovation by IAALS.[15] This rule was approved by Chief Justice Balmer and went into effect on May 29, 2013.

IDRT was inspired by the Idaho Informal Custody Trial (ICT) rule, which has operated since 2008.[16] However, unlike IDRT, the Idaho model is limited to determining custody and child support issues.

SFLAC and Deschutes County Court considered whether this process should be enacted by statute or court rule. As discussed below, to date, the few states that have created informal trial models have opted to pursue adoption by court rule or, in the case of Michigan, supreme court order. Establishing the IDRT process by court rule was determined to be the simplest and quickest process for Oregon and allowed for a more efficient pilot project.

Before IDRT was approved, extensive vetting was accomplished with stakeholders, including domestic violence advocates, local and statewide members of the bar, and the public.

IMPLEMENTATION AND OPERATION OF THE IDRT PROCESS

CASES AND HEARING TYPES APPROPRIATE FOR IDRT

Any contested family law proceeding where evidence and testimony is allowed qualifies for IDRT. The rule provides that IDRT "may be held to resolve all issues in original actions or modifications for dissolution of marriage, separate maintenance, annulment, child support and child custody."[17] All issues of discovery, child custody, parenting time, property division, and spousal support, from show cause proceedings to a trial on the merits, as well as modification proceedings, may be litigated using the IDRT process.

SELECTION OF IDRT

Upon filing, the parties are provided with a brochure summarizing the IDRT process and comparing the components of both the IDRT process and a traditional trial.[18] The IDRT rule requires a forced choice by the parties. It is an opt-in process because both parties must agree and sign the waiver form. To ensure that the option is given consideration in every case, parties are forced to

affirmatively select which type of trial they choose at the time their request for a trial or hearing is made. This generally occurs at a pretrial conference for SRLs. This election process is analogous to other civil and criminal proceedings where parties must elect whether they wish a bench or jury trial.

During early development discussions, some members of the SFLAC preferred an opt-out procedure to encourage the use of IDRT. This would have made IDRT the default choice, unless at least one party chose the traditional trial. Opt-out was rejected to ensure the court obtained explicit and voluntary consent of the parties; in addition, opt-out would have required legislation to establish a statewide rule much like the legislation authorizing small claims courts.

Since selecting an IDRT necessitates that parties waive certain statutory rights, a case can be set for an IDRT only if both parties sign the form waiving the traditional trial.[19]

IDRT OR HEARING PROCEDURE

Steps Taken to Ensure Parties Understand the IDRT Process

In all cases, and with special emphasis in cases involving SRLs, the court carefully informs litigants about the IDRT process by:

- Providing a copy of an informational brochure (or referral to the online version of the brochure) at multiple stages in the proceedings, including at the time of filing, at the pretrial conference and at the time of trial;
- Orally advising litigants about the process at various stages in the proceedings, including at a pretrial conference and at the time of trial;
- Periodically reviewing with litigants the IDRT, consent and waiver form;
- Consultation with retained counsel if the parties are represented and recommending that the parties seek legal advice if they do not have a lawyer.

At the commencement of an IDRT preceding, the judge carefully reviews the process with the parties and confirms their consent.

Hearing Procedure

SLR 8.015(2) provides that an IDRT will be conducted as follows:[20]

(a) At the beginning of an [IDRT] the parties will be asked to affirm that:
  (i) They understand the rules and procedures of the [IDRT] process; and,
  (ii) They are consenting to this process freely and voluntarily and that they have not been threatened or promised anything for agreeing to the [IDRT] process.

(b) The Court may ask the parties or their lawyers for a brief summary of the issues to be decided.

(c) The moving party will be allowed to speak to the Court under oath concerning all issues in dispute. The party is not questioned by counsel, but may be questioned by the Court to develop evidence required by any statute or rule, for example, the applicable requirements of the Oregon Child Support Guidelines if child support is at issue.

(d) The Court will ask the moving party (or the moving party's attorney if the party is represented) whether there are any other areas the party wishes the Court to inquire about. The Court will inquire into these areas if requested.

(e) The process in subsections (c) and (d) is then repeated for the other party.

(f) Expert reports will be entered into evidence as the Court's exhibit. If either party requests, the expert will be sworn and subjected to questioning by counsel, the parties, or the Court.

(g) The parties may offer any documents they wish for the Court to consider. The Court will determine what weight, if any, to give each document. The Court may order the record to be supplemented. Letters or other submissions by the parties' children that are intended to suggest custody or parenting preferences are discouraged.
(h) The parties will then be offered the opportunity to respond briefly to the comments of the other party.
(i) The parties (or a party's attorney if the party is represented) will be offered the opportunity to make a brief legal argument.
(j) At the conclusion of the case, the Court shall render judgment. The Court may take the matter under advisement but best efforts will be made to issue prompt judgments.
(k) The Court retains jurisdiction to modify these procedures as justice and fundamental fairness requires.

One critical feature of IDRTs is that the parties tell their own story, in their own words, presented as they wish. Within their allotted time to speak, parties may share with the court whatever they wish. The judge will guide them toward relevant material if they stray too far and ask sufficient questions to elicit essential information necessary to render a decision.

The Role of Attorneys in the IDRT Process

The IDRT process is available to represented and self-represented parties alike. In cases with represented parties, attorneys provide consultation and advice to retained clients regarding whether or not they should select an IDRT for trial. Also, attorneys advise potential clients in initial consultations prior to being retained about the availability of the IDRT process. At the hearing the attorneys are asked to summarize the issues and may advise their clients during the process, but they do not question or cross-examine witnesses.

Attorneys also do not participate in the offering of exhibits. Any document offered into evidence will be received, subject to the right of the court to reject those that have absolutely no relevance or are otherwise inappropriate.

The role of attorneys, as well as every other step of the process, can be modified by the judge at any stage of the proceeding.

One advantage of the IDRT option is that it provides an excellent vehicle for lawyers to offer unbundled or limited-scope legal services. Several parties have consulted lawyers and then proceeded to handle the IDRT without counsel in the courtroom.

LENGTH OF IDRTs

Generally speaking, IDRTs are scheduled for two hours of in-court trial time. In addition, judges dedicate thirty minutes of pretrial time for case file review and up to sixty minutes of posttrial time to reach their decision and, in self-represented cases, complete, sign, and present the final judgment to the parties.

While a number of cases in which parties are represented are also concluded within two hours, cases in which both parties are represented generally take somewhat longer to complete.

IDRT APPEAL RIGHTS

Use of the IDRT process does not limit either party's right to appeal. However, it narrows the issues upon which an appeal may be taken, assuming the waiver itself is held to be valid and binding (the party signing is competent and there is no duress or fraud). We are not aware of any appeals challenging the validity of any waiver or IDRT proceeding.

Table 1
Number of Traditional and Informal Trials, June 2013 to December 2015

Case Type	*Formal*	*IDRT*	*Total*	*Pct.*
Dissolution	79	27	**106**	25%
Other	4	0	**4**	0%
Petition Custody	53	12	**65**	18%
Separation	10	1	**11**	9%
Total	146	40	186	22%

STATEWIDE APPLICATION OF IDRT

After reviewing the IDRT evaluation discussed below, the SFLAC determined IDRT is a success in Deschutes County and has recommended to Chief Justice Balmer its statewide application in the form of a new Oregon Uniform Trial Court Rule in the fall of 2016. The chief justice has indicated his support and proposed rule changes for statewide application is in process.

EVALUATION OF IDRTs IN DESCHUTES COUNTY, OREGON

Forty IDRTs were held in Deschutes County Circuit Court from June 2013 through December 2015.[21] These represented twenty-two percent of all domestic relations trials held during this period.

A formal evaluation was designed for the IDRT pilot with the assistance of IAALS. The evaluation consisted of a litigant satisfaction survey for both traditional and IDRT cases, matched to case outcome data and a postimplementation questionnaire reflecting the experience of judges with IDRT. The litigant satisfaction survey failed to generate a sufficient number of responses from IDRT litigants and was therefore abandoned. However, the post-implementation questionnaire was expanded to include a group of attorneys. The judicial officer questionnaire responses were obtained during individual conversations with three judges. The attorney responses were obtained during a single conversation with three attorneys who had experience with IDRTs. All questionnaire responses were obtained in March and April of 2016. The results of these questionnaire-based conversations have generated the conclusions presented below.

IDRT was evaluated, based on the responses of three Deschutes County judges and three practicing attorneys who represented clients in IDRT proceedings. This evaluation followed an outline established in the Evaluation Design Judge Questionnaire. A statistically valid evaluation, based on users to date, could not be accomplished due to the inadequate number of survey responses returned.

NUMBER OF IDRTs

The judges interviewed for this evaluation had all conducted between five and ten IDRTs. The attorneys interviewed for this evaluation had all participated in one to three IDRTs and had counseled up to three clients who subsequently participated in an IDRT without representation present at the proceeding. Table 1 summarize general information about IDRT for the thirty-one months of program data from June 2013 through December 2015.

IDRTs were used most frequently in dissolution cases with twenty-five percent of trials in dissolution cases heard as an IDRT.

Table 2 shows the number of IDRTs over time. As expected, the rate of IDRTs in the first six months was lower than in the subsequent two years. This occurred because many of the trials held during the first six months of implementation were scheduled prior to the effective date of the IDRT rule.

Table 2
Number of Traditional and Informal Trials by Year

Year	*Formal*	*IDRT*	*Total*	*Pct.*
2013	39	6	**45**	13%
2014	54	16	**70**	23%
2015	53	18	**71**	25%
Total	146	40	186	22%

Table 3 shows the number of SRLs that opted for IDRTs during the sample period. In cases where both parties were self-represented, the vast majority of litigants have opted for the IDRT process over a traditional trial.

CONTENT OF THE CONSENT AND WAIVER FORM

No issues or concerns had been raised regarding the content of the written waiver. Further, all judges indicated that they engaged both parties in a colloquy, on the record and prior to the hearing or trial, to confirm the parties were aware of the content and implications of the waiver and implications of the choice of IDRT over a traditional trial.

FACTORS IN CASES THAT AFFECT SUITABILITY FOR AN IDRT

The broadest category of cases that are appropriate for the IDRT process are those where neither party is represented, where the marital assets are reasonably straightforward, and where no nonexpert witness testimony was critical to achieving a just result. Most cases involving two SRLs followed this pattern. IDRT was appropriate in these cases because most SRLs did not have sufficient familiarity with the law to effectively present their case, use witness testimony, operate within the confines of the rules of evidence, and focus on the statutory factors a judge must consider in deciding the issues presented.

Cases involving domestic violence where both parties are self-represented are viewed as particularly well suited for the IDRT process. The IDRT rules allow the victim to introduce medical and law enforcement reports without having to call a witness to establish foundation. Additionally, the IDRT process allows the victim to avoid cross-examination by the perpetrator, and the judge is able to maintain a level of control in directing the lines of inquiry and focus of the trial, thus mitigating the inappropriate exercise of power and control by a perpetrator during the conduct of the trial.

Of the forty IDRTs conducted between June 2013 and December 2015, one or both parties were represented in as many as nine cases.[22] The IDRT process proved appropriate in cases where one or both litigants were represented, when the parties could not afford counsel for a traditional trial, where the trial was focused on a narrow issue, or where legal strategy suggested the IDRT process would allow evidence to be introduced that might otherwise be excluded in a formal trial process.

Table 3
Number of Traditional and Informal Trials by Representation

# Attorneys	*Formal*		*IDRT*		*Total*	
0	13	9%	**31**	78%	44	24%
1	41	28%	**3**	8%	44	24%
2	92	63%	**6**	15%	98	53%
Total	146		40		186	

Case Spotlight

When initially implemented, some worried that the IDRT process would not be appropriate in cases involving high-value marital assets. These concerns were refuted by a self-represented divorcing couple who had worked together to resolve all issues, except the division of several parcels of real estate valued in excess of one million dollars. The parties had carefully researched the law, but arrived at different conclusions on how to correctly value the real estate. They simply wanted a judge to tell them who was correct and successfully used the IDRT process to bring that one issue before a judge.

There were no cases in which the IDRT process was initiated, but during the trial or hearing the judge found this process to be unfair or inappropriate.

The judges and attorneys participating in the evaluation agreed that the traditional trial process was more appropriate for cases in which both parties were represented, where there were significant and complex marital assets, where nonexpert testimony was critical in achieving a just result, or where there were complexities surrounding the issues of child custody and support.

IDRT REDUCED THE LEVEL OF CONFLICT BETWEEN THE PARTIES

The judges and attorneys participating in the evaluation were in general agreement that the IDRT process reduced conflict at trial for the following reasons:

- Friends and family members are not called to testify and publicly choose sides at trial.
- Parties are not able to elicit testimony from friends and family that is spiteful or intended to cause emotional harm to the other party.
- The parties do not cross-examine each other, eliminating their ability to ask questions intended to cause emotional distress or harm to the other party.
- While allowing both parties to completely tell their side of the story, the judges felt they were able to both set an example and direct that testimony be provided in a respectful manner. Further, with the judge asking questions, testimony stays relevant.
- The simpler process means that the rules do not interfere with the parties providing information to the judge, reducing frustration and friction among the parties.

LITIGANTS' SENSE OF FAIRNESS IN CUSTODY DISPUTES

The perception of the judges and attorneys evaluating IDRTs was that the litigants' sense of fairness was directly tied to their belief or feeling that they were heard. There was a broad consensus that the IDRT process significantly enhanced the parties' sense that the process was fair, and this was true even when the outcome was not exactly what had been advocated. The IDRT process almost guaranteed this result because parties do not present their case through witness testimony, but rather through a direct conversation with the judge.

The judges noted that when conducting a traditional trial they can ascertain the parties' legal positions but not always the underlying emotional dynamic. Using the IDRT process, the judge learns much more about how the parties feel, which allows the judge to recognize and acknowledge these feelings while still rendering a decision based on the facts and law. The outcome would very likely be the same as in a traditional trial, but the parties seem more inclined to accept the ruling after the IDRT process.

Case Spotlight

Following an IDRT on a custody modification, a couple relayed to the judge that the original dissolution trial was brutal. Both sides called friends and family to testify and say hurtful things. The emotional damage took several years to overcome. Both litigants shared that the IDRT process was much less painful, and avoiding a repeat of the painful aspects of their first trial would allow them to continue co-parenting in a positive, supportive manner.

The attorneys noted that a represented party's sense of fairness is often diminished when they feel their attorney does not ask questions or delve into subjects that are not legally relevant but are emotionally important to the client. Further, when objections lead to the exclusion of information a party considers important, that party might perceive the process to be unfair feeling that the judge did not have the opportunity to hear all of the facts. The attorneys felt that they improved their client's sense of fairness (in all trials) when they explain why certain things happened posttrial.

ACCESS TO JUSTICE

To the extent that access to justice is defined by timeliness, it is improved by the availability of IDRTs. The reason is practical: shorter trials are easier to schedule into the court's trial calendar and are more likely to be heard when scheduled. The data collected reflected that IDRT hearings were shorter than traditional hearings, no IDRT hearing took longer than half a day and most were much shorter.

BEST INTERESTS OF THE CHILD

In an IDRT the testimony of the parties in cases with SRLs is more focused on the statutory factors a judge is required to consider in determining child custody or parenting time because the judge is generally directing the lines of inquiry. This contrasts with traditional trials involving SRLs where judges have felt more constrained in their ability to direct the questioning of witnesses and parties.

The judges interviewed observed that because the judge-initiated questioning was more focused, the parties tended to follow the example set by the judge and focus their comments on issues relevant to their children's best interests and the other matters at issue. This resulted in both a reduction in arrow slinging by the parties and more targeted testimony on the issues the judge is required by statute to consider in making decisions. However, judges conducting an IDRT still allow the parties to talk themselves out, which occasionally led to excursions into irrelevancy but with the benefit of the parties having felt heard.

EFFECTIVE USE OF JUDICIAL TIME

In cases involving two SRLs, judicial efficiency is achieved with the IDRT process. IDRTs avoid the tedium of presenting numerous nonexpert witnesses to testify. There has also been a marginal reduction in the amount of time the parties testify because the direct questioning by the judge keeps the focus on the legal issues to be resolved.

PROCEDURAL JUSTICE

For cases involving two SRLs, the IDRT process was viewed as providing better procedural justice. Procedural justice can only be served if the participants understand and can effectively use the procedures in the manner and for the purpose they are intended. Most SRLs cannot effectively

employ the rules of evidence nor effectively present their case through the question–answer exchange with witnesses.

FURTHER BENEFITS AND DISADVANTAGES OF THE IDRT

Because the IDRT is established by a court rule, judges no longer worry about violating the cannons of judicial ethics when employing these informal procedures. In the conduct of a trial involving one or two SRLs, a judge is no longer restrained or conflicted when proceeding informally and stretching the boundaries of evidentiary rules, when the application of these rules would prevent the admission of evidence the court needs to consider to make a decision.

The attorneys who participated in the evaluation indicated some potential clients, and some retained clients reported that, absent the availability of the IDRT process, they would likely have forgone a hearing and felt disserved by the court process.

Finally, an important goal of the IDRT was for parties to receive a decision immediately following the trial. In furtherance of this goal, several judges have adopted the practice of completing, signing, and filing the judgment at the conclusion of the trial. This provides legal finality to the parties and ensures the judgment is actually entered. Further, it eliminates the back-and-forth correspondence that frequently occurs when the judge relies on SRLs to draft the form of judgment, thereby reducing the workload of judges and staff.

SUGGESTIONS FOR IMPROVEMENT

The Deschutes County Court is in the process of developing a trial preparation outline for SRLs. There are excellent materials available, including those from the National Judicial Institute in Canada.[23] When developed, the trial preparation outline would be of particular benefit to SRLs selecting either trial process, but these materials would be available to all litigants and lawyers.

The attorney group felt that allowing the judge to review and consider any available mediator's report could help to narrow the issues for trial. Mediation proceedings in Oregon are confidential.[24] As such, mediation reports are inadmissible unless both parties consent to their admissibility. Therefore, either the IDRT waiver would need to include the stipulation that mediator reports are admissible, or the mediation confidentiality statute would have to be amended.

PROGRAMS SIMILAR TO THE IDRT IN OTHER JURISDICTIONS

Australia was the first jurisdiction to introduce an informal procedure sharing many of the essential elements of the IDRT—the Children's Cases Pilot Project began in 2004. Idaho was the first to initiate a similar procedure in the United States in 2008. Utah, Alaska, and Michigan have initiated models similar to IDRT and Iowa may be soon to follow. All jurisdictions other than Oregon's and Alaska's, which was modeled on Oregon's, limit the informal proceedings to the litigation of children's issues. Some limit the program availability to only SRLs. These are summarized below.

IDAHO

The Idaho ICT was the direct inspiration for Oregon's IDRT. ICT Rule 713 was developed in 2008 and applies statewide. It was limited to the determination of child custody and child support issues.[25] Like IDRTs, the goal was to provide judges and litigants a less contentious alternative trial process. The basic premise of the ICT was suspension of the rules of evidence; waiver of the rules of discovery; and waiver of the traditional question-and-answer manner of trial that allows litigants to directly present their case, issues, and concerns to the court. The ICT excludes cross-examination, which it felt risks increasing conflict in an already highly emotional and often hostile environment.

The ICT rule was evaluated in 2010 and determined to be very positive for most litigants using this process for the same reasons the IDRT has been praised. Like IDRTs, some judges felt the Idaho model would not be appropriate when complex issues involving expert and nonexpert testimony needed to be litigated.

In July 2015, Idaho further modified family law hearing practice; though this later rule change did not affect the ICT.

In the Idaho Rules of Family Law Procedure 102 created a simpler evidentiary standard that applies in all family law cases, unless a party timely selects the strict application of the rules of evidence.[26] The evidentiary standard in Rule 102 provides that all relevant evidence is admitted, unless excluded for certain enumerated reasons. It is meant to replace only the evidentiary rules that apply to hearsay, character, and authentication but does not replace all of the evidentiary rules. In addition, relevant documents are admitted without further authentication and foundation if they appear on their face to be authentic. Rule 102 is not as extensive as the waiver of all of the rules of evidence that parties consent to when choosing the ICT. This portion of the Idaho evidence code was modeled on similar provisions contained in Rule 2 of the Arizona Rules of Family Law Procedure.[27]

AUSTRALIA[28]

Idaho's ICT model is based on a process used in Australia called The Children's Cases Program. This began as a pilot program in the Sydney and Parramatta (suburb of Sydney) registries in March 2004 and became a national program in 2006. An exhaustive description and evaluation of the pilot program was commissioned by the Family Court of Australia and published in June 2006.[29]

The court was seeking a less adversarial, more child-focused process to conduct family law litigation. This type of trial was suggested by former Australian Chief Justice Alastair Nicholson.[30]

The Children's Cases Program is limited to matters involving children. It requires the judge to play a more active, inquisitorial role, such as engaging the parties in discussion about what needs to be done and highlighting areas of agreement between the parties, as well as isolating issues that need to be resolved. The process is designed to be more cooperative. However, the rules of evidence are not automatically waived, and witness examination and cross-examination is allowed, though it is less aggressive than in a traditional trial. The judge is given wide discretion to apply or waive rules of evidence or procedures, as the case and justice requires.

ALASKA

In 2014, the Alaska Judicial Education Department invited coauthor Jeff Hall and Judge Wells Ashby of Deschutes County to share the Deschutes County experience with IDRTs. Shortly thereafter, the Alaska Supreme Court promulgated a statewide rule, Alaska Rule of Civil Procedure 16.2, which is substantively identical to the IDRT.[31] Thus far, the anecdotal evidence suggests that the program is a success.

UTAH

Utah's Code of Judicial Administration Rule 4-904, "Informal Trial of Support, Custody and Parent-Time," as the title suggests, is limited to the determination of child support, child custody, and parent-time issues.[32] Rule 4-904 was enacted in 2014 and applies statewide. Other than being limited to children's issues, this process resembles the IDRT. The parties are not questioned, except by the court. They are permitted to tell their story without being cross-examined. The rules of evidence are waived. The final order has the force of a traditional trial, except that appeal may not be premised on a violation of the Utah Rules of Evidence.

MICHIGAN

Michigan's pilot project created by Supreme Court Order in 2010 and available in the Twenty-Ninth Judicial Circuit Court was a voluntary, opt-in process that authorized a "conference-style hearing."[33] The Michigan model was a hybrid between a IDRT and a traditional trial. Both narrative testimony and witness questioning is allowed. "Informal evidentiary rules and procedures" are followed rather than waiving the traditional rules of evidence. Michigan's pilot project is referenced as an example of an informal procedure that is not as radical a departure from the traditional trial model as IDRT. This pilot project was abandoned in 2013, suggesting a hybrid traditional/informal trial procedure may not be workable.

IOWA AND OTHER JURISDICTIONS

On July 12, 2016, the Iowa Supreme Court Family Law Case Processing Reform Task Force presented its report to a special session of the Iowa Supreme Court. This Task Force urged the adoption of the Deschutes County IDRT rules for Iowa. The Court was receptive and the matter is under active consideration.

It is likely that Iowa and other jurisdictions will enact an IDRT-like informal process in the near future. Indeed, there may be similar programs already available elsewhere in addition to those discussed above. Clearly, the IDRT process addresses the needs of both the court and litigants for many cases.

IAALS RECOMMENDATIONS

In May 2016 IAALS completed its extensive "Cases Without Counsel" research project. Among its recommendations the IAALS report supports the IDRT process, suggesting that it is a more efficient and fair process to manage cases involving SRLs.[34]

CONCLUSION

Deschutes County's IDRT process is an innovative option for courts seeking to better serve the public and provide greater access to justice and procedural fairness in any family law matter. While no panacea, this important innovation provides a less adversarial and more user-friendly family law dispute resolution regime for many disputes. It is particularly attractive to SRLs who struggle to navigate the complexities of the traditional trial model. Families reconstellating and requiring the assistance of the court need and deserve accessible, fair, and customer-friendly innovations like IDRT.

NOTES

1. R. LaFountain, William J. Howe III and Jeffrey E. Hall, *Examining The Work of State Courts: An Overview of 2013 State Court Caseloads*, Nat'l Ctr. for St. Cts. (2015), *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC_CSP_2015.ashx.

2. The Uniform Premarital Agreement Act has been adopted by twenty-seven states, proposed in four more and premarital agreements are valid in almost every state, including those that have not adopted this uniform law. Wikipedia, https://en.wikipedia.org/wiki/Uniform_Premarital_Agreement_Act (last visited September 13, 2016).

3. "Self-represented" is used to describe litigants without lawyers, rather than the Latin "pro se."

4. The Center for Out-of-Court Divorce–Denver: Positive Solutions for Families in Transition offers Denver-area families a proven family centered approach, working in partnership with the local courts. Through the Center, families with children can take advantage of financial and legal education, mediation, and individual family counseling. The Center also provides postdecree support services. The Center For Out-Of-Court Divorce, http://centerforoutofcourtdivorce.org/(last visited September 13, 2016).

5. IAALS is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. IAALS has four initiative areas, one of which is the

Honoring Families Initiative (HFI). HFI identifies and recommends dignified and fair processes for the resolution of divorce, separation, and custody in a manner that is more accessible and more responsive to children, parents and families. Learn more about IAALS and HFI at http://iaals.du.edu.

Natalie Knowlton, IAALS, The Family Law Bar: Stewards of the System, Leaders of Change (2016), *available at* http://iaals.du.edu/sites/default/files/documents/publications/the_family_law_bar_stewards_of_the_system_leaders_of_change.pdf.

6. *Id*.

7. Jud. Council of Cal., Task Force on Self-Represented Litigants, Implementation Task Force: Final Report 2–3 (Oct. 2014) (discussing the rise of self-representation in various states over the past thirty years) available as Attachment A at: http://www.courts.ca.gov/partners/documents/EA-SRLTaskForce_FinalReport.pdf (last visited September 13, 2016).

8. This estimate is based on conversations with the chief family court judge in Multnomah County, Oregon's largest jurisdiction. Determining the exact percentage of self-represented litigants is impossible because of the way records of cases are kept. Furthermore, frequently litigants have an attorney of record for only part of their case. Few judicial case management systems track at what different stages a litigant self-represents.

9. Natalie Anne Knowlton et al., IAALS, Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court (2016), http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

10. *Id*. at 13.

11. *Id*. at 16–22.

12. Studies in Australia and elsewhere evidence that litigants feelings of being treated fairly by family courts are driven far more by procedural fairness and the sense of "being heard" than by the outcome. William Howe and Chief Justice Diana Bryant, Conversation at AFCC Annual Conference, Seattle, Washington, (Jun 2, 2016).

13. Judicial Department State of Oregon, Local Supplementary Rules 7 (2015), *available at* https://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/Deschutes_SLR_2015.pdf/$File/Deschutes_SLR_2015.pdf.

14. SFLAC, created by statute and its members appointed by the chief justice is charged with ". . . identifying family law issues that need to be addressed in the future. The Statewide Family Law Advisory Committee enabling statute is ORS 3.436. See http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/familylaw/ors3436.pdf/ (last visited September 13, 2016).

15. IAALS, through HFI, has made significant contributions to forwarding family law reform efforts in the United States. Its most recent report, *The Family Law Bar: Stewards of the System, Leaders of Change,* is outstanding. *See* IAALS, http://iaals.du.edu (last visited September 13, 2016). *See also* Knowlton, *supra* note 5.

16. State of Idaho Judicial Branch, https://www.isc.idaho.gov/ircp16p (last visited September 13, 2016).

17. Judicial Department State of Oregon, *supra* note 13, at Rule 8.015(1).

18. Oregon Judicial Department, *Domestic Relations Trials in the Deschutes County Circuit Court*, http://courts.oregon.gov/Deschutes/docs/form/dissolution/IDRT_Brochure.pdf (last visited September 13, 2016).

19. Domestic Relations Trial Process Selection and Waiver for Informal Domestic Relations Trial, http://courts.oregon.gov/Deschutes/docs/form/dissolution/Trial_Selection_and_Waiver_Form.pdf (last visited September 13, 2016).

20. Judicial Department State of Oregon, *supra* note 13, at Rule 8.015(2).

21. Based on a summary review of the Odyssey case registry for cases with the hearing event "trial court" between June 1, 2013, and December 31, 2015. It is likely that the number of IDRTs is slightly undercounted.

22. Based on a summary review of the case registry and the case participant listing. The date range of attorney representation relative to the trial date was not verified in all instances.

23. National Judicial Institute, https://www.nji-inm.ca/(last visited September 13, 2016).

24. ORS 36.220.

25. Sup. Ct, IRFLP 713, https://www.isc.idaho.gov/irflp713 (last visited September 13, 2016).

26. Sup. Ct, IRFLP 102, (July 1, 2015), http://www.isc.idaho.gov/irflp102 (last visited September 13, 2016).

27. Ariz. Rules Fam. L. Proc., http://law2.arizona.edu/clinics/child_and_family_law_clinic/Materials/Rules%20of%20Family%20Law%20Procedure.pdf (last visited September 13, 2016).

28. The Family Court of Australia has long been the gold standard in family court reform. The Children's Cases Program is but one example. This vertically integrated family court has published periodic surveys of user satisfaction. Fam. Ct. Australia, *Court User Satisfaction Survey 2015*, *available at* http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2015/ (last visited September 13, 2016).

29. Rosemary Hunter, *The Family Court of Australia's Children's Cases Pilot Program* iv–vi (July 25, 2007), http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/7/5/3/5/p175354_index.html.

30. Fam. Ct. Australia, The *Less Adversarial Trial Handbook* iv–vi (Jun. 02, 2009), http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2009/LAT (former Chief Justices Nicholson's inducements).

31. *See* Ala. Rules of Ct., *Rules of Civil Procedure* (2015–2016), *available at* http://www.courtrecords.alaska.gov/webdocs/rules/docs/civ.pdf; *See also* Ala. Ct. Sys. Self-Help Ctr.: Fam. L., *Domestic Relations Trials- Understanding the Two* Options (May 13, 2015), *available at* http://courts.alaska.gov/shc/family/shcdr-trials.htm.

32. Utah Cts., *Informal Trial of Support, Custody and Parent-Time* (Jan. 29, 2015), *available at* https://www.utcourts.gov/howto/family/informal_trial/.

33. Inst. of Continuing Legal Educ., *ADM File No. 2006-25: Administrative Order No. 2008-1* (Apr. 8, 2008), *available at* https://www.icle.org/contentfiles/milawnews/Rules/Ao/2006-25_04-08-08_unformatted-order.pdf.

34. Knowlton et al., *supra* note 9, at 14.

William J. Howe, III, after a general civil practice for twenty years, has practiced exclusively family law with Gevurtz, Menashe, Larson & Howe, P.C., of Portland, Oregon since 1995. He was named in "Best Lawyers in America" as the 2009 Lawyer of the Year—Family Law, Portland, Oregon, and he is one of ten family lawyers from Oregon included in the 2005 and subsequent "Best Lawyers." He has also been honored in Super Lawyers *and* Portland Monthly *and many other publications for many years. In addition to his private practice of over forty years he has devoted his time and energy to family court reform issues. He was appointed by a succession of Oregon chief justices since 1997 to serve as the vice chair of the Statewide Family Law Advisory Committee; currently serves on the advisory committee of the Honoring Families Initiative of the Institute for the Advancement of the American Legal System; is currently president of the Oregon Family Institute; has served as president on the board of the Oregon Academy of Family Law Practitioners; served on the board of directors of the Association of Family and Conciliation Courts; was chair of the Oregon Task Force on Family Law from 1993 to 1997, having been appointed by Governor Barbara Roberts in 1993 and reappointed by Governor Kitzhaber in 1995; and serves as an Oregon Court of Appeals Mediator. He has also served as pro tem judge and mediator, and he was awarded the 2003 Pro Bono Challenge Award for donating the Highest Number of Pro Bono Public Service Hours by the Oregon State Bar. In addition, he has made over 120 presentations at family law conferences and at other venues in the United States, Canada, Australia, Europe, and South Africa; has authored several articles on family law–related matters; and consulted with several jurisdictions regarding family law reform.*

Jeffrey E. Hall currently serves as the trial court administrator for the Deschutes County Circuit Court, having been appointed in July 2012. He previously worked for over twenty years in the Washington State judicial branch in various roles, including trial court administrator and executive director of the Board for Judicial Administration and State Court Administrator. He served on a variety of boards and commissions in support of the Washington judicial branch, including the Judicial Information Systems Committee, Minority and Justice Commission and the Washington State Interpreter Advisory Commission. He was recently appointed to the Oregon Supreme Court Council on Inclusion & Fairness. He is a graduate of Seattle University where he earned bachelor's degrees in humanities and criminal justice. He received a master's degree in judicial administration in 1988 from the University of Denver, College of Law.

CHAPTER 8 – DOMESTIC RELATIONS PROCEEDINGS

8.012 TIME FOR FILING CERTAIN DOCUMENTS IN DOMESTIC RELATIONS PROCEEDINGS

The following documents must be filed with the Court and a courtesy copy must be provided to the judge not less than one full business day prior to the beginning of the trial in actions for dissolution of marriage, separate maintenance, annulment, child custody, and child support:

(1) The statement listing all marital and other assets and liabilities, the claimed value for each asset and liability, and the proposed distribution of the assets and liabilities required under UTCR 8.010(3). Parties are encouraged to prepare joint statements where feasible.

(2) The Uniform Support Declaration required under UTCR 8.010(4).

(3) The alternate affidavit in lieu of the Uniform Support Declaration under UTCR 8.010(5).

(4) The parties' proposed Parenting Schedule as required under SLR 8.075.

8.015 INFORMAL DOMESTIC RELATIONS TRIAL

(1) Informal Domestic Relations Trials may be held to resolve all issues in original actions or modifications for dissolution of marriage, separate maintenance, annulment, child support, and child custody filed under ORS Chapter 107, ORS Chapter 108, ORS 109.103 and ORS 109.701 through 109.834.

(2) The Informal Domestic Relations Trial will be conducted as follows:

(a) At the beginning of an Informal Domestic Relations Trial the parties will be asked to affirm that they understand the rules and procedures of the Informal Domestic Relations Trial process, they are consenting to this process freely and voluntarily and that they have not been threatened or promised anything for agreeing to the Informal Domestic Relations Trial process.

(b) The Court may ask the parties or their lawyers for a brief summary of the issues to be decided.

(c) The moving party will be allowed to speak to the Court under oath concerning all issues in dispute. The party is not questioned by counsel, but may be questioned by Deschutes County Circuit Court Page 8 11th Judicial District 2016 Supplementary Local Rules Revised and effective February 1, 2016 the Court to develop evidence required by any statute or rule, for example, the applicable requirements of the Oregon Child Support Guidelines if child support is at issue.

(d) The Court will ask the moving party (or the moving party's attorney if the party is represented) whether there are any other areas the party wishes the Court to inquire about. The Court will inquire into these areas if requested.

(e) The process in subsections (c) and (d) is then repeated for the other party.

(f) Expert reports will be entered into evidence as the Court's exhibit. If either party requests, the expert will be sworn and subjected to questioning by counsel, the parties, or the Court.

(g) The parties may offer any documents they wish for the Court to consider. The Court will determine what weight, if any, to give each document. The Court may order the record to be supplemented. Letters or other submissions by the parties' children that are intended to suggest custody or parenting preferences are discouraged.

(h) The parties will then be offered the opportunity to respond briefly to the comments of the other party.

(i) The parties (or a party's attorney if the party is represented) will be offered the opportunity to make a brief legal argument.

(j) At the conclusion of the case, the Court shall render judgment. The Court may take the matter under advisement but best efforts will be made to issue prompt judgments.

(k) The Court retains jurisdiction to modify these procedures as justice and fundamental fairness requires.

2013 Commentary:

Additional information about the Informal Domestic Relations Trial process is available on the Court's website at http://courts.oregon.gov/Deschutes/

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

_____ PETITIONER,	)	Case No: _____
	)	**DOMESTIC RELATIONS TRIAL PROCESS SELECTION and WAIVER FOR INFORMAL DOMESTIC RELATIONS TRIAL**
_____ RESPONDENT.	)	

The parties to a domestic relations case must choose how they want the trial to be conducted. There are two options:

(1) A traditional trial, which means that both parties are allowed to call witnesses and to cross-examine the witnesses appearing on behalf of the other party and the Rules of Evidence will apply;

OR

(2) An Informal Domestic Relations Trial under SLR 8.015 which will restrict the ability of both parties to present witnesses and the rules of evidence will not apply.

An Informal Domestic Relations Trial will be held if both parties elect to proceed under SLR 8.015. If either party chooses a traditional trial then the case will be set for a traditional trial.

TRADITIONAL TRIAL

____ I elect to proceed to trial under the traditional rules for trial.

Dated this _____ day of _____, 20____.

_____ _____
Signature Printed Name

INFORMAL DOMESTIC RELATIONS TRIAL

____ I elect to proceed to trial under the Deschutes County Circuit Court Supplementary Local Rule 8.015 for Informal Domestic Relations Trials.

I agree to waive the normal question and answer manner of trial and I agree the court may ask me questions about the case.

I agree to waive the rules of evidence in this Informal Domestic Relations Trial. Therefore:

- The other party can submit any document or other evidence he or she wishes into the record.
- The other party can tell the court anything he or she feels is relevant.

I understand the following:

- My participation in this Informal Domestic Relations Trial process is strictly voluntary, and that no one can force me to agree to this process.
- The court will determine what weight will be given to documents, physical evidence, and testimony that is entered as evidence during the Informal Domestic Relations Trial process, and.

I am confident I understand the Informal Domestic Relations Trial process.

I have not been threatened or promised anything for agreeing to this Informal Domestic Relations Trial process.

Dated this _____ day of _____, 20____.

_____ _____

Signature Printed Name

DOMESTIC RELATIONS TRIALS

In the Deschutes County Circuit Court

Two different types of trials are available in the Deschutes County Circuit Court for resolving domestic relations cases. Domestic relations cases include divorce, separation, unmarried parent, and modification cases about child custody, parenting time, and child support. The two types of trials are called an Informal Domestic Relations Trial (IDRT) and a Traditional Trial. You will need to choose the type of trial that you think is best for your case.

What is an Informal Domestic Relations Trial (IDRT)?

In an Informal Domestic Relations Trial (IDRT), you and the other person speak directly to the judge about the issues that are disputed, such as child custody and dividing property or debts. A question and answer format is not used. Only the judge asks questions of each person. This happens even if you or the other person has a lawyer. Usually, other witnesses are not allowed to testify. You can, however, ask the court to let an expert witness testify, such as doctor, counselor, or custody evaluator.

The Rules of Evidence do not apply in an IDRT. This means you can tell the judge everything that you think is important. You also can give the judge any documents or papers you want the judge to review. The judge will decide the importance of what you and the other person say and the papers you each give to the judge. In an Informal Domestic Relations Trial, lawyers are only allowed to:

- say what the issues in the case are,
- respond when the judge asks if there are other areas the person wants the court to ask about, and
- make short arguments about the law at the end of the case.

The Informal Domestic Relations Trial is a voluntary process. In other words, you decide whether it is something you want to do. An IDRT will be used only if both people involved in the case agree to it. Both people must complete a form that says what type of trial they choose.

What is a Traditional Trial?

In a Traditional Trial, lawyers or people who represent themselves usually present information to the judge by asking questions of witnesses. Each side gets to ask follow-up questions of the other person and their witnesses. Generally, the judge asks few, if any, questions.

The Rules of Evidence apply. The Rules of Evidence place limits on the things a witness can talk about and the kind of documents that can be given to the judge to read. If you or the other person has a lawyer in a Traditional Trial, the lawyer will make opening statements and closing arguments to the judge and will ask questions of you, the other person, and other witnesses. If you represent yourself, you will be expected to follow the Rules of Evidence and you will be the one to make opening statements and closing arguments and to question witnesses.

DOMESTIC RELATIONS TRIALS

In the Deschutes County Circuit Court

Why would I choose an Informal Domestic Relations Trial?

1) Fewer rules apply, so Informal Domestic Relations Trials are more flexible. IDRTs may be easier for people who are representing themselves. The judge is more involved in asking questions and guiding the process. The judge may be able to reduce conflict between the two sides and help them focus on the children or other issues.
2) You can speak directly to the judge about your situation without interruption or objections from the other person or their lawyer. The other person is not allowed to ask you questions.
3) You do not have to worry about formal rules that limit what you can say in court. You can:
   - Speak freely about conversations between you and other people who are not in court.
   - Talk to the judge about what your children have said about custody and parenting time.
   - Tell the judge whatever you think is important before he or she makes a decision about your case.
4) You can give any documents you think are important to the judge.
5) Informal Domestic Relations Trials may be shorter. A lawyer may be able to prepare in a shorter amount of time. Therefore, the cost to have a lawyer represent you may be less. You may have to take less time off from work.
6) The judge usually, but not always, makes a decision the same day as the trial.
7) Your case is relatively simple. You are comfortable explaining your circumstances and the facts to the judge.

Why would I choose a Traditional Trial?

1) Rules and formal procedures are in place to protect each person's rights. The Rules of Evidence apply. You or your lawyer may feel more comfortable with this structure.
2) You like the fact that the Rules of Evidence will limit what people can say and the information that can be given to the judge in writing.
3) The question and answer format will be more effective in getting out the information about your case. It may be important to be able to ask the other person follow-up questions.
4) You may bring any witnesses you think are important to court.
5) Generally, written statements from family members, teachers, and friends will not be considered by the judge. People with something to say about your situation or the other person's situation will need to come to court.
6) Your case is complicated. You and the other person own a business or have lots of stocks, property, and retirement funds to divide.

DOMESTIC RELATIONS TRIALS

In the Deschutes County Circuit Court

How an Informal Domestic Relations Trial Works:

1) When the Informal Domestic Relations Trial begins both people will be asked if:
   - they understand the rules and how the trial works, and
   - they agreed to participate in the IDRT voluntarily.
2) The person that started the case will speak first. He or she swears to tell the truth and may speak about anything he or she wishes.
3) He or she is not questioned by a lawyer. Instead, the judge will ask some questions in order to make a better decision.
4) If the person talking has a lawyer, then that lawyer may ask the judge to ask their client questions on specific topics.
5) This process is repeated for the other person.
6) If there are any experts, the expert's report may be given to the judge. Either person may also ask to have the expert testify and be questioned by the judge or the other person.
7) Each person may submit documents and other evidence that they want to the judge to see. The judge will look at each document and decide whether it is trustworthy and should be considered.
8) Each person may briefly respond to comments made by the other person.
9) Each person or their lawyer may make a short legal argument about how the laws apply to their case.
10) Once all the above steps are complete, the judge states their decision. In some cases, the judge may give the ruling at a later date.
11) Any of the above steps may be modified by the judge in order to make sure the trial is fair for both people.

How a Traditional Trial works:

1) Both people or their lawyers make an opening statement, telling the judge about the case and what result they want and why that result would be fair. The person who started the case goes first.
2) The person who started the case then calls all of their witnesses. That person or their lawyer asks the witnesses questions and may give the judge documents or other evidence. The other person or their lawyer then takes a turn asking the witnesses questions. The people in the case will also usually be witnesses.
3) The other person then gets a turn to calls all of their witnesses and that person or their lawyer asks the witnesses questions and may give the judge documents or other evidence. And then, the person who went first or their lawyer takes a turn asking the witnesses questions.
4) The judge may allow the witness to be questioned again if the judge thinks it would help them make a better decision.
5) Both people, or their lawyers, make a closing argument, summarizing the evidence (statements of witnesses and documents), explaining how the witnesses support the result they want, and telling the judge what he or she thinks is most important for the judge to consider in making a decision.

DOMESTIC RELATIONS TRIALS

In the Deschutes County Circuit Court

What Both Trials Have in Common:

1) You have to decide which type of trial you want to have. Both people must agree to have an Informal Domestic Relations Trial. The case will be scheduled for a traditional trial if both people want a Traditional Trial or if only one person wants a Traditional Trial.

2) Before the trial starts there are several documents that each person ***must*** prepare and give to the judge and the other person:

   - A list of everything you and your spouse own and owe. If possible, it is best to give the judge one list, even if you do not agree on what each item is worth or who should get it.
   - If there are children and child support is an issue or if spousal support is an issue, the Uniform Support Declaration. If the Uniform Support Declaration is not required, you must submit an alternate affidavit. An affidavit is a notarized letter explaining why a Uniform Support Declaration is not applicable in your case.
   - If there are children, a parenting schedule.

3) Before the trial starts, each person must give the judge and the other person a copy of all of the documents and other evidence that you will give to the judge to consider. In a traditional trial the judge will decide if the information can be used during the trial.

4) The Judge will follow the law and will consider the factors that the law requires in making a decision about your case.

5) After the trial is over, the judge will direct one person (or their lawyer if they have one) to draft a final judgment in writing. The final, written judgment must contain all of the decisions the judge made at the end of the trial. The case is not over until the judge receives the final written judgment and signs it.

RESOURCES

For more information about going to court, go to www.courts.oregon.gov and click on either the "Case Participant" or "Self-Represented" link.

For information about finding an attorney, go to www.osbar.org and click on the "For The Public" link.

Oregon Judicial Department
11th Judicial District
Deschutes County Circuit Court
1100 NW Bond Street
Bend, Oregon 97701

Revised 06 10 2013

PROPOSED MANDATORY UTCR
INFORMAL DOMESTIC RELATIONS TRIALS

8.XXX INFORMAL DOMESTIC RELATIONS TRIAL

(1) Upon the consent of both parties, Informal Domestic Relations Trials may be held to resolve any or all issues in original actions or modifications for dissolution of marriage, separate maintenance, annulment, child support, and child custody filed under ORS Chapter 107, ORS Chapter 108, ORS 109.103 and ORS 109.701 through 109.834.

(2) The parties may select an Informal Domestic Relations Trial within 14 days of a case subject to this rule being at issue (see UTCR 7.020 (6)). The parties must file a Trial Process Selection and Waiver for Informal Domestic Relations Trial in substantially the form specified in Form 8.XXX in the UTCR Appendix of Forms. This form must be accepted by all judicial districts. SLR 8.XXX is reserved for the purpose of making such format mandatory in the judicial district and for establishing a different time for filing the form that is more consistent with the case management and calendaring practices of the judicial district.

(3) The Informal Domestic Relations Trial will be conducted as follows:

(a) At the beginning of an Informal Domestic Relations Trial the parties will be asked to affirm that they understand the rules and procedures of the Informal Domestic Relations Trial process, they are consenting to this process freely and voluntarily and that they have not been threatened or promised anything for agreeing to the Informal Domestic Relations Trial process.

(b) The Court may ask the parties or their lawyers for a brief summary of the issues to be decided.

(c) The moving party will be allowed to speak to the Court under oath concerning all issues in dispute. The party is not questioned by counsel, but may be questioned by the Court to develop evidence required by any statute or rule, for example, the applicable requirements of the Oregon Child Support Guidelines if child support is at issue.

(d) The parties will not be subject to cross-examination. However, the Court will ask the non-moving party or their counsel whether there are any other areas the party wishes the Court to inquire about. The Court will inquire into these areas if requested and if relevant to an issue to be decided by the Court.

(e) The process in subsections (c) and (d) is then repeated for the other party.

(f) Expert reports will be received as exhibits. Upon the request of either party, the expert will be sworn and subjected to questioning by counsel, the parties, or the Court.

(g) The Court will receive any exhibits offered by the parties. The Court will determine what weight, if any, to give each exhibit. The Court may order the record to be supplemented. (h)The parties or their counsel will then be offered the opportunity to respond briefly to the statements of the other party.

(i) The parties or their counsel will be offered the opportunity to make a brief legal argument.

(j) At the conclusion of the case, the Court shall render judgment. The Court may take the matter under advisement but best efforts will be made to issue prompt judgments.

(k) The Court may modify these procedures as justice and fundamental fairness requires.

(4) The Court may refuse to allow the parties to utilize the Informal Domestic Relations Trial procedure at any time and may also direct that a case proceed in the traditional manner of trial even after an Informal Domestic Relations Trial has been commenced but before judgment has been entered.

(5) A party who has previously agreed to proceed with an Informal Domestic Relations Trial may file a motion to opt out of the Informal Domestic Relations Trial provided that this motion is filed not less than ten calendar days before trial. This time period may be modified or waived by the Court upon a showing of good cause. A change in the type of trial to be held may result in a change in the trial date.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Limited Scope Representation and Family Law: Ethics and a View from the Bench

Presenters:

The Honorable Timothy Gerking, Jackson County Circuit Court Judge

Judge Gerking was appointed to the bench in 2010. Prior to his appointment, he was a partner with the law firm of Brophy, Schmor, Gerking, Bropy, Paradis & Maddox in Medford. Judge Gerking was admitted to practice in Oregon in 1979 and was previously admitted in the state of Arizona where he began his legal career in 1974. Judge Gerking had an active trial practice in Medford representing insurance companies and four Southern Oregon School Districts. He received an undergraduate degree from the University of Arizona and a JD from Arizona State University Law School.

Helen M. Hierschbiel, Executive Director, Oregon State Bar

Helen M. Hierschbiel served as General Counsel and Deputy General Counsel for the Oregon State Bar for a total of 9 years. In those roles she gave ethics guidance to lawyers, served as liaison to the Legal Ethics Committee, wrote over 35 articles and gave over 100 presentations regarding lawyers' ethical obligations. She started working at the OSB in December 2003 in the Client Assistance Office, reviewing and investigating ethics complaints against lawyers. Prior to working for the Bar, she worked in private practice in Portland, Oregon and for DNA-Peoples Legal Services on the Navajo and Hopi Reservations in Arizona. She received her JD from Lewis & Clark Law School in 1991, and is licensed to practice law in Oregon and Arizona (inactive). As of January 1, 2016, Helen became the Executive Director/CEO for the Oregon State Bar. In spite of this change in role, she continues to act as a resource on matters of lawyer ethics, including answering calls on the OSB Ethics Hotline.

Joshua Kadish, Attorney at Law, Wyse Kadish LLP

Mr. Kadish is a graduate of Stanford Law School (1979). He was law clerk to Justice Hans Linde of the Oregon Supreme Court and has been in private practice since 1980. He is a partner at Wyse Kadish LLP, where he practices family law, mediation, estate planning and business law. He is an adjunct professor at Lewis and Clark Law School and has taught negotiation and mediation there for thirty years. Mr. Kadish's mediation practices focuses on families in conflict around divorce, will contests, care of elders and closely held businesses. He received the Oregon Mediation Association's annual award for excellence in 2000, the ADR Section Sidney Lezak award for excellence in the field of dispute resolution in 2011, and a DJC Leadership in the Law award in 2012. He is an Oregon Super Lawyer. He has taught and written extensively about mediation and family law.

Samantha M. Benton, Program Manager, Family Law Program, Oregon Judicial Department

Samantha joined the Juvenile and Family Court Programs Division, OJD in 2014. Previously, she clerked for the Honorable Valeri L. Love at the Lane County Circuit Court, primarily in juvenile dependency, juvenile delinquency, and criminal dockets. Samantha graduated from the University of Oregon School of Law in 2012, with a Certificate of Completion in Estate Planning and was Editor-in-Chief for the Oregon Review of International Law. During law school she participated in the Probate Mediation Clinic, gaining valuable experience in dispute resolution and probate matters, and was a regional finalist for the ABA Client Counseling Competition. She earned her B.A. in History from the University of Puget Sound, and before attending law school worked in state and federal government, most recently as Chief of Staff to State Representative Scott Bruun in the 2009 Oregon Legislature.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Oregon Law and Surrogacy Arrangements

Presenter:

The Honorable Beth Allen, Multnomah County Circuit Court Judge

Judge Allen sits on a dedicated family law bench that includes juvenile dependency and delinquency matters. Judge Allen is co-chair of Multnomah County's Child Welfare Committee's workgroup on LGBTQ dependency and delinquency issues. In that role, she is involved in recruitment and training for foster parents to care for that demographic and she created the Judge's LGBTQ Reference Card. She serves on the Family Court Improvement Project Tools & Standards Committee, which is developing tools, standards, and training for lawyers, custody evaluators and others in an effort to ensure they are considering whether domestic abuse is impacting families in litigation. She is also a member of the Judicial Conduct Committee of the Judicial Conference. Judge Allen is the judge who handles the Surrogacy docket for Multnomah County.

Sam R. Walton, Attorney at Law, Bouneff, Chally & Koh

Sam R. Walton, Esq. joined Bouneff, Chally & Koh as an associate attorney in 2017.Sam was born and raised in Northeast Portland and attended Grant High School before leaving Portland to earn a bachelor's degree in anthropology with a minor in Egyptology from the American University in Cairo in 2010. Sam then returned to Portland to pursue a law degree from Lewis & Clark Law School, which he completed in 2013. Prior to joining Bouneff, Chally & Koh, Sam worked as a volunteer attorney at the Multnomah County Circuit Court and subsequently served as a clerk for the Honorable Beth A. Allen from 2014 to 2016, during which time he learned the ins and outs of family court procedure and family law. Sam is licensed to practice law in Oregon and has been a member of the Oregon State Bar since 2013. His practice areas include adoption, surrogacy, and assisted reproductive technology. Outside of work, Sam enjoys hiking, backpacking, reading science fiction, climbing mountains, happy hours, board games, video games, learning new languages, and has recently taken up rock climbing.

SURROGACY NUTS AND BOLTS
(DON'T GO NUTS AND BOLT, YOU CAN DO IT!)

Hon. Beth A. Allen
Multnomah Circuit Court
Beth.a.allen@ojd.state.or.us

Sam R. Walton
Bouneff, Chally, & Koh
sam@bckattorneys.com

Roadmap

- The Law
- Baby steps, getting started in the process
- What information do you need
- Timeline—when do you start
- Where do you file
- What must be in your pleadings
- What must be in the judgment
- Reasons for applying pre-birth
- What to do in special cases
- How long will it take to get a judgment
- What to do after you get the judgment

SW1

Oregon's Statutory Law Concerning Surrogacy

But, …

- ORS 163.537 provides in relevant part:
  - (1) A person commits the crime of buying or selling a person under 18 years of age if the person buys, sells, barters, trades or offers to buy or sell the legal or physical custody of a person under 18 years of age.
  - (2) Subsection (1) of this section does not:
  - …
- (d) Apply to fees for services in an adoption pursuant to a surrogacy agreement.

Slide 3

SW1 My thinking on this was that you left it blank intentionally to highlight the dearth of statutory law dealing explicitly with surrogacy. Is that correct?
Sam Walton, 1/31/2017

And, related…

- ORS **109.239 Rights and obligations of children resulting from artificial insemination; rights and obligations of donor of semen.** If the donor of semen used in artificial insemination is not the mother's husband:
- (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and
- (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.
-
- **109.243 Relationship of child resulting from artificial insemination to mother's husband.** The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.

Plus…

- Filiation proceedings may be relevant
  - **109.070 Establishing paternity.** (1) The paternity of a person may be established as follows: * * * (d) filiation proceedings [and] (g) (g) * * * by other provision of law.
  - Filiation proceedings are found in ORS 109.124 through 109.237.

So, Robin Pope Devised a Plan

- **Declaratory Judgment**: ORS 28.010 provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."
- ORS 28.120: "This chapter is declared to be remedial. The purpose of this chapter is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered."
- Declaratory judgments constitute such "other provision of law," an interpretation explicitly endorsed by the Oregon Supreme Court in *Thom v. Bailey*, 257 Or. 572, 59-600 (Or 1971), and courts have so far accepted this without issue.

Supplemental Relief

- ORS 28.080: The Uniform Declaratory Judgement Act specifically includes a provision contemplating supplemental relief based on a declaratory judgment where necessary or proper. In these parentage proceedings, practitioners use this provision to request that the Court order the Oregon State Registrar of the Center for Health Statistics to amend a child's birth record and issue new or amended birth certificates reflecting the Court's determination of legal parentage.
- The basis for the Court's supplemental order lies in ORS 432.245 and ORS 432.088

What information do you need?

- The judgment will refer to the surrogacy contract the parties entered into, so you will need to confirm that the contract did what you are saying it did
- The genetic background of the child(ren)
  - However, if you have two intended fathers who both provided sperm and it is unclear which is the genetic father, it is fine to include this ambiguity in the pleadings (e.g. "either IP A or IP B is the genetic father of the child")
- Information about the medical procedures
  - IVF arranged by intended parents or donated embryos?
  - Date of embryo transfer
- Approximate due date of child(ren)
- Information about intended parents and gestational carrier (and her spouse, if applicable)

But, first…

- Matching intended parents with a surrogate
  - Agency or independent?
    - Pros and cons
  - How to determine if it's a good "fit."
  - Concerns regarding residence, marital status, degree to which intended parents want to "participate" in and direct the pregnancy
  - Representation duties
    - At contracting stage
    - At time of filing petition
    - Upon birth

Drafting the surrogacy contract

- Who drafts?
- Who pays?
- How do you begin?
- What must you include?
- What might you include?
- What to expect in negotiations
- Pitfalls to avoid

Timelines: when do you start?

- Timing will vary from case to case, depending in large part upon the needs of the intended parents and the requirements of their home state/country.
  - For example, European intended parents who, due to the particularities of their home country's national health care system and the circumstances of their surrogacy (twins), needed to begin the process earlier than usual in order to make sure they had insurance in place to take care of any unexpected expenses in the event of a premature delivery.
  - Some countries require the parentage proceedings to be filed post-birth
- In general, ~20 weeks into Gestational Carrier's pregnancy is a good time to begin meeting with clients, gathering information, and preparing documents

Where do you file?

- Multnomah County has become the go-to filing location for parentage proceedings in Oregon, in large part because the majority of the legal medical, and agency infrastructure is located here. Often the surrogates reside outside of Multnomah County and the delivery of the child(ren) will take place outside of Multnomah County, but so long as the surrogate resides in Oregon, they may (and typically do) consent to venue in Multnomah County.
  - There are unusual cases where jurisdiction is a closer question. For example, in one case the Intended Parents resided in Spain and the Gestational Carrier resided in Idaho, but they were close enough to the border that the birth was going to occur in Ontario, Oregon. Because the child would be born in Oregon and the child's birth record and birth certificate would be created by Oregon authorities, we found that the Oregon court had jurisdiction over the proceeding.

What must be in your pleadings?

- The pleadings need to be as complete as possible and include ALL relevant information. There is generally not a concern with a petition or accompanying declarations attracting the attention of unfriendly foreign authorities.
- See Sam's checklist. If it's in the judgment, it needs to be alleged in the petition or declaration or other supporting testimonial document; and to be ordered it must be requested in the petition

What must be in the judgment?

- Findings of Fact that support the judgment
  - Recitation of the parties' residency
  - Explanation of the surrogacy contract and what the parties intended by it
  - Recitation of the medical procedures undertaken, and confirmation that the statement of the physician who performed the procedures was filed with the court
  - Statement that all parties consented to the medical procedures
  - Statement re: estimated due date of the child
  - Statement that all parties believe establishing legal parental rights in intended parents and amending birth records/certificates to reflect this is in the child's best interests
  - Statement that all parties contractually agreed that the intended parents would assume all parental rights and obligations for the child, including support, education, and all other expenses that they would have incurred had the child been born to them
  - Statement re: Declaratory Act (i.e. the action is brought to resolve uncertainty regarding the legal rights of the parties to the child)

What must be in the judgment?

- Some of the Findings of Fact can be omitted from the judgment where the circumstances call for it (i.e. intended parents' home country does not look kindly on surrogacy as a matter of policy – e.g. Germany), so long as they are included in other pleadings (i.e. Petition, Declaration of Intended Parents, etc.). However, the jurisdictional facts and facts supporting the application of the relevant statutes must be included regardless of any permissible intentional omissions.

What must be in the judgment?

- Regardless of truncation, there are certain things that must be included and which are not concerns in terms of attracting unwanted attention from foreign authorities
  - Conclusions of Law – These generally are always included. Be sure that if surrogate is married, the presumption of ORS 109.070(1)(a) is specifically rebutted.

What must be in the judgment?

- Establishing legal parentage is the whole purpose of this process, so regardless whether the judgment is being tailored to avoid any mention of surrogacy, the judgment must include specifics as to what the court is ordering. Generally:
  - Jurisdictional statement
  - Applicability of Uniform Declaratory Judgment Act
  - Disestablishing surrogate (and spouse, if married) as legal parents (if applicable – in some two-step proceedings the surrogate remains the legal mother until her rights are terminated in a second parent adoption)
  - Establishing legal parentage of intended parent(s)
  - Granting custody to intended parents on the basis of their status as legal parents of the child (this is not strictly necessary, and some practitioners choose not to include such a provision – really redundancy for the sake of complete clarity)
  - Ordering a new or amended birth record/certificate to be created/issued for the child that reflects the order of the court.

Reasons for filing pre-birth

- Ensure that intended parents have legal parental rights from the moment of birth
  - This moves the various post-birth administrative procedures along more quickly (e.g. obtaining birth certificates, apostilles, passports, etc.), which can be a big concern for international clients anxious to get home.
- International law concerns (e.g. Hungary case where parentage had to be established pre-birth to get the child registered)
- No interim period where parental rights are uncertain

Special cases: what do you do?

- While surrogacy has become common enough in Oregon that the judgment in a standard surrogacy arrangement is essentially pro forma, there are no lack of special cases that call for particular attention to the details.
  - Unfriendly home country: there are a number of countries that have strong public policies against surrogacy – in such cases the judgment will usually be tailored to avoid any mention of surrogacy, with all the relevant information being included in the petition or in declarations supporting the petition.
  - Intended parents not genetically related to child(ren): In most gestational carrier surrogacies, at least one of the intended parents will be genetically related to the child or children at issue. However, in the case of an embryo donor, none of the parties have any genetic relationship to the child or children and the pleadings will need to reflect this (in such cases the focus shifts to intended parents' ownership of the donor embryos and to the intent of the parties in entering into the agreement.)

How long will it take to get a judgment?

- Parentage proceedings in Multnomah County must be e-filed. This is a fairly recent change in process (judgments used to be brought to family law ex parte).
  - Having judgments go through the e-filing process means that the length of time from filing to entry of the signed judgment is far more reliant on the efficiency of court staff and judges.
  - Luckily, Multnomah County has dedicated itself to processing these judgments quickly, and so far the process has been working quite well.

What to do after you get the judgment

- Applying for a passport
- Getting a SSN for the child – Generally not issued at birth because birth certificates will be amended shortly after
- Registered as a citizen in home country?
  - Refer to our Hungarian case from a couple years ago
- Is this a two-step process? Will they be doing second-parent adoption proceeding?
- Do they need apostilles?
  - This is like a certified copy that is recognized internationally
- Practical concerns back home
  - Getting the child insured, etc.

Questions?

Thank You!

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Introduction: The Legal Framework

Oregon has been identified as a destination state for people seeking surrogacy services:

> In a convergence of medical advances and cultural shifts, Oregon has quietly become an international destination for gestational surrogacy, an industry banned in many states and countries. Couples from all over the world, especially gay and lesbian couples, come to the state and pay $100,000 or more for the chance to become biological parents, a transaction that mixes business with joy and wraps the resulting babies in a bundle of practical, legal and ethical questions.[1]

The Oregonian article referred to above, and included in the materials, notes that intended parents find Oregon surrogates more healthy, reputable reproduction clinics more numerous, costs more reasonable, and the legal process more straightforward.

Yet, like many other states, Oregon has little in the way of statutory and case law specifically addressing surrogacy arrangements. One of the few statutes that does address surrogacy is not, as one might expect, a statutory scheme laying out a legal process for dealing with these arrangements, but rather an exception to a provision in Oregon's criminal statutes prohibiting buying or selling a person under 18 years of age. ORS 163.537 provides in relevant part:

> (1) A person commits the crime of buying or selling a person under 18 years of age if the person buys, sells, barters, trades or offers to buy or sell the legal or physical custody of a person under 18 years of age.
>
> (2) Subsection (1) of this section does not:
>
> …
>
> (d) Apply to fees for services in an adoption pursuant to a surrogacy agreement.

This provision, however, is somewhat outdated, because adoption is no longer the standard procedural mechanism for ensuring that parental rights are established in the intended parents pursuant to

[1] Oregonian, April 16, 2015, Oregon's paid surrogates are choice for same-sex couples around the world. http://www.oregonlive.com/kiddo/index.ssf/2015/04/surrogacy_in_oregon.html.

a surrogacy arrangement. This makes sense because using adoption as a mechanism in this context is something of a legal fiction: in terms of genetic heritage (in the case of a gestational carrier surrogacy), and perhaps more importantly, in terms of the intent of both the surrogate and the intended parents, the child's parentage properly lies with the intended parents. Going through the adoption process essentially means that the intended parents are "adopting" their own child or children, simply because Oregon's statutes require that the name of the mother who gives live birth (the surrogate in these arrangements) be listed as the "live birth mother" in the report of live birth, which, when registered, becomes the record of live birth. A judgment of adoption does allow the birth certificate to be amended,[2] but there is another avenue through which this amendment may occur: ORS 432.245(1)(b) provides that the record of live birth shall be amended when the State Registrar of the Center for Health Statistics receives "[a] request that a replacement record of live birth be prepared to establish parentage, as…ordered by a court of competent jurisdiction in this state that has determined the paternity of a person." The use of the word "paternity" reflects the assumption at the time of enactment that the only action to establish parentage, other than adoption, is a filiation proceeding. In any event, the majority of surrogacies involve a determination of "paternity" for at least one of the intended parents and sometimes both. Further, apparently the State Registrar has interpreted that provision to include determinations that neither intended parents established paternity (i.e. non-paternity – no father).[3]

About a decade ago, Robin Pope, an Oregon practitioner representing intended parents and surrogates, tried a creative solution: the declaratory judgment.[4] ORS 28.010 provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." The purpose of declaratory judgments is then spelled out in ORS 28.120: "This chapter is declared to be remedial. The purpose of this chapter is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." Oregon's paternity statutes specifically allow for paternity to be "established or declared *by other provision of law*."[5] Practitioners have been including a statement in their parentage petitions and proposed declaratory judgments that the declaratory judgment proceeding constitutes such "other provision of law," in large part based upon the Oregon Supreme Court's ruling to that effect in 1971,[6] and courts have so far accepted this without issue. Thus, the uncertain parentage is resolved by declaratory judgment, which establishes parentage pursuant to Oregon's paternity statutes, which in turn allows the court to order the State Registrar of the Center for Health Statistics to prepare an amended birth record and issue an amended birth certificate.

There is, however, some uncertainty about the role of the paternity statutes in these proceedings. At the heart of this uncertainty is the question whether Oregon's paternity statutes are in fact the only way to establish legal paternity, and what the relationship between the various provisions for establishing

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[2] ORS 432.245(1)(a) (2013).

[3] *See* OAR 333-011-0275(1)(b). Also, OAR 333-011-0275(3)(a) provides the details that must be included on the form for a new record when a new record of live birth is to be prepared after "adoption, *legitimization*, determination of paternity," etc. Thus far, there are no known cases of the State Registrar refusing to amend a birth certificate when the court has specifically "determined the paternity" of the child. The new birth certificates are prepared as a matter of course.

[4] Oregonian, April 16, 2015, Oregon's paid surrogates are choice for same-sex couples around the world. http://www.oregonlive.com/kiddo/index.ssf/2015/04/surrogacy_in_oregon.html

[5] ORS 109.070(1)(g) (2013).

[6] *See* Thom v. Bailey, 257 Or 572, 599-600, 481 P.2d 355 (Or 1971)

paternity is. Furthermore, there is a question regarding the meaning of the word "paternity" as used in the statutes. Traditionally, the term was used to refer to legal *fatherhood*, so there is a question as to whether the paternity statutes may also be used to establish a woman as the legal *mother* of a child (i.e. maternity). These questions make it clear that, although we have established this procedure in Oregon and it has so far been functioning remarkably well, there are some fundamental issues that need to be addressed going forward to avoid uncertainty and the potential for litigation going forward. Many practitioners are currently taking a "wait and see" approach, and dealing with procedural issues as they arise. This has been working well enough, but it would perhaps be useful to resolve these uncertainties with a legislative fix, though this would, of course, be costly in terms of time and resources.

The declaratory judgment is an ideal solution because at the center of any surrogacy arrangement lies a fundamental uncertainty: who will be the child's legal parents? A well-drafted declaratory judgment establishing parentage answers this question by referencing all facets of the arrangement between the parties (and also any donors of genetic material): the initial surrogacy agreement between the surrogate (and her spouse if she is married) and the intended parents, a statement of any genetic material donor's intent to relinquish any rights to their genetic material as well as any embryos or children created using such genetic material, a declaration of the physician performing the various procedures involved in surrogacies (artificial insemination, egg/sperm retrieval, in vitro fertilization, embryo transfer), and in some cases a declaration of the intended parents. These references support findings of fact that the child is not the genetic (if not a "traditional" surrogacy) or intended child of the surrogate, but is the intended and/or genetic child of the intended parents, and therefore the intended parents have certain legal rights (to be recognized as the legal parents) and obligations (to be legally responsible for the child safety, welfare, education, etc.).

Oregon's artificial insemination statutes could be argued to apply to surrogacy arrangements as well where one or both of the intended parents is not the source of the genetic material used to create the child, but rather they have obtained genetic material from one or more donors. ORS 109.239 provides "[i]f the donor of semen used in artificial insemination is not the mother's husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination," and ORS 109.243 provides "The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination." Thus, if a married surrogate is impregnated using "donor" semen, and the surrogate's husband consents (which he must), than the "donor" has no "right, obligation or interest" in the child, *and* the surrogate's husband "shall be" a legal parent. A surrogacy agreement explicitly addressing this issue, or a declaration in the pleadings that the statute does not apply because of the unique circumstances, is generally a useful addition to avoid issues down the road.

Oregon courts have extended the protections of ORS 109.243 to unmarried same-sex couples where the partner of the biological parent has consented to the artificial insemination *and* the couple would have chosen to marry had the choice been available to them.[7] Of course, after the Supreme Court's

[7] Madrone v. Madrone, 271 Or App 116 (Or. App., 2015); *See also* Shineovich and Kemp, 214 P.3d 29, 229 Or. App. 670 (Or. App., 2009).

decision last year in Obergefell v. Hodges[8], the fact-intensive inquiry to determine if a same-sex couple was similarly situated to a married heterosexual couple spelled out by the Oregon Court of Appeals in Madrone has become a thing of the past, as same sex couples now have the same choice whether or not to marry as heterosexual couples. Assuming that the artificial insemination statutes apply to a surrogacy, then, the practitioner should take care when the surrogate is married, no matter the gender of her spouse.

One interesting thing about Madrone is that the Court quite specifically declined to base its decision on whether or not the same-sex partner of a woman impregnated through artificial insemination *intended* to be a parent to the child. The Court reasoned that to create a test based on intent would be to abrogate the wishes of the legislature to only extend the protections of ORS 109.243 to *married* couples, while recognizing that, given the state of marriage equality at that time, such a restriction raised constitutional issues. By couching their decision in language of choice to be married or not (despite the fact that no such choice was available) rather than intent to be a parent, the Madrone court reasoned that the underlying intent of the legislature was preserved as much as possible in ensuring that same-sex couples were not discriminated against in a manner that violated the Oregon Constitution. Assuming again that the artificial insemination statutes apply in a gestational surrogacy (or if one considers a traditional surrogacy), this raises some practical issues for the practitioner: if one cannot disclaim parenthood in the surrogate's spouse by way of a statement in the pleadings that she did not intend and never intended to be a legal parent of the child, how does one get past the operation of ORS 109.243? The language of the statute is not that of a presumption that may be rebutted, but rather that of a legal relationship created automatically by operation of law. It seems possible that in this situation, adoption might be the only option to terminate the legal parental relationship formed in the surrogate's spouse.

However, a strong argument can also be made that, at least in the case of gestational carrier surrogacies, which have become vastly more common than traditional surrogacies, Oregon's artificial insemination statutes, on their face, do not apply because none of the procedures involved qualify as "artificial insemination" as defined by ORS 677.355: "artificial insemination means introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means." Because gestational carrier surrogacies operate by way of in vitro fertilization and embryo transfer, there is no "introduction of semen into a woman's vagina, cervical canal, or uterus" as contemplated by the statute, and thus the provisions of ORS 109.239 through ORS 109.247 simply do not apply, regardless of the parties' intent one way or the other.

Different Approaches to Establishing Parentage

There are three main theories regarding establishment of parentage, each with different legal consequences. The first would be focusing on the genetic parentage. This places primary importance on the declaration of the physician who performed the procedures involved, because this, of the things we typically see, is the most concrete evidence of the child's genetic heritage (barring a DNA test, which for various reasons Oregon courts don't require for these parentage judgments, perhaps in large part because many of these judgments are done pre-birth at a stage in the pregnancy where DNA testing carries with it a certain level of risk). The problem with a strictly genetic approach to establishing parentage is that it works only when both the sperm and the egg were retrieved from the intended parents. But it is typically the situation in which most judges are comfortable.

[8] Obergefell v. Hodges, 135 S.Ct. 2584 (2015

The second approach to establishing parentage in these cases may be characterized as a "property-based" approach. Under this approach, because the intended parents are the legal "owners" of the genetic material used to create the child (whether through self-production or by acquiring it from donors), they are also the legal parents of the child that is created with that genetic material. As a preliminary matter, it should be noted that Oregon case law specifically defers to the parties' intent where there has been agreement as to the disposition of embryos created through in vitro fertilization.[9] While that case does not specifically define embryos as property, it does hold that parties are free to agree as to disposition of joint genetic material (i.e. embryos), which would suggest that a single person is free to dispose of their own genetic material as they see fit, which of course would include donating it (i.e. relinquishing all rights to it). Here, a declaration from the intended parents stating that they "owned" the genetic material used to create the child is the most important piece of evidence supporting establishment of parentage. Referring to or including the contract that transferred "ownership" may be helpful if a judge is concerned about how the intended parents came to own the sperm and/or eggs. This approach resolves the problems raised by situations where neither intended parents is, in fact, the genetic parent of the child.

Finally, one may look to the contractual intent of the parties involved to determine parentage of a child. Under this approach, establishment of legal parentage in the intended parents is built upon the fact that all parties involved (surrogate and intended parents) specifically *want* legal parentage to go to the intended parents. Here, the crucial piece of evidence would be the surrogacy agreement entered into by the parties. The cases we have seen generally have not included the surrogacy agreement as part of the court file. However, the petition and the judgment itself usually reference the critical provisions: That the parties entered into an agreement that the intended parents would be the legal parents and that all parties relied on that agreement in undertaking the procedures which led to the surrogate's pregnancy. This approach in many ways makes the most sense of these three separate approaches. However, because under this approach paramount importance is placed on agreement between the parties, the enforceability of such agreements by the court must be addressed.

In Oregon, there are actually a couple cases dealing with the enforceability of surrogacy agreements.[10] Unfortunately, neither is directly on point in that they involve traditional surrogacies (where the surrogate is the genetic mother of the child as well as carries the child to term) and adoption proceedings. In Adoption of BABY A, the question presented to the court was whether an adoption judgment pursuant to traditional surrogacy agreements should be granted where the surrogate was paid for her services. The trial court denied the adoption judgment stating that the payment of money to the surrogate vitiated her consent to the adoption and therefore the adoption could not be completed, relying on dictum from an older case.[11] The trial court then ruled that the surrogate's consent was involuntary and declined to sign the judgement. The court of appeals reversed, basing its decision on evidence that the surrogate would have consented even without the payment, and added that she had never withdrawn her consent.[12]

[9] In re Marriage of Dahl and Angle, 194 P.3d 834, 222 Or. App. 572 (Or. App., 2008).
[10] Adoption of BABY A 128 Or. App. 450, 877 P.2d 108 (1994), Weaver v. Guinn, 176 Or App 383, 385, 31 P3d 1119 (2001).
[11] Franklin v. Biggs, 14 Or App 450, 461, 513 P2d 1216 (1973).
[12] 128 Or. App. 450, 453.

This is distinguishable from current parentage proceedings because we are not dealing with an adoption judgment, but rather a declaratory judgment of parentage. However, the court in Adoption of BABY A did state that the "primary purpose of the adoption proceedings is the promotion and protection of a child's best interests."[13] 128 Or. App. 453, 877 P.2d 108, *quoting* P and P v. Children's Services Division, 66 Or. App. 66, 72, 673 P.2d 864 (1983). Although the purpose of a declaratory action is not to transfer custody and legal parentage by extinguishing the birth parent's (or parents') rights, a court must consider the child's best interests.[14] Where the agreement shows that the surrogate and, if relevant, her spouse, have indicated complete disinterest in raising the child, the intended parents have declared their ability and desire to raise the child, and the all parties have agreed that the intended parents are best situated to be the legal parentage of the child, it is in the child's best interest that legal parentage be established in the intended parents.

In Oregon's only other case related to surrogacy, Weaver v. Guinn, the court states, in dicta, that an agreement between the parties regarding custody and visitation in a filiation proceeding do not bind the court and do not control the court's decision as to the best interests of the child. Rather, the trial court must look to the factors listed in ORS 107.137, first and foremost of which is the best interests and welfare of the child.[15] The court there did indicate, however, that courts most certainly *could* consider an agreement between the parties when determining the best interests of the child, but that it did not have to enforce the agreement. However, this is not directly on point as parentage proceedings are not filiation proceedings. Rather, they are their own creature that incorporates certain aspects of filiation proceedings and certain aspects of adoption proceedings, blending it all together under the rubric of a declaratory judgment.[16] It does not seem unlikely, however, that Oregon courts would view parentage proceedings in a similar light to filiation proceedings, and to that end, these judgments usually contain a specific finding of fact that all parties involved believe it is in the best interests of the child that the court act in accordance with the parties' intentions as stated in the surrogacy contract and declare that the intended parents are the legal parents of the child.

Rather than follow a single one of the three approaches to establishing parentage, Oregon practitioners tend to take more of a middle-ground approach. They prepare stipulated declaratory judgments of parentage addressing the intent of the parties, the surrogacy agreement they entered into, the intended parents' ownership of any donated genetic material, and the statement of the physician as to the genetic makeup of the child. This allows that, whatever approach a given judge might be inclined to take, there is evidence to support the establishment of legal parentage in the intended parents.

I interject here, however, that in many cases, whether out of an abundance of caution, particularly for same-sex intended parents, or due to particular requirements in the intended parents' home state or country, non-genetic parents may want to seek an adoption judgment even after a declaratory judgment establishing legal parentage in both intended parents has been granted. Whereas the recognition of

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[13] 128 Or. App. 450, 453, 877 P.2d 108, *quoting* P and P v. Children's Services Division, 66 Or. App. 66, 72, 673 P.2d 864 (1983).
[14] *See* Doherty v. Wizner, 210 Or App 315 (2006).
[15] Weaver v. Guinn, 388-389.
[16] *E.g.* Most (but not all) parentage judgments acknowledge the need to rebut the presumption in ORS 109.070 that the birth mother's husband is the father of the child (some judgments treat the child as "born out of wedlock" under ORS 109.124, thus negating the need to rebut the presumption, though these judgments typically also say the presumption is rebutted in any event).

adoption judgments as a matter of full faith and credit is unassailable, a declaratory judgment based on a contract another state may find violates its well-established public policy may not be. Although Oregon has not addressed the issue, other courts have found that despite the already established parentage through declaration, a judgment of adoption may be useful and necessary to provide certainty in some states or countries. [17]

Additional Concerns in International Cases

Interesting issues sometimes arise when dealing with surrogacy arrangements in which the intended parents are not U.S. citizens, simply due to the variety of foreign laws regarding surrogacy, adoption, and parentage, and the specific requirements and concerns a given country might have. For example, we once had a case where the intended parents in a gestational carrier surrogacy arrangement were from Hungary, which has some very specific requirements regarding when the parentage judgment must be signed, specifically requires that a separate judgment be produced for each child, even when both are carried by the same woman, and has some apprehensions about surrogacy arrangements in general. In that case, it was imperative that the judgment be signed before the children were born in order for the intended parents to be named on the birth certificate. Otherwise, the children could not have been registered as Hungarian citizens, which could have impacted the parents' ability to return home with the children and other problems in the future.

The attorney in that case had to be very careful to exclude, as far as possible, any reference to surrogacy in the judgment itself, because that document would need to be presented to the Hungarian authorities. Presumably, if those authorities saw that the placement of the intended parents' names on the birth certificate was pursuant to a surrogacy arrangement, they would not have allowed the children to be registered. Thus, rather than specifically cite to the contract and the declaration of the doctor and other documents that were essential to obtaining the judgment, in the stipulated judgment the attorney cited generally to all the pleadings in the record.

That case highlighted the importance of communication between legal practitioners and the court throughout the lifecycle of the parentage process. When we first received that proposed judgment and reviewed the file, I determined there was vital information missing and I was concerned that something less than forthright was going on (i.e. an illegal adoption). Once we were able to have a conversation with the attorney who submitted the judgment, however, and got a more complete picture of the context of the case, we were able to work out a solution to get the judgment signed before time ran out and the children were born. Because the concern was strictly with what appeared in the judgment itself, we simply had the attorney file the declaration of the intended parents, and the statement of the physician that performed the medical procedures involved in the surrogacy with the court without adding any additional information to the judgment itself. These documents provided me with all the information I needed to feel comfortable declaring parentage in the intended parents (information about the genetic heritage of the child, references to the surrogacy agreement and the intent of all parties involved in the case that parentage be established in the intended parents, etc.) without drawing unwanted attention from the Hungarian authorities. Since then, some practitioners have begun using such short-form judgments as a matter of course, including all the relevant facts in the petition and then simply stating in the judgment that Respondents have admitted

[17] *See* Matter of L., No. A-11966/15 (Family Court, Kings County, October 6, 2016)

all factual allegations as stated in the petition and that the court accepts the admission and finds that the facts are as alleged in the petition.

Conclusion

Oregon's approach of using declaratory judgments to establish parentage in the intended parents, who have usually invested a great deal of time, money, and emotion in starting their new family with the help of a surrogate, provides a solid legal framework to establish parentage while remaining flexible enough to accommodate the vast array of possibilities currently available and adapt to the innovations that are sure to continue into the future. Until all states recognize the value of supporting families created through ART, Oregon will likely remain a destination state.

Oregon's paid surrogates are choice for same-sex couples around world

By **Amy Wang | The Oregonian/OregonLive**

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The first time Carey Flamer-Powell gave birth, she delivered a girl and took her home. The second time, she delivered a boy and sent him to Georgia.

Flamer-Powell, 38, was a gestational surrogate, paid to carry the boy by his future parents, a lesbian couple. As a lesbian herself who'd struggled with infertility, Flamer-Powell found her experience so stirring that in August 2014 she set up a surrogacy agency catering to gay and lesbian clients. Eight months later, **All Families Surrogacy** does a brisk business from a third-floor office in the Beaverton Round Executive Suites, drawing clients from around the world.

In a convergence of medical advances and cultural shifts, Oregon has quietly become an international destination for gestational surrogacy, an industry banned in many states and countries. Couples from all over the world, especially gay and lesbian couples, come to the state and pay $100,000 or more for the chance to become biological parents, a transaction that mixes business with joy and wraps the resulting babies in a bundle of practical, legal and ethical questions.

Intended parents from countries of all stripes - Israel, Argentina, China, Australia, France, Sweden, Ecuador, Canada, Germany, Egypt - are flocking to All Families and other Oregon surrogacy agencies for a combination of reasons, said those working in the field:

- Oregon has no law against gestational surrogacy. Some states, such as Washington, forbid any paid surrogacy; Oregon surrogates are advised not to travel to Washington in their third trimester. In other states, surrogacy is legal for heterosexual married couples but not for same-sex couples.

- Oregon has a pre-birth procedure for amending a birth certificate so it bears the names of the intended parents and not the surrogate's. The procedure, devised by Beaverton lawyer **Robin Pope** about eight years ago, allows the intended parents to bypass a court hearing through a process called declaratory judgment. As a result, establishing legal parentage is "very straightforward" in Oregon, Pope said. The procedure puts Oregon "really ahead of quite a few states," said Judy Sperling-Newton, director of the **American Academy of Assisted Reproductive Technology Attorneys (AAARTA)** and an owner of **The Surrogacy Center in Madison**, Wisconsin.
- Oregon is home to several nationally known fertility clinics that have high success rates with in vitro fertilization and live births. John Chally, an adoption attorney and co-founder of the 21-year-old **Northwest Surrogacy Center** in Portland, said he remembers 25 percent pregnancy rates in the early days of gestational surrogacy. Now fertility clinics are so sure of success they are willing to transfer only one or two embryos at a time.
- Oregon surrogates are seen as particularly desirable. "We have a good reputation in terms of being healthy, (having) prenatal care, taking care of themselves," said Adrienne Black, a former surrogate who founded a Eugene surrogacy agency, **Heart to Hands Surrogacy**, in 2011. Geri Chambers, another former surrogate who owns the 5-year-old **Greatest Gift Surrogacy Center** in Sherwood, agreed: "We're definitely more of an organic, plant-based, natural type of surrogate."
- Oregon surrogacy is less expensive, relatively speaking. "It seems like the fees for all of these things are a little less than in California or on the East Coast," Black said.

According to 2012 statistics from the Centers for Disease Control and Prevention, gestational surrogacy accounts for about 1 percent of the annual 60,000 U.S. births through assisted reproduction technologies. It's not clear how those statistics play out in Oregon, because the state doesn't track births by surrogacy.

What is clear is that gestational surrogacy has burgeoned to where so-called intended parents can choose from an increasingly varied array of agencies in Oregon: Decades-old agencies with hundreds

of babies to their credit, newer "boutique" agencies that work with only a handful of clients at a time, agencies that once specialized in adoption but now offer surrogacy as well.

In fact, surrogacy is now gaining on adoption in popularity. The Northwest Surrogacy Center expects to facilitate 75 to 100 surrogate births this year, Chally said. With more countries shutting down international adoption and fewer women giving up babies, adoption isn't the option it used to be. "I don't know where we would be today if we hadn't added surrogacy," he said.

His comments were echoed by Susan Tompkins, executive director of Journeys of the Heart, a 25-year-old Hillsboro adoption agency, which decided last year, after years of watching adoption rates drop, **to start offering gestational surrogacy**. The agency now has 15 surrogates and is working toward its first surrogacy birth.

"It's definitely something that is a trend," Tompkins said.

* * *

In a side room at the Lucky Labrador Tap Room, seven women sit chatting amid plates of pizza and salad and glasses of wine or beer. They're here on a rainy Saturday evening in February to learn more about All Families Surrogacy and what it takes to carry someone else's baby.

The lights go down. Flamer-Powell and Angela Padilla, the agency's surrogate coordinator, click through presentation slides noting All Families' requirements for surrogates: No one under 21 or over 44. A history of uncomplicated pregnancy and at least one healthy birth since any miscarriage. At least one child at home, because a surrogate should understand what it's like to be a parent. No one who's on any form of government assistance, because "surrogacy is not meant to be a job," says Flamer-Powell. No one with a body-mass index over 34, because a surrogate should be in good health.

The women in attendance learn that intended parents cover all expenses: fertility treatments and hospital bills, prenatal vitamins and maternity clothes, legal fees and more. If they come from

overseas, they handle the paperwork for the baby's passport and, if necessary, the baby's immigration visa, a process that can require still more money for potentially lengthy stays in the U.S.

All Families Surrogacy starts new surrogates at $30,000, experienced surrogates at $35,000. In March, the agency offered a $500 signing bonus for qualified surrogates and those who referred them.

Flamer-Powell says she's not in it for the money. She doesn't need to work, she tells the attendees; she's in business to help other people experience the fulfillment of parenthood.

The lights come up, and the questions begin:

Is a surrogate's compensation taxed as income? No, says Flamer-Powell. The money is considered payment for pain and suffering. (That could change: In January, the U.S. Tax Court ruled in **Perez v. Commissioner** that the Internal Revenue Service could tax an egg donor's $20,000 compensation as income because the donor was paid for services rendered.)

What citizenship does a baby born through surrogacy have? U.S. citizenship, as with any other baby born on American soil. It's up to international parents to decide if they want to seek citizenship in their home countries as well for the baby.

Are embryos screened before being transferred to a surrogate's uterus? Yes. (Dr. Paula Amato, a reproductive endocrinologist and expert in fertility services at Oregon Health & Science University, says in a separate interview that the screening is regulated by the U.S. Food and Drug Administration "because you're transferring tissues.")

Which insurance companies are surrogacy-friendly? Flamer-Powell emphasizes that surrogates with her agency must carry their own health insurance and names three locally available health plans that cover surrogacy.

If a surrogate has a miscarriage, does she still get paid? Her compensation is pro-rated based on the length of her pregnancy. It's also pro-rated if she delivers prematurely.

What about breastfeeding after the baby is born? Surrogates don't nurse. Instead, intended parents who want the baby to have breast milk and/or its precursor, colostrum, will ask a surrogate to pump.

Not asked are the questions everyone outside the world of surrogacy has: Why would a woman do this? How can a woman carry and deliver a baby, then just walk away?

* * *

John Weltman, founder and president of **Circle Surrogacy of Boston**, a 20-year-old agency that has recorded 1,000 surrogate births for clients from 69 countries, said he'd rank Oregon among the five best states for surrogacy, alongside California, Colorado, Connecticut and Massachusetts.

"Oregon is a great state for surrogacy, no question about it," Welman said.

And being able to go through surrogacy in a state also known for its gay-friendliness is icing on the baby shower cake for gay and lesbian couples.

Chally, of Northwest Surrogacy Center, estimated that 70 percent of his clients are gay. "That part of the practice is still growing quickly and we're very happy to be doing that," he said. His clients, in turn, are delighted to be in Oregon. "People in Portland have been very kind to our clients, very embracing, very curious in a kind way about what they're doing. ... The acceptance has been high," he said.

Black said that when she first got into surrogacy about 10 years ago, "it was definitely more of a heterosexual-focused family-building opportunity. But as it becomes more popular and more well known, the availability for the LGBT community has just skyrocketed."

Black linked the increase in gay and lesbian clients to surrogates' relatively high acceptance of same-sex couples. "Surrogates have to be a pretty open-minded group of individuals," she said. "And they have that option of choosing who they want to carry for."

"Surrogacy," said Pope, the lawyer, "really has become a gay rights issue."

Indeed, Whitney Lewis, 31, a married Grants Pass mother of two, said she decided to become a surrogate in part to help a gay or lesbian couple and to teach her children about equal rights for sexual minorities. Referring to her older daughter, 7, she said, "It's opened her eyes to pictures of different families."

But the law has struggled to keep pace with the medical and cultural advances. There's no regulatory oversight or licensing for surrogacy agencies, Sperling-Newton said. Instead, there are **guidelines for best practices from the American Society of Reproductive Medicine** and strong recommendations to use one of the 150 or so **attorneys who have AAARTA credentials**.

And when lawmakers do try to address surrogacy, they can run into political and ethical opposition.

In 2013 and 2014, **Louisiana Gov. Bobby Jindal vetoed bills that would have legalized surrogacy contracts** in his state. "(T)his legislation still raises concerns for many in the pro-life community," Jindal wrote in his veto letter, referring to the fact that surrogacy sometimes involves abortion of surplus embryos.

In 2012, **New Jersey Gov. Chris Christie vetoed a bill** that would have loosened his state's restrictions on gestational surrogacy. He said there were still too many questions about "the profound change in the traditional beginnings of the family" that the proposed law would have set in motion.

Critics of gestational surrogacy also voice concerns about exploitation of surrogates, saying the women might not fully realize what they're signing up for or the risks they're taking.

Sperling-Newton said every surrogate she's met in three decades in the business has known exactly what she was doing, and the objections and concerns are behind the times.

"It's happening," she said of gestational surrogacy. "It's going to be a way for people to build their families, regardless of what the law does, and so we have to catch up and try to create laws to protect people."

* * *

Tamara Belfatto, 27, is soft-spoken but unwavering; she shows no hesitation in explaining why she decided to carry twins for a couple from another country last year.

Belfatto grew up in Eugene; graduated from North Eugene High School and Pioneer Pacific College; married; and had a daughter, Arianna, now 2. Belfatto worked at a bank and at a Netflix call center, then stayed home with her daughter for awhile before returning to work this spring.

"We have a lot of infertility on both sides of our family," she said of herself and her husband. "That's what originally drew me to surrogacy."

Motherhood was the turning point for her, she said as she sat in her North Plains living room while her toddler napped in a bedroom and a tiny 6-week-old Jack Russell/rat terrier dozed in a basket on the floor.

"I had that self-realization of what it was to be a parent," she said. "I felt more for people that couldn't. ... With my daughter, I don't know what I would do without her now that I have her. I don't think anyone should have to go without kids."

And being a surrogate isn't just about giving, she said. It's also about receiving, in that surrogates and intended parents often form close ties. "I wasn't looking to just help someone have a family but I was also looking for that special relationship and connection that you can make," she said. "We added more members to our family."

Her husband, Andrew, said he was initially surprised when she brought up the idea. "It's not something I ever thought about," he said.

But neither he nor his wife recalled him objecting. She said the only questions she remembers him having were about whether she could truly walk away without a baby in the end. "For so long I wanted a baby of my own," she said. "We were married for five years before we had Arianna."

But the twins were different, she said. To explain, she cited a children's book, **"The Kangaroo Pouch" by Sarah Phillips Pellet**, which equates surrogacy with babysitting.

"I was kind of distant," Belfatto said of her feelings toward the twins in utero. "Because I knew they weren't mine."

That's a perspective echoed by other women who've been surrogates.

"I never had any attachment," said Padilla, the surrogate coordinator at All Families Surrogacy, who carried twins for a gay French couple last year as a gestational surrogate with a different agency. "It was really cool to feel them moving and kicking but I was never like ... " She gave an exaggerated sigh. Perhaps it helped, she joked, that she and her husband have three children under the age of 6. Her mindset was more along the lines of, "I am so glad I'm not taking these babies home. They are all yours!"

Flamer-Powell said surrogacy isn't about giving up a baby but about giving a baby back. "This is not a bonding experience between you and an infant," she said. "Honestly, this is more a bonding experience between you and the family."

In her case, she said, the women she carried for became close friends who now text her regularly with photos of their growing boy. On the day she delivered their son, she said, her 3-year-old told them, "Here's your baby. My mommy carried him for you."

Black said surrogacy is, ultimately, about families.

"It's one of the most beautiful family-building options out there," she said. "So intentional, with so much love and care and thought. And that's really magical."

-- Amy Wang

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271 Or App 116

**In the Matter of the Registered Domestic Partnership of:
Karah Gretchen MADRONE, Petitioner-Respondent,
and Lorrena Thompson MADRONE, Respondent-Appellant.**

**No. 214
A154894**

COURT OF APPEALS OF THE STATE OF OREGON

**Argued and submitted November 4, 2014
May 13, 2015**

Klamath County Circuit Court
1201759CV;

Dan Bunch, Judge.

John C. Howry argued the cause for appellant. On the briefs were Brett A. Baumann and Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, P. C.

Thomas A. Bittner argued the cause for respondent. On the brief were Mark Johnson Roberts and Gevurtz, Menashe, Larson & Howe, P. C.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

HADLOCK, J.

Reversed and remanded.

Page 117

HADLOCK, **J**.

In this case, we consider how to determine whether an unmarried same-sex couple is similarly situated to a married opposite-sex couple for purposes of ORS 109.243 and, thus, entitled to the privilege granted by that statute. ORS 109.243 creates parentage in the husband of a woman who bears a child conceived by artificial insemination if the husband consented to that insemination. The statute's effect is automatic; it requires no judicial or administrative filings or proceedings. In *Shineovich and Kemp*, 229 Or App 670, 214 P3d 29, *rev den*, 347 Or 365 (2009), we held that the statute violated Article I, section 20, of the Oregon Constitution because it granted a privilege—parentage by operation of law—on the basis of sexual orientation, because it applied only to married couples and because, when we decided *Shineovich*, same-sex couples were not permitted to marry in Oregon. To remedy the violation, we extended the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id*. at 687. It was undisputed that the parties in *Shineovich* were similarly situated to a married opposite-sex couple, so we did not consider to *which* same-sex couples our extension of ORS 109.243 applies.

This case raises that question. During the parties' relationship, respondent gave birth to a daughter, R, who was conceived by artificial insemination. Shortly thereafter, the Oregon Family Fairness Act took effect, allowing same-sex couples to register domestic partnerships, which petitioner and respondent then did. They later separated, and petitioner brought this action for dissolution of the domestic partnership. Among other claims, petitioner sought a declaration that she is R's legal parent by operation of ORS 109.243. The trial court granted summary judgment for petitioner on that claim based on our analysis in *Shineovich*. Respondent appeals. For the reasons set out below, we conclude that ORS 109.243 applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them. The record in this case includes evidence creating a genuine dispute on the latter

Page 118

point. Accordingly, the trial court erred in entering summary judgment, and we reverse.

The parties present fairly divergent views of the facts. Because this appeal comes to us following a grant of summary judgment, we view the facts in the light most favorable to respondent, the nonmoving party. *Jones v. General Motors Corp*., 325 Or 404, 420, 939 P2d 608 (1997). The parties, who are both women, met briefly in March 2004 in Oceanside, Oregon, where petitioner lived. Respondent, who lived in Colorado at the time, had recently been in a serious car accident that resulted in numerous injuries and required extensive rehabilitation. The parties corresponded after respondent returned to Colorado. Three months later, respondent returned to Oceanside for a week, during which the parties began a romantic relationship. They wanted to live together, and they moved to Colorado, where respondent continued her rehabilitation from the car accident.

During their time in Colorado, petitioner pressured respondent to hold a "commitment ceremony" with family and friends. The parties agreed that they did not want to seek a legal relationship, because they "did not believe in such social constructs" and "shared a common belief in freedom from marriage." Respondent was hesitant about having a commitment ceremony because petitioner was becoming more controlling of respondent and of their situation. Respondent took comfort in knowing that a ceremony would not be legally binding with respect to either the parties' relationship or any children that either party might have. The parties believed that, if one of them had a child, the other would not automatically be recognized as a legal parent, and they "made no agreements of any kind that would be binding upon a child either of [them] chose to have * * *." They believed that, if they chose "to be parents together," they would have to take legal action to "make it official."

Notwithstanding respondent's reservations, the parties eventually agreed that they would have the commitment ceremony. Together, they chose and bought rings and dresses for the ceremony and registered for gifts. In mid-2005, respondent succumbed to pressure from petitioner to

Page 119

move back to Oregon. The parties returned to Oceanside and held the commitment ceremony that September, as they had planned. Petitioner and respondent exchanged vows and rings at the ceremony. For several years thereafter, the parties had annual anniversary photos taken in the dresses that they had worn that day.

The month after the ceremony, the parties accepted joint positions managing the Clifftop Inn in Oceanside. They lived and worked at the inn, renovating the business and the premises. In March 2007, they bought the inn.

Respondent had wanted to have a child since before the parties met. By spring 2007, that desire had become urgent. She told petitioner that she "was going to have a child of [her] own no matter what." Respondent felt that it was her decision, and it did not matter to her whether she had the child with petitioner or not. Petitioner was initially hesitant about having a child at that time because she was concerned about the parties' financial stability and about the fact that working at the inn consumed so much of their time and energy. Respondent also had "mixed thoughts" about it, but they eventually "romanticized it and talked about doing it together." Respondent was concerned about having to "legally share" her baby with the biological father, so the parties decided to use two sperm donors in order to obscure the father's identity. Respondent wanted petitioner to be biologically related to the child, so she suggested asking petitioner's brothers if they would donate sperm. Only one of the brothers agreed, so respondent asked a friend of hers, and he agreed to be the other donor. A few days apart, the parties obtained the sperm donations and respondent was artificially inseminated. Petitioner assisted with the first insemination procedure but not the second. Respondent became pregnant.

The parties' relationship deteriorated during the pregnancy. Respondent gave birth to the baby, R, on January 21, 2008. By that point, respondent later asserted, the parties were "nothing more than 'roommates.' " After R was delivered, petitioner told respondent that she had not realized how hard it would be to not have a biological connection with the baby.

Page 120

Both parties legally changed their last names. Before R was born, respondent had often considered changing her own last name, and, having studied matrilineal societies, she wanted her daughter to have a "powerful, independent" last name. Respondent and petitioner both liked the name Madrone, and they agreed to give R that name. They both changed their last names to Madrone about two weeks after R was born, and it is the surname listed for R on her birth certificate.

The summary judgment record does not disclose who filled out R's birth certificate, but petitioner was not listed as a parent. Respondent did not attempt to put petitioner's name on the birth certificate, because she did not want petitioner to be R's legal parent. Respondent stated in an affidavit that she was "always clear that [she] was the legal, biological and SOLE guardian" of R. She also said, "I had the choice to add [petitioner] to my daughter's birth certificate, and I never did and never intended to." Petitioner never asked to have her name added. The parties were both aware that petitioner's name could be added to the birth certificate, but, in respondent's words, "because of an overall deteriorated relationship and a disconnect in any parenting of [R] by petitioner, it never happened."

Nonetheless, the parties filed a declaration of domestic partnership in March 2008.[1] How the domestic partnership came about is unclear. In her affidavits in opposition to petitioner's motion for summary judgment, respondent gave somewhat conflicting accounts about signing the domestic partnership paperwork. In her first affidavit, she stated that, while she was still recovering from childbirth, the midwife who assisted with R's delivery told respondent that she had to sign the paperwork. According to respondent, she was "out of it" and "not completely aware" of what she was doing; she signed the documents and only later

Page 121

realized what she had done. In her second affidavit, respondent's story changed from not having been aware of what she was doing to having felt pressured to sign the paperwork. Respondent stated that the midwife "had her own agenda" and that respondent was "scrambled by the strength of that agenda," not to mention still in recovery from giving birth. Respondent said that she "never would have sought it, but when [the midwife] showed up with it and said to do it, [she] felt pressured and wrong not to." According to respondent, the midwife notarized the paperwork right then.

Documentary evidence conflicts with both of respondent's accounts. A copy of the declaration of domestic partnership that the parties actually filed indicates that both parties signed it, and the midwife notarized it, on February 19, 2008, nearly a month after R was born.

R was reared with "attachment parenting," a practice that calls for more-or-less constant physical contact between the baby and a caregiver. In respondent's understanding, it is a "mother-centered philosophy" that "does not allow for 'co-parenting.' " R slept between petitioner and respondent in their bed at night, but otherwise, respondent generally carried R in a sling, and R was dependent on her "for everything." Petitioner would spend time with R, but never for very long without respondent being present and never alone for a night, as respondent "always had concerns" about petitioner and R "being alone together."

The parties separated in 2012 and respondent subsequently denied petitioner regular contact with R. Later that year, petitioner commenced this action for dissolution of the domestic partnership. In the operative petition, she asserted a claim for declaratory relief, seeking a declaration that she is a legal parent to R. Petitioner alleged that, at the time of R's conception and birth, she was respondent's "domestic and life partner," that she and respondent had planned the pregnancy with the intent to raise the child together, and that she had consented to the artificial insemination procedure. Petitioner also alleged that the parties would have married had Oregon law permitted them to.

In support of the declaratory-relief claim, petitioner relied on ORS 109.243, which provides:

Page 122

> "The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination."

Petitioner alleged that the statute unconstitutionally discriminated against her on the basis of sex and sexual orientation because, if she were male and married to respondent, it would create legal parentage in her without regard to whether she was R's biological parent.

Petitioner later moved for summary judgment on her declaratory-relief claim. She relied on our opinion in *Shineovich* in support of the motion. In *Shineovich*, we explained that "ORS 109.243 grants a privilege—legal parentage by operation of law—to the husband of a woman who gives birth to a child conceived by artificial insemination, without regard to the biological relationship of the husband and the child, as long as the husband consented to the artificial insemination." 229 Or App 685. We held that the statute violates Article I, section 20, of the Oregon Constitution:

> "Because same-sex couples may not marry in Oregon, that privilege is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial

> insemination, where the partner consented to the procedure with the intent of being the child's second parent. We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents by other means—namely, adoption. There appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so. Thus, we conclude that ORS 109.243 violates Article I, section 20."

Id. at 686. We went on to hold that the appropriate remedy for the violation was to "extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id*. at 687.

In her motion, petitioner argued that, under *Shineovich*, "there are two requirements for application of the

statute to [R's] situation: that the parties be domestic partners and that [petitioner] consent to the insemination." She asserted that both requirements were satisfied and, thus, that the court should grant summary judgment in her favor.

In response to the motion, respondent argued that *Shineovich* is distinguishable from this case. She asserted that, there, the parties were registered domestic partners before their children were born, whereas she and petitioner did not become domestic partners until nearly two months after R was born. Respondent contended that "the protections afforded in ORS 109.243 apply to domestic partners, not simply people in a relationship." According to respondent, "[i]f petitioner were male, the situation at hand would be that of a boyfriend trying to assert parental rights over a child who was born before the marriage and is undisputedly not the biological father." Respondent also argued that she had never consented to petitioner being considered her "husband equivalent" and that "to presume such consent now would be to deprive Respondent of significant due process rights to consent or withhold consent to the biological and/or legal paternity of a child born of her body." Respondent argued that this case is further distinguishable from *Shineovich* because, in that case, "the parties were unable to have both parties' names on the birth certificate, but in this case the parties were able, but chose not, to add Petitioner's name to the birth certificate. This gives insight into the parties' intent * * *."

After a hearing, the trial court granted the motion for summary judgment. In a letter opinion, the court stated:

> "No pertinent facts are in dispute regarding the nature of the parties' relationship prior to the birth of [R]. It is crystal clear that they lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child. It is evident that [petitioner] consented to the performance of the artificial insemination."

The court entered a limited judgment declaring that R is the child of petitioner and respondent "the same as if born to them in lawful wedlock" and ordering the State Registrar and the Center for Health Statistics to issue a birth certificate for R designating both parties as legal parents.

Respondent appeals, assigning error to the trial court's grant of summary judgment. She makes three primary arguments. First, respondent contends that summary judgment was inappropriate because there are factual disputes that, if resolved in her favor by a factfinder, distinguish this case materially from *Shineovich*. Second, she argues that the trial court's interpretation of *Shineovich* actually *creates* a privilege or immunity that is not granted to all citizens on equal terms, in violation of Article I, section 20. Specifically, respondent asserts that the trial court created a privilege for women in opposite-sex nonmarital relationships that women in same-sex relationships do not have: sole legal-parent status for a woman who conceived a child through artificial insemination, did not seek the consent of her partner, and did not intend to be a legal co-parent with her partner. Finally, respondent argues that the trial court's interpretation of *Shineovich* deprives respondent of her due process parental right to make decisions concerning the care, custody, and control of R. We address those arguments in turn.

Respondent's argument that this case is factually distinguishable from *Shineovich* misses the mark, as we addressed a different question in *Shineovich* than we address in this case. In *Shineovich*, we analyzed only whether ORS 109.243 violates Article I, section 20, because it denies a privilege to the same-sex partner of a woman who conceives a child through artificial insemination and, having concluded that the statute does violate Article I, section 20, held that the appropriate remedy was to extend the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." 229 Or App at 687. Beyond addressing those broad points, we did not have reason to articulate a precise standard by which to determine whether the same-sex partner of a mother who conceived by artificial insemination comes within the reach of ORS 109.243. We attempt to draw the line more precisely here.

Article I, section 20, provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally

belong to all citizens." As we explained in *Shineovich*, that provision of the constitution

> "protects against disparate treatment of 'true classes'—that is, classes that are defined not by the challenged law itself, but by a characteristic apart from the law, such as gender, ethnic background, residency, military service, and—as pertinent here—sexual orientation. *Tanner v. OHSU*, 157 Or App 502, 521, 524, 971 P2d 435 (1998). Disparate treatment of a subset of true classes—'suspect classes'—is subject to more rigorous scrutiny than disparate treatment of other true classes. Suspect classes are those that have been 'the subject of adverse social or political stereotyping or prejudice.' *Id*. at 523. Homosexuals constitute a suspect class. *See id*. at 524 ('[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.'). Disparate treatment of suspect classes is permissible only if it can be justified by genuine differences between the class and those to whom privileges or immunities are made available."

229 Or App at 681-82. "[R]equiring privileges or immunities to be granted 'equally' permits the legislature to grant privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same." *State v. Savastano*, 354 Or 64, 73, 309 P3d 1083 (2013). If a statute does not treat similarly situated people the same, the statute violates Article I, section 20, and we must determine whether to invalidate the statute or to extend it so that it applies to all who are similarly situated. We will opt to extend the statute if doing so "advances the purpose of the legislation and comports with the overall statutory scheme." *Hewitt v. SAIF*, 294 Or 33, 53, 653 P2d 970 (1982). Thus, in determining whether the

protections of ORS 109.243 must be extended to a particular citizen or class of citizens, we must consider whether that person or class is similarly situated to the persons or classes expressly affected by the statute.

In *Shineovich*, we held that ORS 109.243 violates Article I, section 20, because it creates a privilege that "is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the

Page 126

intent of being the child's second parent." 229 Or App at 686. In rejecting respondent's contention that the statute does not apply in this case because the parties did not establish a legal relationship before R was born, the trial court noted our reference to intent in *Shineovich*. The court stated that we had "focused on the parties' intent, not upon their legal status."

In retrospect, we recognize that our reference in *Shineovich* to the nonbiological partner's intent to be the child's second parent may be misleading. The reference simply reflected the facts of that case—there was no question that the petitioner in *Shineovich* intended to be the children's second parent. *See id*. at 672 ("The parties rushed to perform the ceremony before [the first child's] birth specifically with the intent that petitioner would be his legal parent."). We did not mean for that fact to establish a benchmark for determining whether ORS 109.243 should be applied to any particular same-sex couple. When it enacted the statute, the legislature may have assumed that any husband who consented to his wife's being artificially inseminated intended to be the resulting child's parent, and thus saw no need to include an intent requirement in the statute. Whatever the reason, the statute does not turn on intent, and our ultimate conclusion in *Shineovich* reflects that. We concluded that "the appropriate remedy is to extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." 229 Or App at 687.

Extending the statute simply on the basis of intent to be a parent would comport with one purpose of the legislation—protecting the support and inheritance rights of children conceived by artificial insemination—but it would not be consistent with the overall statutory scheme—specifically, the legislature's decision to make the statute apply only to children of married couples. If an unmarried opposite-sex couple conceives a child by artificial insemination using sperm from a donor, the statute does not apply, even if the couple, in the words that the trial court used to describe petitioner and respondent, "lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child." Accordingly, it would be inappropriate for courts to extend the statute to same-sex couples

Page 127

solely on the basis of one or both of the parties' intent to have the nonbiological party assume a parental role. *See Hewitt*, 294 Or at 53 (extension of a statute should "comport[ ] with the overall statutory scheme"). Just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice—commitment without marriage. Because ORS 109.243 would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice.

We therefore conclude that *choice* is the key to determining whether ORS 109.243 applies to a particular same-sex couple. Ultimately, the distinction between married and unmarried heterosexual couples is that the married couples have chosen to be married while the unmarried couples have chosen not to be. And, as we have explained, that choice determines whether ORS 109.243 applies. Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite-sex couple contemplated in ORS 109.243 cannot be whether the same-sex couple chose to be married or not. Rather, the salient question is whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to.

Whether a particular couple would have chosen to be married, at a particular point in time, is a question of fact. In some cases, the answer to that question will be obvious and not in dispute. For example, there was no disputing that the parties in *Shineovich* would have chosen to marry—they actually did make that choice, and were not *legally* married only because their marriage was later declared void *ab initio*. *Shineovich*, 229 Or App at 672-73. In other cases, the answer will be less clear. A number of factors may be relevant to the fact finder's determination. A couple's decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each

Page 128

other out as spouses; considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married. We hasten to emphasize that the above list is not exhaustive. Nor is any particular factor dispositive (aside from unsuccessfully attempting to get married before same-sex marriages were legally recognized in Oregon, as happened in *Shineovich*), given that couples who choose not to marry still may do many of those things. Instead, we view the factors as tending to support, but not compelling, an inference that a same-sex couple would have married had that choice been available.

In this case, the summary judgment record includes evidence pointing to two factors that tend to support the opposite inference—that the couple would not have married in any event: rejection of the institution of marriage and intent not to share legal parentage of any children born during the relationship. We use the phrase "tend to support" advisedly, particularly with respect to rejecting the institution of marriage. A factfinder would need to evaluate a professed rejection of marriage carefully in the light of a couple's conduct and history. It stands to reason that a person who has been denied the benefits of a social institution might react to that denial by rejecting the institution's validity or worth but might, once the prohibition is lifted, change his or her view and embrace the institution. Because the question is whether a couple would have married *if they could have*, the factfinder must determine what the individual's views would have been if marriage had not been prohibited. In some cases, it may be reasonable to infer that the individual's views would not have changed—that is, they still would have declined to marry, just as many committed opposite-sex couples do. In other cases, the more reasonable inference may be that a same-sex couple's rejection of marriage was rooted in the prohibition itself and that, indeed, the couple would have married had the law allowed.

Page 129

With the above standards in mind, we turn to whether summary judgment was appropriate in this case. "The court shall grant [a summary judgment] motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." ORCP 47 C. Respondent stated in her affidavits that the parties did not want to enter into a legal relationship, because they "did not believe in such social constructs." A factfinder could find that respondent was not credible or, given that the parties registered a domestic partnership (the closest thing to marriage that the state offered to same-sex couples at the time) shortly after such partnerships became available, that her view would have been different had same-sex marriage not been prohibited. However, because the case is in a summary-judgment posture, we must draw all reasonable inferences in respondent's favor. *Jones*, 325 Or at 420. A factfinder could reasonably infer, on this record, that the parties would not have chosen to marry even if the law had permitted them to. If the fact-finder determines that the parties would not have married in any event, ORS 109.243 would not apply, and petitioner would not be entitled to a declaration that she is R's legal parent in accordance with that statute. It follows that issues of material fact remain and, therefore, that the trial court erred in granting summary judgment.

As noted above, respondent argues that ORS 109.243 does not apply for another reason, namely, that petitioner did not consent to the artificial insemination. Because the meaning of "consent" will be at issue on remand, we address it briefly here. Respondent understands "consent" to require that the biological mother not only *received* the approval of her partner for the artificial insemination, but that she also *sought* that approval in the first place. Respondent notes that the common definition of "consent" is "give assent or approval," *see Webster's Third New Int'l Dictionary* 482 (unabridged ed 2002). She argues that, "before there can be 'consent,' there must first be a request for 'assent or approval.' " In addition, respondent contends that that the use of the word "consent" indicates a legislative intent to limit the application of ORS 109.243 to couples

who intend to be legal coparents at the time of conception. In other words, according to respondent, implicit in a would-be biological mother's request for consent to artificial insemination is a request to share the legal benefits and burdens of parentage.

Respondent's argument raises an issue of statutory construction. To determine whether the legislature intended "consent" to be understood to include intent by the mother to share legal parentage, we look to the text of ORS 109.243 in context and to any relevant legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). As respondent notes, the common meaning of "consent" is "give assent or approval." *Webster's* at 482. Nothing about that term itself or the statutory context supports respondent's argument that "consent" requires that the artificially inseminated woman intend to share legal parentage with her husband. Nor does the legislative history support that view. In short, ORS 109.243 requires nothing more than that the mother's husband give assent or approval to the performance of artificial insemination. We acknowledge that, as applied in determining which same-sex couples are similarly situated to married opposite-sex couples for purposes of applying ORS 109.243, an intent not to share parentage might indicate that a same-sex couple would not have chosen to marry. However, we see no reason that such intent should bear on the issue of "consent" for couples that would have married.

We turn finally to respondent's due process argument. Respondent asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution " 'protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' " (Quoting *Troxel*

v. Granville, 530 US 57, 66, 120 S Ct 2054, 147 L Ed 2d 49 (2000).) Respondent acknowledges that that "right is not absolute," but she contends that her decision to be R's sole legal parent must be accorded "some special weight," and that applying ORS 109.243 in this case would violate her right to make decisions concerning R's care, custody, and control.

We decline to address that argument for two reasons. First, the parties' very brief arguments on appeal do

not adequately grapple with the difficulty in "identify[ing] the scope of the parental rights protected by the Due Process Clause." *O'Donnell-Lamont and Lamont*, 337 Or 86, 100, 91 P3d 721 (2004), *cert den*, 543 US 1050 (2005). More fundamentally, the due process argument is premature, given our resolution of this appeal. Neither the parties nor the trial court had the benefit of this opinion—and its articulation of a standard for determining when ORS 109.243 applies in the context of same-sex relationships—when they addressed the due process question. On remand, if respondent chooses to renew her argument that the Due Process Clause prohibits application of ORS 109.243 in the circumstances of this case, we expect that her argument will address, in detail, how application of the standard that we have announced in this decision results in an unconstitutional interference with her parental rights.

To summarize, the summary judgment record, viewed in the light most favorable to respondent, establishes that there are issues of material fact that, if resolved in respondent's favor, lead to the conclusion that the parties were not similarly situated to a married heterosexual couple. If the factual disputes were resolved in that manner, the result would be that ORS 109.243 does not operate to make petitioner R's legal parent. It follows that the trial court erred in granting petitioner's summary judgment motion.

Reversed and remanded.

Footnotes:

1. The parties registered their partnership in Tillamook County under the Oregon Family Fairness Act (OFFA), ORS 106.300 to 106.340, which provided for the "establishment of a domestic partnership system [to] provide legal recognition to same-sex relationships." ORS 106.305(6). The OFFA was signed into law in 2007, "but because of a court challenge, did not go into effect until February 4, 2008." *Slater v. Douglas County*, 743 F Supp 2nd 1188, 1190 (D Or 2010). Thus, the OFFA was not in effect when R was born.

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194 P.3d 834

222 Or. App. 572

In the Matter of the MARRIAGE OF Laura Lee DAHL, Petitioner-Respondent, and Darrell Lee ANGLE, Respondent-Appellant.

DR04090713.

A133697.

Court of Appeals of Oregon.

Argued and Submitted January 15, 2008.

Decided October 8, 2008.

[194 P.3d 835]

Mark Johnson, Portland, argued the cause for appellant. With him on the briefs was Johnson Renshaw & Lechman-Su PC.

William J. Howe, III, Portland, argued the cause for respondent. With him on the brief was Gevurtz Menashe Larson & Howe PC.

Before ARMSTRONG, Presiding Judge, and ROSENBLUM, Judge, and CARSON, Senior Judge.

ARMSTRONG, P.J.

[222 Or. App. 574]

In this marital dissolution case, husband appeals a dissolution judgment that ordered the destruction of six cryopreserved embryos (frozen embryos)[1] that were formed using husband's sperm and wife's eggs and that

[194 P.3d 836]

have been held in storage at Oregon Health and Science University (OHSU). For the reasons stated below, we affirm.

Although we review the evidence *de novo*, ORS 19.415(3), we will defer to the trial court's implied and express credibility findings. *Olson and Olson*, 218 Or.App. 1, 3, 178 P.3d 272 (2008). Husband and wife married in March 2000. Wife bore one son, J, whom she and husband conceived by traditional means. In May 2004, the parties decided to try to conceive a child through *in vitro* fertilization (IVF), which involved OHSU staff harvesting eggs from wife, combining those eggs with husband's sperm to form embryos, and implanting some of the embryos in wife's uterus. After several failed attempts to implant embryos through that process, the parties discontinued that effort. Soon after, the parties decided to dissolve their marriage. The parties reached an agreement on all matters pertaining to the dissolution of their marriage except for one: the disposition of six frozen embryos that remained from the IVF process.

At the time of the IVF procedure, the parties and OHSU executed an Embryology Laboratory Specimen Storage Agreement (agreement) that detailed the terms of

[222 Or. App. 575]

storage of embryos created through the IVF procedure. Section 5 of the agreement addressed the parties' ability to transfer and dispose of the embryos. As is relevant here, that section provides:

"In connection with requests for transfer of the Embryos or upon termination of this Agreement, UNIVERSITY is hereby irrevocably authorized and directed to transfer or dispose of the Embryos as follows:

"A. In accordance with the written joint authorization of CLIENTS pursuant to the terms of this Agreement, or if one of said CLIENTS is deceased (as established by a certified copy of a death certificate) in accordance with the surviving CLIENT'S such authorization; or

"B. *If the CLIENTS are unable or unwilling to execute a joint authorization,* the CLIENTS hereby designate the following CLIENT or other representative to have the sole and exclusive right to authorize and direct UNIVERSITY to transfer or dispose of the Embryos, pursuant to the terms of this Agreement[.]"

(Emphasis added.) Directly below paragraph 5B, wife's name is printed in a space designated "Name," and, next to wife's name, her initials ("LD") and husband's initials ("DA") appear in spaces designated for the parties' approval. Below that, the following paragraph states:

"Provided however, prior to any transfer/thaw in accordance with the foregoing, if any court of competent jurisdiction shall award to either CLIENT all rights with respect to the Embryos to the exclusion of the other CLIENT, by an order or decree which is final and binding as to them, then UNIVERSITY shall have the right thereafter, whether or not a party to the proceedings in which such order or decree is issued, to deal exclusively with the CLIENT to whom such rights were awarded, without liability or accountability to the other CLIENT."

Paragraph C then sets forth steps that OHSU will take to dispose of the embryos in the event that (1) the parties refuse to comply with the provisions in paragraphs A and B, (2) either party fails to comply with provisions of the agreement within 60 days of written demand from OHSU, or (3) both parties die. Those steps entail, first, OHSU using reasonable efforts to accomplish up to three alternatives,

[222 Or. App. 576]

with the first two requiring the approval of husband and wife. The first alternative provides for OHSU to donate the embryos to another woman who is attempting to initiate a pregnancy, in which case both husband and wife would need to sign and have notarized a donation consent form and would waive and release any claims to the embryos or any resulting offspring. The spaces designated for the parties' election of that option are blank. The second alternative provides for OHSU either to donate the embryos to a recognized research facility approved by its Institutional Review Board or to use the embryos in its own laboratory. The initials "LD" and "DA" appear in the designated spaces below that alternative. Paragraph C then reads:

[194 P.3d 837]

"If neither alternative (1) or (2) is selected, or if UNIVERSITY has been unable to accomplish the selected alternative(s) in accordance with the foregoing, UNIVERSITY may thaw and discard the Embryos."

The final page of the agreement has the parties' signatures, which were executed and notarized on May 14, 2004. In addition, every page of the agreement has spaces for the parties' and the OHSU representative's initials; each of those spaces is marked with the initials "LD," "DA," and those of the OHSU representative.

Both wife and husband testified at a hearing in the dissolution proceeding on the disposition of the six embryos. Wife testified that, when she and husband signed the agreement, they had intended to use the embryos to create a child for themselves as a married couple and did not intend to use the embryos if they were no longer married. She further stated that they had discussed what would happen to any embryos that were not used by them and had agreed that they would donate the embryos to a facility for scientific research. Her understanding of the agreement was that, if she and husband disagreed on the disposition of the embryos, she would have sole and exclusive right to direct OHSU to transfer or dispose of the embryos. She opposed having the embryos donated to another woman for implantation. She expressed concern that, if the embryos were successfully implanted, then the resulting offspring might eventually attempt to contact J, as his or her genetic sibling. In addition,

[222 Or. App. 577]

she did not want to produce another child with husband, and she stated that, if she were to produce more children genetically, she would not want someone other than her to raise them.

Husband denied having initialed or read the OHSU agreement, and stated that he had signed the last page of the document without a notary present and without having seen the rest of the document. He said that he believed that the "embryos are life," and opposed their destruction or donation to science because "there's no pain greater than having participated in the demise of your own child." Accordingly, he wished to have the embryos donated to others who were attempting to conceive. He testified that he would do "everything" to protect wife's and J's confidentiality related to the donation of the embryos, but acknowledged that he could not guarantee their anonymity.

After hearing the parties' testimony, the court found that the OHSU agreement "is the agreement of the parties," that both parties had signed the agreement with a notary present, and that it did not believe that husband was being untruthful but, rather, that husband had an inaccurate recollection of signing the consent form. The court then ordered, based on the parties' positions, that the embryos be destroyed. However, it further stated that, if the parties jointly agreed that the embryos should be donated to medical research, then the court would honor that decision for the embryos' disposition.[2] The court subsequently issued a dissolution judgment, which included an order that the embryos be destroyed.

Husband appeals, assigning error to the trial court's order that the embryos be destroyed. He urges us to award the embryos to him, over wife's objection, under our authority to make a just and proper distribution of the parties' property. Because he views the embryos as living things that he does not

[222 Or. App. 578]

want killed, husband argues that it is just and proper for the court to award the embryos to him because his desire to preserve what he believes to be life should be considered more important than wife's desire to

avoid having a child born from one of her eggs. Wife responds that the court lacks authority to interfere with her decision because the embryos are not property and, thus, are not subject to court disposition in a marital dissolution proceeding. Ultimately,

[194 P.3d 838]

however, she urges us to affirm the trial court's order to have the embryos destroyed or, provided husband agrees, donated for research purposes, in effect enforcing the agreement that the parties signed at the time of the IVF procedure. In the alternative, wife argues that, even if the embryos are subject to court disposition as property, the court cannot award decision-making authority in a way that could result in the birth of a child over the objections of a source of the genetic material.

We summarize the issues in this case, which are questions of first impression in Oregon, as follows: *First*, does a contractual right to dispose of embryos that have been created during a marriage and cryopreserved for potential later use constitute personal property under ORS 107.105(1)(f) that is subject to the court's authority to distribute in a subsequent dissolution proceeding? *Second*, if the court has such authority, what constitutes a distribution of that property that is "just and proper in all the circumstances"?

Although our review of the evidence in dissolution cases is *de novo*, the first question — whether a contractual right to dispose of embryos is personal property that is subject to disposition in a dissolution case — presents a legal question that we review for legal error. *See Shelton and Shelton*, 196 Or.App. 221, 234, 100 P.3d 1101 (2004), *adh'd to on recons.*, 197 Or.App. 391, 105 P.3d 944 (2005) (reviewing question of law in dissolution case for legal error). ORS 107.105 lists the subject matter over which the court has authority to enter a judgment in a dissolution proceeding. That statute provides, in part:

"(1) Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:

"* * * * *

[222 Or. App. 579]

"(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances."

ORS 107.105. Marital property "constitutes the entire class of property subject to the dispositional authority of the court in a marital dissolution action." *Massee and Massee*, 328 Or. 195, 206, 970 P.2d 1203 (1999). Given the statutory language, we first must determine whether the contractual right to dispose of frozen embryos is "personal property" for purposes of the statute. If it is not, then the court has no authority in a dissolution proceeding or judgment to deal with those contractual rights.[3] If the court does have such authority, we will need to determine what distribution of that property is just and proper in all the circumstances.

Our courts have had few occasions to explore the meaning of "personal property" in ORS 107.105(1)(f). The Oregon Supreme Court looked to a dictionary definition of property when it determined that appreciation of one party's separately held assets was property, stating that "`property' means something that is or may be owned or possessed, or the exclusive right to possess, use, enjoy, or dispose of a thing." *Massee*, 328 Or. at 206, 970 P.2d 1203 (citing *Webster's Third New Int'l Dictionary* 1818

(unabridged ed. 1993)). Notwithstanding the apples-to-oranges comparison between appreciation of assets and an intangible contractual right to dispose of frozen embryos, the latter right appears to fit within that admittedly broad definition. As shown by the agreement, the parties have rights to direct the facility holding the embryos to transfer or dispose of them through implantation, donation to another woman, donation to a research facility, or destruction.

Indeed, although the language of the embryo storage agreement does not control what constitutes personal property under ORS 107.105, it does indicate that the parties

[222 Or. App. 580]

understood that husband and wife had the "exclusive right to possess, use, enjoy, or

[194 P.3d 839]

dispose of" frozen embryos that were stored under the agreement. Under a heading entitled "Storage," the agreement provides:

"The UNIVERSITY will provide storage services for CLIENTS' personal property consisting of cryopreserved embryos (Embryos), which might later be used by CLIENTS in an effort to create a pregnancy."

Further, in the paragraph that follows the storage paragraph, under a heading entitled "Description of Embryos," the agreement provides:

"CLIENTS represent and warrant that they have *lawful possession of and the legal right and authority to store* the Embryos under the terms of this Agreement."

(Emphasis added.)

We acknowledge that there is some inherent awkwardness in describing those contractual rights as "personal property," as we discuss in more detail below. However, we nonetheless conclude that the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a "just and proper" division under ORS 107.105. The trial court did not err in treating it as such.

Given that conclusion, the question of what constitutes a just and proper distribution of that right presents a significantly more difficult question. The division of property rarely gives rise to this level of deeply emotional conflict and, notwithstanding the idea that some properties are unique and personally meaningful, a decision to award particular property to a party generally can be considered to be a decision that is ultimately measured in monetary (or equivalent) value. A decision about the contractual right to direct the disposition of embryos cannot reasonably be viewed that way, as the parties appear to agree. As such, our case law controlling the just and proper distribution of property in a marital dissolution proceeding — all of which addresses the distribution of property to which some sort of monetary value can be ascribed — offers little assistance in our task here. Nor can we identify any express source of public policy in our constitution, statutes, administrative rules, or elsewhere that could inform the distribution of property of this nature.

[222 Or. App. 581]

Given the dearth of Oregon legal authority to guide our inquiry, we look to legal authority from outside Oregon. As of this writing, eight other state appellate courts have confronted similar cases. While those cases are not controlling, several are instructive, and we briefly discuss them here.

The first reported marital dissolution case addressing the disposition of embryos is *Davis v. Davis*, 842 S.W.2d 588 (Tenn.1992). In that case, the husband and wife disagreed on how to dispose of embryos on the dissolution of their marriage. They had not signed an agreement with the IVF clinic regarding the storage of the embryos and, hence, had not resolved how they and the clinic would deal with contingent events. The Tennessee Supreme Court ultimately held that courts should resolve such disputes

"first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed."

Id. at 604. In that case, there was no agreement between the progenitors, so the court weighed the relative interests of the parties, determining that the husband's interest in not procreating outweighed the wife's interest in donating the eggs to another couple. *Id.*

Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998), is the first marital dissolution case involving the disposition of embryos in which parties had signed an agreement with the IVF facility concerning the storage of the embryos. In that case, the wife wanted to implant the embryos in an attempt to get pregnant, while the husband wanted to have the embryos donated for scientific research. The agreement with the IVF facility provided, among other things, that (1) the frozen embryos would not be released from storage without the parties' mutual written consent; (2) in the event of divorce, legal ownership of the stored embryos was to be determined in a property

[194 P.3d 840]

settlement by a court with jurisdiction; (3) in the event that the parties no longer wished to initiate a pregnancy or could not agree on the disposition of the embryos, then the parties elected to

[222 Or. App. 582]

donate the embryos for scientific research. *Id.* at 559-60, 673 N.Y.S.2d 350, 696 N.E.2d at 176-77.

The New York Court of Appeals first noted that New York courts should generally presume that "[a]dvance directives, subject to mutual change of mind that must be jointly expressed," are valid, binding, and enforceable as between the progenitors. *Id.* at 565, 673 N.Y.S.2d 350, 696 N.E.2d at 180 (citing *Davis*, 842 S.W.2d at 597). The court acknowledged the difficulty the parties faced in determining in advance their preferences for disposition in the event of contingent events, such as death, divorce, aging, or the birth of other children, but further explained:

"Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitors — not the State and not the courts — who by their prior directive make this deeply personal life choice."

Id. at 566, 673 N.Y.S.2d 350, 696 N.E.2d at 180.

The court then focused its inquiry on the agreement. The wife's only argument about the agreement was that it was ambiguous as to the parties' intent that the embryos be donated to science in the event of a divorce.[4] The court disagreed with the wife, concluding that, under New York case law, the agreement was unambiguous and manifested the parties' mutual intent at the time that they signed it that the embryos be donated for research. *Id.* at 569, 673 N.Y.S.2d 350, 696 N.E.2d at 182. Accordingly, the court enforced the agreement and upheld the lower court's order that the embryos be donated for scientific research.

Several of the other courts confronted with disputes over embryos in cases in which the parties had signed an agreement with a medical facility for the disposition of stored embryos have adopted, or implicitly followed, the general framework set forth in *Davis* and *Kass*. *See, e.g., Cahill v. Cahill,* 757 So.2d 465, 468 (Ala.Civ.App.2000) (enforcing

[222 Or. App. 583]

agreement stating that parties relinquished control of the embryos to the IVF facility on dissolution of marriage); *Roman v. Roman,* 193 S.W.3d 40, 50 (Tex.App.2006), *rev. den.* (2007), *cert. den.*, ___ U.S. ___, 128 S.Ct. 1662, 170 L.Ed.2d 356 (2008) (ordering frozen embryos destroyed in accordance with IVF agreement); *Litowitz v. Litowitz,* 146 Wash.2d 514, 533, 48 P.3d 261, 271 (2002), *cert. den.,* 537 U.S. 1191, 123 S.Ct. 1271, 154 L.Ed.2d 1025 (2003) (same); *cf. A.Z. v. B.Z.,* 431 Mass. 150, 159-60, 725 N.E.2d 1051, 1057 (2000) (determining that the agreement was unenforceable for public policy reasons while neither rejecting nor accepting *Davis* and *Kass* framework). Other courts require mutual contemporaneous consent by the parties. *See In re Marriage of Witten,* 672 N.W.2d 768, 783 (Iowa 2003) (enjoining any transfer of frozen embryos until parties reached consensus where agreement required parties' joint written consent); *J.B. v. M.B.,* 170 N.J. 9, 29-30, 783 A.2d 707, 719-20 (2001) (balancing interests of parties when parties contemporaneously disagreed).

We conclude that the general framework set forth by the courts in *Davis* and *Kass,* in which courts give effect to the progenitors' intent by enforcing the progenitors' advance directive regarding the embryos, is persuasive. Moreover, giving effect to a valid agreement evincing the parties' intent regarding disposition of embryos is consistent with our statutory and case law that give similar effect to prenuptial agreements and agreements made during a marriage. *See, e.g.,* ORS 108.700 to 108.740 (governing prenuptial agreements); ORS 107.104 (stating policy encouraging enforcement of marital settlement agreements); *Patterson and Kanaga,* 206 Or.App. 341, 347-48, 136 P.3d 1177 (2006) (settlement agreements incorporated

[194 P.3d 841]

into judgments enforceable unless enforcement contravenes law or public policy).

Thus, on *de novo* review, we agree with the trial court's determination that the agreement evinced the parties' intent. The parties signed the agreement at the time that they participated in the creation of the embryos. The agreement provided that, in connection with requests for the transfer of the embryos or the termination of the agreement,[5]

[222 Or. App. 584]

OHSU would transfer the embryos in accordance with the parties' joint written authorization. In the absence of such authorization, the parties designated wife to authorize and direct OHSU to act regarding the embryos. Although the agreement did not specifically state that the couple was selecting options for

disposition of the embryos in the event of marital dissolution or separation, the parties contemplated the contingency of their not being able to reach agreement on the disposition of the embryos, and they selected wife to be the primary decision maker in that regard. Further, the parties were given choices when they entered the agreement on possible disposition of the embryos. At that time, they did not choose to donate the embryos to another woman for implantation, the choice that husband now advocates; rather, they chose either to donate the embryos to science or to have them destroyed. In sum, the parties agreed that wife would decide the disposition of the embryos unless a court, in essence, overruled the parties' preference for a decision maker and allocated that responsibility to a different party. The parties further understood that OHSU would either donate the embryos to a facility for scientific research or destroy them if the parties did not comply with the agreement.

Husband does not argue that the agreement itself is ambiguous or invalid for public policy reasons. Rather, he asks that we award possession of (and decision-making authority over) the embryos to him, because his belief that the embryos are life and his desire to donate the embryos in a way that would allow "his offspring to develop their full potential as human beings" should outweigh wife's interest in avoiding genetic parenthood.

We reject husband's request. Again, while we review *de novo* the trial court's division of marital property, we review the award itself for the proper exercise of discretion. *See Kunze and Kunze,* 337 Or. 122, 136, 92 P.3d 100 (2004)

[222 Or. App. 585]

(holding that the ultimate determination of what is just and proper is discretionary); *Olson,* 218 Or.App. at 14, 178 P.3d 272. Accordingly, based on our conclusion that courts should give effect to agreements showing the parties' intent for the disposition of frozen embryos, we will not disturb the trial court's decision unless it fails to comport with that framework.

We do not see how the court's decision to issue an order that the embryos be destroyed is not a disposition that is just and proper in all the circumstances. The trial court determined that the agreement showed the intent of the parties. Husband fails to advance, and we cannot identify, any affirmative countervailing state policy that would impose a genetic parental relationship on someone as a default principle. Nor does he identify any affirmative state policy favoring his preferred disposition of the embryos.[6] Given

[194 P.3d 842]

that, we have no basis on which to disturb the trial court's conclusion.

Absent a countervailing policy, it is just and proper to dispose of the embryos in the manner that the parties chose at the time that they underwent the IVF process. According to the agreement here, the parties designated wife to be the decision maker regarding the embryos. Wife's stated preference for disposition of the embryos is expressed in the trial court's order to destroy them, absent husband's renewed agreement to donate them for scientific research. In issuing the order to destroy the embryos, the trial court essentially gave effect to the agreement. Accordingly, we do not disturb that decision.

Affirmed.

Notes:

1. Although we generally adopt the parties' use of the term "embryo" in this opinion to refer to a fertilized egg that has not been implanted in a uterus, the medically accurate term for an egg in that state is a "preembryo" or "prezygote." *See* Elizabeth A. Trainor, J.D., *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstances,* 87 A.L.R.5th 253, 260 (2001). A preembryo develops into an embryo only after implantation into a woman's uterus. *Id.* The parties here did not present evidence at trial of the embryos' stage of development. However, the appendix to the agreement that the parties entered with Oregon Health and Science University identifies the embryos as cleaving embryos, as distinguished from zygotes and blastocysts. In all events, the embryos are those that were not implanted in wife.

In addition, the term "frozen embryos" is a term of art for preembryos that have been cryogenically preserved. *Id.* The six embryos at issue in this case are, technically speaking, frozen embryos; because we need not differentiate between frozen and unfrozen embryos, we likewise use the term "embryo" to refer to frozen embryos.

2. It is not clear whether the trial court, when it issued the order to destroy the embryos, was enforcing the IVF agreement (either by issuing an order in accordance with wife's desire to avoid parenthood, or in accordance with the alternatives selected by the parties when they signed the agreement), or was balancing the interests of the parties and concluding that wife's interest in avoiding genetic parenthood was more compelling than husband's interest in preventing the destruction of the embryos by donating them to others for implantation.

3. The parties do not contend that any statutory provision other than ORS 107.105(1)(f) confers on the court in a dissolution proceeding the authority to deal with contractual rights involving the distribution of frozen embryos. Our independent review of ORS 107.105 and related statutes leads us to conclude that there is no other statutory provision that could be a source of authority for a court to deal with the contractual rights to dispose of frozen embryos in such a proceeding.

4. The court observed that, in some instances, such agreements might be unenforceable for violating public policy or due to significantly changed circumstances. *Kass,* 91 N.Y.2d at 565 n. 4, 673 N.Y.S.2d 350, 696 N.E.2d at 179-80 n. 4. The wife did not raise either of those issues, and the court declined to pursue them.

5. The agreement has a clause on its duration, which provides in part:

"The term of this Agreement shall be for the period of one (1) year commencing upon the date of first freeze of zygotes or embryos, at the end of which time it shall automatically terminate, unless said date is extended prior to the termination date by mutual agreement of all parties hereto in writing. The above notwithstanding, in the event that zygotes or embryos are not frozen within six (6) months of the signing of this agreement, the agreement [*sic*] shall be destroyed."

The record does not indicate whether the parties extended the term of the agreement; likewise, it is silent as to the date on which the "first freeze" occurred. However, the agreement was signed on May 14, 2004. Assuming that the first freeze occurred within six months of May 2004, the agreement had terminated by the time that the court held a hearing regarding the embryos, which was in June 2006.

6. Such policy would be found in legislative enactments, administrative rules, regulations, and the state and federal constitutions. *See Compton v. Compton,* 187 Or.App. 142, 145, 66 P.3d 572 (2003) (citing *A-1 Sandblasting v. Baiden,* 293 Or. 17, 22, 643 P.2d 1260 (1982)). Oregon is not among the handful of states

that have enacted legislation addressing state policy regarding decision-making authority over preembryos. *See, e.g.*, Cal. Health & Safety Code § 125315 (West 2006) (requiring IVF providers to obtain informed and voluntary choice regarding disposition of unused embryos); Fla. Stat. Ann. § 742.17 (West 2005) (requiring IVF agreement and prescribing decision-making authority absent such an agreement); La. Rev. Stat. Ann. § 9:121-133 (2008) (defining a human embryo as a "juridical person" that must be implanted); Mass. Gen. Laws Ann. ch. 111L, § 4 (West Supp. 2008) (requiring IVF providers to obtain informed and voluntary choice regarding disposition of unused embryos); N.J. Stat. Ann. § 26:2Z-2 (West 2007) (permitting embryonic research, requiring informed and voluntary choice by parties regarding disposition).

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877 P.2d 107

128 Or.App. 450

**In the Matter of the ADOPTION OF BABY A and Baby B, Minors.
J.F., C.F., T.C. and D.C., Appellants.**

93C-33419; CA A83037.

Court of Appeals of Oregon.

**Argued and Submitted June 1, 1994.
Decided June 22, 1994.**

Russell Lipetzky, Salem, argued the cause and filed the brief, for appellants.

Before WARREN, P.J., and EDMONDS and LANDAU, JJ.

[128 Or.App. 452] WARREN, Presiding Judge.

In this adoption case, the prospective adoptive parents and the birth mother and her husband appeal the trial court's refusal to grant the petition for adoption. On de novo review, we reverse.

The birth mother entered into a surrogate agreement with adoptive parents, in which she agreed to be artificially inseminated with adoptive father's sperm. The artificial insemination was successful and she gave birth to twins. The birth mother was paid $14,000, which exceeded her pregnancy related expenses. Birth mother and her husband gave their consent to the adoption. There is no objection to the adoption petition. The report prepared for Children's Services Division concluded that the adoption was in the children's best interests. Nonetheless, the trial court denied the petition, relying on Franklin v. Biggs, 14 Or.App. 450, 513 P.2d 1216, rev. den. (1973). It concluded that the payment of money to birth mother makes her

consent involuntary and invalidates her consent to the adoption.

We conclude that neither the adoption statutes nor Franklin v. Biggs, supra, preclude this adoption. ORS 109.350 provides that the court shall order an adoption if, among other things, "it is fit and proper that such adoption be effected * * *." ORS 109.311(1) provides that each adoption petition

"shall be accompanied by a written disclosure statement containing an itemized accounting of all moneys paid or estimated to be paid by the petitioner for fees, costs and expenses related to the adoption, including all legal, medical, living and travel expenses."

The petition in this case did that. ORS 109.311(3) provides that no fee may be paid or accepted for locating a child for adoption or for locating another person to adopt a child, except that reasonable fees may be charged for services provided by licensed adoption agencies. There was no fee paid in this case for locating the children or any other party to the adoption. Therefore, the statute does not prohibit the court from granting this adoption.

The trial court's reliance on Franklin v. Biggs, supra, is misplaced. In that case, the mother gave birth to [128 Or.App. 453] twins. Thereafter, she gave her consent to their adoption by third parties. She was paid $200 shortly after she released the twins to the adoptive parents. She later sought to withdraw her consent. We said that she could withdraw her consent, because the payment of money "vitiates any consent * * *." 14 Or.App. at 461, 513 P.2d 1216.

This case is factually distinguishable. Although the surrogate agreement provided that the birth mother would be paid money in addition to her medical expenses, the evidence was that she would have entered into the agreement even without the payment of money. Further, the birth mother does not seek to withdraw her consent, and in fact continues to assert strongly her desire to have the twins adopted by the adoptive parents. "The primary purpose of adoption proceedings is the promotion and protection of a child's best interests." P and P v. Children's Services Division, 66 Or.App. 66, 72, 673 P.2d 864 (1983). All parties, as well as the investigating agency, agree that the adoption is in the children's best interest. There is nothing in the adoption statutes that prohibits this adoption, and we conclude that the trial court should have granted the petition.

Reversed and remanded with instructions to grant petition for adoption.

31 P.3d 1119
176 Or. App. 383

Judy Ann WEAVER, Respondent,
v.
Richard Linwood GUINN, Appellant.

99-2050-F-2; A110516

Court of Appeals of Oregon.

Argued and Submitted August 2, 2001.

Decided September 5, 2001.

[31 P.3d 1120]

Laurance W. Parker, Medford, argued the cause and filed the brief for appellant.

Colette Boehmer, Medford, argued the cause and filed the brief for respondent.

Before LANDAU, Presiding Judge, and BREWER and SCHUMAN, Judges.

LANDAU, P.J.

In this filiation proceeding, father appeals the judgment of the trial court awarding mother custody of the child. Father argues that the trial court erred in declining to enforce the terms of an agreement between the parties concerning custody of the child. We affirm.

The parties stipulated to the following facts. Father and mother met in 1998 through a mutual friend who understood that father was interested in locating a woman who would be willing to be artificially inseminated and to carry a child to term and that mother might be interested in doing that under the appropriate circumstances. The parties reached a verbal agreement that mother would attempt to become pregnant with father's child through artificial insemination and would carry the child to term in exchange for $12,000, plus other costs and insurance. Mother further agreed that she would surrender the child to father, who would then be responsible for parenting the child.

In July 1998, father reduced their agreement to writing. Entitled "Artificial Insemination Surrogate Contract," the agreement begins by acknowledging that "this Agreement may be held unenforceable in whole or in part as against public policy." It then explains that its purpose is

[31 P.3d 1121]

"to provide a means for [father] to fertilize by Artificial Insemination the egg of [mother], who agrees to carry the embryo to term and relinquish custody of the child born pursuant to this Agreement to its Genetic Father * * *."

The agreement goes on to spell out various representations of the parties, selection of physicians to assist in the artificial insemination, medical instructions, and the like. The parties did not execute the agreement at that time.

Between July 1998 and September 1998, the parties agreed to engage in consensual sexual intercourse. Mother became pregnant in September 1998.

Seven months later, the parties signed the artificial insemination agreement. No amendment was made to reflect the fact that the parties subsequently had agreed to initiate the pregnancy by means other than artificial insemination.

On May 19, 1999, mother gave birth to the child. Meanwhile, by the date of the birth, mother had accepted approximately $12,000 in payments from father. On May 20, mother executed a "special consent" form acknowledging the paternity of father and permitting him to leave the hospital with the child in his custody. Three weeks later, mother initiated this filiation proceeding seeking custody of the child. Father acknowledged his paternity but asserted that, in accordance with the terms of the parties' agreement, he was entitled to exclusive custody of the child. Mother replied that the agreement did not apply and, in any event, was void as against public policy. According to mother, agreements regarding child custody cannot bind the courts in deciding what is in the best interests of the child.

The trial court held that the artificial insemination agreement did not apply, because mother did not become pregnant by artificial insemination. The court further held that the agreement was unenforceable as against public policy. The court then ordered an evidentiary hearing to determine the best interests of the child. At the hearing, mother testified that, although she had agreed that father would have custody of the child, she understood that she would have substantial visitation rights. Father testified that he agreed to nothing of the sort. After the hearing, the trial court awarded custody to mother, with substantial parenting time for father. The court found that both parents loved the child and were adequate and appropriate parents. The court's only expressed reservations were that, during one visitation, mother briefly had left the child in the care of a six-year-old and that father's apparently irremediable hostility to mother was detrimental to the child.

On appeal, father contends that the trial court erred in failing to enforce the contract between the parties. According to father, the fact that the written agreement speaks of artificial insemination is merely a technical matter of form that should not have sidetracked the court from the underlying substance of the agreement that mother was to bear a child and relinquish custody. Moreover, he argues, the agreement was not unenforceable as against public policy. Given changes in the technology of reproduction and public morals over the last several decades, he contends, it no longer can be said that agreements to bear children for remuneration violate public policy.

Mother contends that the fact that the written agreement speaks of artificial insemination is not a mere technicality, but rather is a material term that was never performed. In any event, she argues, the trial court correctly concluded that such an agreement violates public policy against creating markets in the production of children.

ORS 109.239 spells out the rights of donors of semen used in artificial insemination:

"If the donor of semen used in an artificial insemination is not the mother's husband:

"(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

"(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor."

[31 P.3d 1122]

Clearly, the statute affords no relief to father in this case, and, indeed, father claims no support from that statute.

Father argues that, notwithstanding ORS 109.239, he has a right to sole custody of the child pursuant to the terms of the artificial insemination agreement. According to father, ORS 109.230 expressly authorizes such contracts in providing that "[a]ny contract between the mother and father of a child born out of wedlock is a legal contract," and in this case the parties' agreement expressly provides that father is to have custody of the child.

To begin with, ORS 109.230 does not apply to artificial insemination agreements. As we held in *McIntyre v. Crouch*, 98 Or. App. 462, 780 P.2d 239, *rev. den.* 308 Or. 593, 784 P.2d 1100 (1989), that statute—which applies only to the "mother" and the "father" of a child born out of wedlock—was enacted long before the artificial insemination statute and before the legislature reasonably would have considered a semen donor to be a "father." *Id.* at 468, 780 P.2d 239.

Moreover, as the trial court concluded, the parties did not perform the terms of an artificial insemination agreement. The agreement clearly spells out that its purpose is "to provide a means for [father] to fertilize by Artificial Insemination" an egg of mother's. It contains representations as to mother's capability to carry an artificially inseminated embryo to term and medical instructions as to how the artificial inseminations are to be accomplished. The references to artificial insemination throughout the agreement are not mere formalities; they constitute material terms to an agreement that the parties simply never performed.

Father argues that, even if the written agreement does not apply, there was an oral agreement to produce a child by means other than artificial insemination, and that agreement, too, required mother to relinquish any claim to custody of the child. Mother responds that the stipulated facts contain no mention of such an oral agreement, and father relied on no such agreement at trial.

We agree with mother that father cannot seek the enforcement of an oral agreement that was not mentioned at trial. Moreover, even assuming the parties entered into an oral agreement, the record contains no evidence that its terms included a waiver of parental rights. In any event, such an agreement could not bind the courts in their determination of child custody.

ORS 109.175 provides that, in a filiation proceeding, once paternity has been established, the custody of the child must be determined in accordance with the standards set out in ORS 107.137. That statute, in turn, provides that, in determining the custody of a minor child, the court "shall give primary consideration to the best interests and welfare of the child." ORS 107.137(1). Agreements concerning the custody of children "are worthy of the court's consideration." *Laurance v. Laurance*, 198 Or. 630, 638, 258 P.2d 784 (1953). They may even constitute an admission on the question of parental fitness. *Id.* But they do not control the court's decision as to the best interests of the minor child. *Id.; see also Truitt and Truitt*, 124 Or.App. 531, 534, 863 P.2d 1287 (1993) ("trial court is not bound by * * * agreements regarding

the custody and visitation of minor children"); *Cope and Cope*, 49 Or.App. 301, 306, 619 P.2d 883 (1980), *aff'd* 291 Or. 412, 631 P.2d 781 (1981) ("although the parties' stipulations regarding custody of their children are worthy of consideration, they are not binding on the trial court"); *cf. Leckie and Voorhies*, 128 Or.App. 289, 875 P.2d 521 (1994) (waiver of parental rights in artificial insemination contract enforced).

Father argues that, even if the trial court were entitled to award custody on the basis of the best interests of the child, the fact is that it is not in the best interests of the child to award custody to mother. In support of that argument, father relies on the single incident in which mother briefly left child in the care of a six-year-old. On *de novo* review, we conclude that—particularly in light of the substantial parenting time awarded to father—the trial court did not err in awarding custody to mother.

Affirmed.

Checklist for Parentage Judgments

- Did the parties enter into a gestational carrier agreement? Is it referenced in the proposed judgment?
- Have all parties stipulated to the judgment and does the judgment have their signatures on it as evidence of such stipulation?
- Is the gestational carrier married? If yes, has the presumption in ORS 109.070(1)(a) been addressed (i.e. is there a statement to the effect that the presumption does not apply or has been rebutted?)
- Has the statement of the physician that carried out the procedures involved in the surrogacy (egg retrieval, IVF, embryo transfer) been filed with the court (either as attachment to petition or separately)?
- Does the judgment contain any recitation regarding the parties' belief that establishing legal parentage in the intended parents is in the best interests of the child?
- Is there a statement regarding requirements for declaratory judgments (i.e. something along the lines of "this action is brought for purposes of resolving uncertainty…")?
- Does the language in the judgment accurately reflect the genetic heritage of the child/ren? (I.e. is what the judgment says scientifically possible?)
- Does the judgment establish that the court has jurisdiction?
- Does the judgment, in fact, declare that intended parents are the sole & exclusive legal parents of the child?
- Does the judgment order the State Registrar to amend the birth certificate pursuant to ORS 432.245?
- Any typos (incorrect dates, names, etc.)?

This checklist is not meant, by any means, to be exhaustive or cover every provision that must be included in a parentage judgment, it simply highlights some of the key points that we keep an especially close eye out for.

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Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Protective Orders Ratatouille

Presenter:

The Honorable Maureen McKnight, Chief Family Court Judge, Multnomah County Circuit Court

Judge McKnight is the Chief Family Court Judge in Multnomah County, Oregon, handling family, juvenile, and criminal matters. Her legal career, both before appointment to the bench and afterwards, has focused on systemic family law issues affecting low-income Oregonians, including operation of the state's child support program, access to justice issues such as self-representation, and the response of Oregon's communities to domestic violence. Judge McKnight is the lead on the Family Court Enhancement Project, a member of the Oregon Judicial Department's Family Law Advisory Committee, the author of numerous CLE articles, and the recipient of awards from the Oregon State Bar, Oregon Women Lawyers, and the Oregon Child Support Program.

Restraining Order Ratatouille:

Oregon's Protection Orders -- Separately and Combined

Hon. Paula Brownhill – Clatsop County Circuit Court
Hon. Michael Newman – Josephine County Circuit Court
Elizabeth Vaughn – Clackamas County Facilitator
Hon. Maureen McKnight – Multnomah County Circuit Court

SFLAC Conference – March 16, 2017

"ratatouille"

- A casserole or stew in which the vegetables are cooked separately and even after combined for baking, retain an individual character

2

What we're covering:

- Requirements to obtain different orders
- Remedies available in different orders
- Problematic areas 
- Technological developments:
  - Interactive FAPA applications
  - Odyssey forms for 5/21 day hearings

3

Acronyms

- **FAPA** – *Family Abuse Prevention Act*
- **EPPWDAPA** – *Elderly Persons & Persons with Disabilities Abuse Prevention Act*
- **SPO** – Stalking Protective Order
- **SAPO** – Sexual Abuse Protective Order
- **EPO** -- Emergency Protection Order

4

Oregon Restraining Orders --

FACT or FICTION

Get your Clicker!!

5

Ingredients!!!!!

6

FAPA

Actual, attempted, or threatened PHYSICAL INJURY

Sexual relations by force or threatened force

Eligibility	Current/former spouse, current/former cohabitant, sexual intimate w/in 2 years, parent of joint child, adult related by blood or marriage. + (teen) Minor vs. current/past spouse or adult sexual intimate
Showing	Abuse w/in last 6 months + imminent danger of further abuse
Relief Available	Restraint against abuse, child custody and parenting time, ouster from home if married or held by petitioner, civil standby, restraint from other premises, contact prohibitions, "other relief necessary" – pets, monetary assistance, firearms, etc.
Process	Ex parte order. Noticed hearing if respondent requests.
Duration of order	1 year, unless dismissed earlier
Modifiability	Custody, parenting time, ouster, restraint from premises. Ex parte only if Petr is seeking less restrictive terms
Renewability	Yes: if reasonable for person in petitioner's situation to fear additional abuse
Enforcement	Mandatory arrest. Contempt of court. C Felony if intentional violation + fear/risk of physical injury

7

EPPWDAPA

Eligibility	65/+ or Disabled (*physical/mental impairment* substantially limiting a major life activity; *brain injury* affecting daily life
Showing	Abuse w/in last 6 months + immediate/present danger of further abuse
Relief Available	Restraint from abuse, ouster from home if married or held by petitioner, civil standby, restraint from other premises, "other relief necessary" including contact prohibitions
Process	Ex parte order. Contested hearing if Respondent requests.
Duration of Order	1 year
Modifiability	No
Renewability	Yes – if good cause.
Enforcement	Mandatory arrest. Contempt of Court.

BROAD: physical pain/injury, neglect, abandonment of duties, ridicule, harassment, misappropriating money

8

Stalking Protective Order

Eligibility	No relationship requirement. Minor Petitioner can file thru GAL. Respondent may be minor and no GAL required.
Showing	*2 unwanted contacts w/in last 2 years* that alarmed/coerced the petitioner + reasonably so + reasonable apprehension re physical safety
Relief Available	Restraint against contact (broadly exemplified to include communication , following, coming into view, sending items, etc.)
Process	Ex parte order + mandatory noticed hearing. Warrant possible if Respondent FTAs.
Duration of Order	Unlimited duration. But due process limits under *Edwards v Biehler*, 203 Or App 271 (2005).
Modifiability	No
Renewability	N/A
Enforcement	Mandatory arrest. A Misdemeanor. C Felony if prior conviction for crime of Stalking or for Violation of SPO

If violation is communication, need reasonable fear re personal safety

9

Stalking

Procedure – 2 routes:

Initiated by Police Citation:
- Victim Complaint form to police
- Officer Citation to Hrg in 3 days if probable cause
- Service of Citation
- Temporary Order if more procdng
- Otherwise SPO if showing made
- No damages this route

Initiated by Civil Complaint
- Complaint filed
- Ex parte application→ Temp SPO req'd if probable cause
- Service
- Longer Temporary Order if more prcdng
- Otherwise SPO if showing made
- Damages available where pled (not on court model form)
- Attorney fees available for Petnr (not on court model form)

10

Where threats are strictly verbal:

State v. Rangel, 328 Or 294 (1999)

Must:

- Communicate a threat that instills in the petitioner a fear of imminent and serious personal violence
- Be unequivocal
- Be objectively likely to be followed by unlawful acts

Consider if threat is unequivocal to *this Petitioner,* based on past incidents. --

Is the meaning of the threat hidden to others but understood by this Petitioner?

11

SAPO

Eligibility	Minor or adult petitioner. 12/+ can file on own. Respondent cannot be a "family or household member" or already be subject to another civil, criminal, or juvenile protective order. [Minors can file against adult related to by blood, marriage, or adoption, + stranger-abuser. And more?]
Showing	1/+ incident of sex abuse w/in last 6 months + reasonable fear for physical safety
Relief Available	Restraint from abuse, contact prohibitions. *Discretionary*: contact with Petitioner's children or family or interfering with same, restraint from Petr's home or other premises, "other relief neces'ry"
Process	Ex parte order. Noticed hearing if respondent requests.
Duration of Order	1 year
Modifiability	Yes – Petr can make ex parte request for less restrictive terms. Otherwise, either party can show good cause.
Renewability	Yes – objectively reasonable for person in petitioner's situation to fear for physical safety if not renewed
Enforcement	Mandatory arrest; Contempt of court

12

EPO

Eligibility	Police officer seeks if the "family or household member" consents
Showing	Probable cause that (1) police responding to domestic disturbance + assault/menacing or (2) immediate dgr of abuse; + EPO is necessary to prevent abuse
Relief Available	Restraint against contact and abuse (menacing, interference)
Process	Officer signs declaration under penalty of perjury and transmits to court. Judge available 24/7 to sign and send back. Officer serves respondent and files.
Duration of order	7 days – no statutory challenge.
Modifiability	No
Renewability	No
Enforcement	Mandatory arrest. Contempt of court.

13

Problem Areas ---

Just a selection

14

"Disabled"

- EPPWDAPA engrafts definitions from other statutory sections
- A person having a physical or mental impairment that substantially limits one or more major life activities *ORS 410.040 (7)*
- A person having a brain injury caused by external forces where the injury results in the loss of cognitive, psychological, social, behavioral, or physiological function for a sufficient time to affect that person's ability to perform activities of daily living. *ORS 410.715*

15

Minor Petitioners: FAPA vs. SAPO

Under FAPA, only minor who can file:
- is/was married to *or*
- has been in a sexually intimate rel'shp

w/ the adult Respondent

Under SAPO, a minor can file against ADULT
- Related by blood, marriage, or adoption
- Who is a "stranger"-abuser

Under SAPO, a minor can file against a sexually abusive parent

What about teen in dating/cohab relationship?

SAPO Respondent cannot be a "family or household member" of Petitioner, but do *minor sexual intimates or cohabitants* fall in group given the operation of the FAPA statute?

16

Paternity: what if not established?

Distinguish:

Qualifying relationship
(unmarried parents of minor child)

Relief available
(authority to grant custody +/or parenting time)

If paternity is not established:

Maybe another qualifying relationship, such as cohabitation or recent sexual intimacy

No other way to order custody or parenting time

17

Rangel: When the only abuse is a verbal threat

** Where threats are strictly verbal:* State v. Rangel, 328 Or 294 (1999)

The threat must:

- communicate a threat that instills in the addressee a fear of imminent and serious personal violence
- be unequivocal
- be objectively likely to be followed by unlawful acts

Consider if threat is unequivocal *to this Petitioner*, based on past incidents

(Is the meaning of the threat hidden to others but understood by Petitioner?)

18

Abusive Speech in EPPWDAPA

Under EPPWDAPA, "abuse" includes use of

- Derogatory or inappropriate names, phrases or profanity
- Ridicule
- Harassment
- Coercion
- Threats
- Cursing
- Intimidation
- Inappropriate sexual comments or conduct

of such nature **as to threaten significant physical or emotional harm** to the applicant

19

Residing in close proximity

- Under FAPA and EPPWDAPA, one cannot "oust" the respondent from the petitioner's home unless the parties are married or the residence is jointly or solely owned or rented by the Petitioner

- What if the parties live next door to each other?

20

- If a Judge can't "oust" the respondent from the Petitioner's home,

Can a Judge nevertheless keep the Respondent away from his home under the authority to restrain the Respondent from entering "*any premises and a reasonable area surrounding the premises"* when necessary to prevent abuse to the Petitioner or children in Petitioner's care?

- If a Judge can, must she?

21

Minors as Respondents in Stalking Cases

- ORS 30.866(5) – The Court *may* enter an order under this section against a minor respondent without appointment of a guardian ad litem
- No other statutory language re Oregon restraining order makes ORCP 27B inapplicable

22

Personal jurisdiction

- To issue enforceable orders, Oregon has to have "minimum contacts" with the Respondent related to the legal action.
- The FAPA forms require the Petitioner to detail WHERE the abuse occurred in addition to what happened
- Is it the Judge's job to raise *on her/his own* this possible defense the Respondent might have?
  - *And deny the order if personal jurisdiction appears lacking? Or let the Respondent raise it when served?*

23

UCCJEA issues

- If child not been in Oregon for last 6 months, or
- Another State entered an order and a parent still lives there (continuing exclusive jurisdiction)

  is there **Temporary Emergency Jurisdiction**?

  Child present in Oregon +
  Abandoned or
  Emergency = Child, Parent, or Sib threatened with mistreatment or abuse (*not* include neglect
- If so, Judge:
- MUST communicate with other state *if another order is pending or already entered elsewhere*
- MAY communicate with other state otherwise (as to determine most convenient forum, declining jdx, etc.)

24

Discovery

- Do Judges in your county allow depositions, or other discovery, in FAPA and other restraining order cases??

25

No discovery

FAPA statutes anticipate expedited processes and require hearings within timeframes inconsistent with the "reasonable notice" standard set out in ORCP 39

Discovery OK

Nothing in the FAPA statute removes this special statutory proceeding from ORCP applicability. ORCP 1

What have Oregon appellate courts said?

What have appellate courts in other jurisdictions said?

26

"Other Relief Necessary"

. . .to provide for the safety and welfare of the petitioner and the children in the custody of the petitioner, including but not limited to:

- emergency monetary assistance"
- (firearms)
- (locks on doors; bus ticket to leave; ??)
- (personal property outside of essential items retrievable in standby)

. . ."to prevent the neglect and protect the safety of any service/therapy animal "or pet

27

Firearms

Authority in Restraining Order ORS to order dispossession:

Any other relief necessary to provide safety & welfare

FAPA	√
EPPWDAPA	√
Stalking	X or ??
SAPO	√
EPO	X

Violation of this provision = Contempt of Court

28

Possession of firearms or ammunition could also be a CRIME for a restraining order Respondent under:

State law (ORS 166.255)	Federal Law (18 USC 922(g)(8)
Order issued after actual notice	
With opportunity to be heard	
Respondent is: (1) current/past spouse, (2) current/past cohabitant (with sexual intimacy) or (3) parent of joint child	
Order contains credible threat finding	
Exception: firearms in public use	

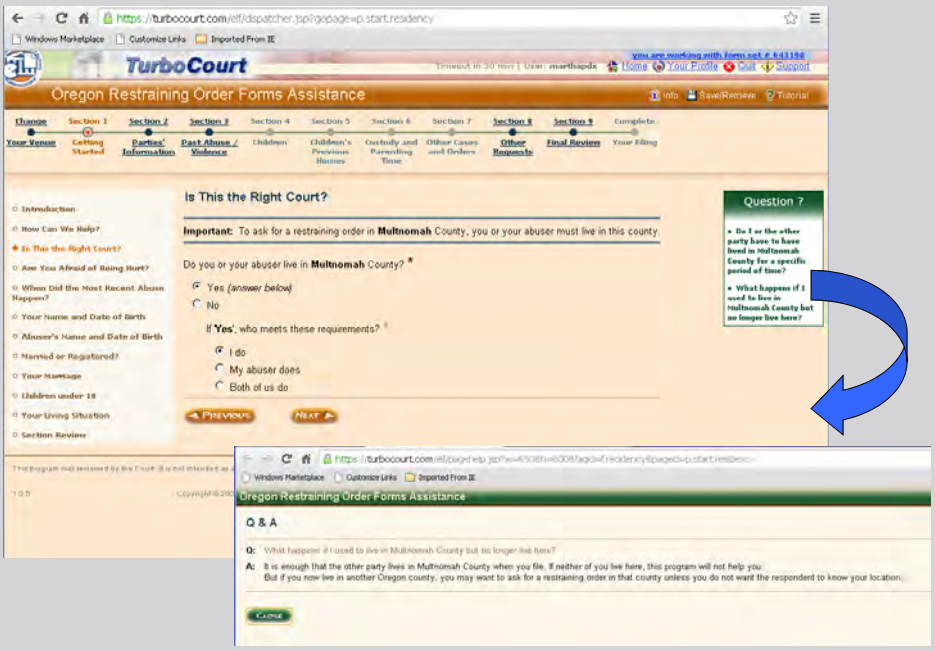
29

Electronic Forms

Interactive online queries for parties ➞ printed forms

Odyssey forms for 5/21 day hearings, with electronic signatures for Judges

30



31

Odyssey Form for 5/21 day hrg

Demonstration

32

End – *THANKS!!!*

TYPES OF PROTECTIVE ORDERS AVAILABLE

***Petitioner* is the person wanting to be protected. The *Respondent* is the person you're getting order against.**

	FAPA *(Family Abuse Prevention Act Order)* ORS 107.700	**EPPDAPA** *(Elderly Persons and Persons with Disabilities Abuse Prevention Act Order)* ORS 124.005	**SAPO** *(Sexual Assault Protective Order)* ORS 163.760	**Stalking** *(Stalking Protective Order)* ORS 30.866
Who may ask the court for protection?	• Adults • Minors involved in sexually intimate relationship with Respondent • Minors under 18 need Guardian ad Litem	• Adults who are 65 years old or older • Adults or Minors with a disability • Minors under 18 need Guardian ad Litem	• Adults • Minors • Minors under 12 need Guardian ad Litem	• Adults • Minors • Minors under 18 need Guardian ad Litem
What is the required relationship between Petitioner and Respondent?	• Adults related by blood, marriage (including former spouses), or adoption • Adults who are/were in an intimate relationship within the past two years • Adults who are unmarried parents of a minor child	No relationship between Petitioner and Respondent required.	• Cannot be a member of family or household • Cannot have any other protective orders against the Respondent • Respondent must be an adult	Any person who knows you did not want contact, but continued to contact you anyway.
Duration of Orders:	• Good for 1 year from date signed • Can be renewed before expiration date	• Good for 1 year from date signed • Can be renewed before expiration date	• Good for 1 year from date signed • Can be renewed before expiration date	• Good for lifetime • Can be vacated on respondent's motion if circumstances change

What abuse must have occurred to qualify for the order?	• In the last 180 days*, Respondent injured you or tried to injure you; and/or • Respondent's actions or words placed you in fear that they would cause you injury very soon; and/or • Respondent caused you to have sexual contact with them by using force or threatening to use force AND • You are in immediate danger of further abuse by the Respondent	• In the last 180 days*, Respondent caused physical abuse, neglect, harassment (including inappropriate language and sexual comments that threatened significant harm), sexual abuse, keeping/taking your property, or financial abuse AND • You are in immediate danger of further abuse by the Respondent	• In the last 180 days*, Respondent made you have sexual contact without your consent (or to which you are/were unable to consent) AND • You are in reasonable fear of your physical safety (injury, threats, and use of physical force are not required)	Two or more unwanted contacts, in the past 2 years, that put you in fear for your or your family's physical safety. Contacts can include: • physical violence • threatening messages (mail, email, in person, text, phone) • following you • spying on you • coming to your work or home
What are some things the Court can order?	• Custody and parenting time orders • Removal from (legally) shared home • Restrict from going certain places • Restrict ability to have firearms • Limit or restrict contact	• Removal from (legally) shared home • Restrict from going certain places • Restrict ability to have firearms • Limit or restrict contact	• Removal from (legally) shared home • Restrict from going certain places • Restrict ability to have firearms • Limit or restrict contact	• No contact • No possession of firearms in certain family situations

*There are some exceptions. For more information speak to an advocate or go to: http://courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/FAPA.aspx

This is a summary of the orders and not a substitute for legal advice. Other handouts and resources have more information about each type order. You may qualify for more than one order.

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DECISIONS FROM THE OREGON APPELLATE COURTS CITING THE FAMILY ABUSE PREVENTION ACT
(May 2016)

Oregon Supreme Court

In Re Jagger, 357 Or. 295 (2015)

The court found that Accused, an attorney, had violated RPC 1.1 (failure to provide competent representation) and RPC 1.2(c) (counseling or assisting client to engage in conduct the accused knows to be illegal or fraudulent). Accused represented Respondent Mr. Fan, who Petitioner Ms. Yang had a FAPA restraining order against. At the time, Respondent was also in jail on a criminal complaint arising from the same incident that gave rise to the restraining order. Accused had arranged a time for Petitioner to come by his office at a later date, but Petitioner unexpectedly came by Accused's office at a time when Accused was on the phone with Respondent in a conference room. Accused invited Petitioner to speak with Respondent for the purpose of discussing the situation. Accused then left the conference room for several minutes while Ms. Yang and Mr. Fan spoke.

Based on Mr. Fan's participation in the conversation he was convicted of contempt of court for violating the contact provision of the restraining order. First, Accused contended that Petitioner voluntarily initiated the contact with Respondent, but the court found that the record did not support that contention. Second, Accused contended that he did not knowingly violate the law because the FAPA order prohibits the restrained person from taking affirmative action to contact the person who filed for the restraining order, and Respondent did not do so. The court disagreed with Accused's interpretation of the FAPA restraining order and suspended him from practicing law for 90 days.

Heikkila v. Heikkila, 355 Or. 753 (2014)

The court held that the Court of Appeals lacked jurisdiction in an appeal because of a defect in service of process. Petitioner (wife) was granted a restraining order against Respondent (husband), and Respondent appealed. Respondent's attorney filed a notice of appeal, and sent a copy to Petitioner, but not to Petitioner's attorney, as required by ORCP 9 B. Respondent's attorney, citing ORS 19.270, argued that the plain text of the jurisdictional statutes requires that notice of appeal be served to other "parties" to the case. Respondent's attorney said that because Petitioner was the other party to the case, and she had been served with timely notice of the appeal, the court of appeals had jurisdiction.

The court said that while Respondent's interpretation was plausible, ORS 19.270 specifies that timely service is jurisdictional, but does not specify *how* such service must be accomplished to confer jurisdiction to the court of appeals. The court held that ORS 19.500 filled that gap by providing that when a document needs to be served or filed, that should be done so in compliance with ORCP 9 B, and therefore affirmed the order of the court of appeals.

State v. Copeland, 353 Or. 816 (2013)

Defendant was charged with punitive contempt for violating the restraining order. To show the Defendant had been served the restraining order, the State offered a deputy sheriff's certificate of service. Defendant objected to the certificate claiming it violated his confrontation rights under Article I, section 11 of the Oregon Constitution and the Sixth Amendment of the U.S. Constitution. The trial court admitted the certificate under the official records hearsay exception, OEC 803(8) and because the court did not find the certificate was "testimonial." The Court of Appeals and Supreme Court affirmed the trial court's ruling.

In re Knappenberger, 338 Or. 341 (2005)

Where Husband consulted Attorney about representation in a divorce case but also discussed a history of Family Abuse Prevention Act (FAPA) restraining orders between the parties as well as Husband's thoughts about applying for new FAPA order, Attorney may not represent Wife regarding the divorce or a restraining order Husband later obtains against Wife. Attorney's advice to Husband on several substantive aspects of divorce, even if Attorney was not ultimately retained, rendered Husband a former client of Attorney for purpose of former client/same matter conflict rule and precluded representing Wife on the divorce.

Moreover, as Attorney also discussed with Husband the factual details regarding Wife's current restraining order and each spouses' motivation for obtaining such orders and also advised Husband on evidence a court would require from Husband if he sought a new FAPA order for himself, defending Wife on that new FAPA order that Husband later obtained *pro se* was precluded. Attorney's representation of Husband provided him with confidences and secrets the use of which was likely to damage Husband in the course of Attorney's defense of Wife.

State ex rel Marshall v. Hargreaves, 302 Or. 1 (1986)

Defendant judge had no discretion to deny realtor a hearing for a restraining order because she had filed, withdrawn, and dismissed two previous restraining orders under Family Abuse Prevention Act. ORS 107.718 is mandatory, not permissive, and does not give judges discretion to deny hearings for restraining orders.

Hathaway v. Hart, 300 Or. 231 (1985), aff'd 70 Or. App. 541 (1984)

A defendant in a criminal contempt proceeding (under former contempt statutes) charged with violating a restraining order under the Family Abuse Prevention Act is not entitled to a trial by jury. Criminal contempts are unique proceedings, not "criminal actions" within the meaning of state statutes requiring jury trials. Nor are criminal contempts "criminal prosecutions" within the meaning of the state constitution provision that guarantees jury trials, as disposition of contempts without jury trials was well established at the time the state constitution was drafted.

Nearing v. Weaver, 295 Or. 702 (1983)

Police officers who knowingly fail to enforce Family Abuse Prevention Act restraining orders by arrest are potentially liable for resulting physical and emotional harm to persons protected by the order.

The defense of discretion does not preclude liability, as officers are not engaged in a discretionary function when they must evaluate and act upon a factual judgment. Moreover, statutory immunity for good faith arrests under the Family Abuse Prevention Act does not immunize the failure to arrest.

(After the court issued plaintiff a restraining order prohibiting her husband from entering her home or molesting her, plaintiff's husband twice again entered plaintiff's home. Plaintiff reported the incidents to defendant officer and asked him to arrest plaintiff's husband. After confirming the restraining order and the damage plaintiff's husband caused, defendant declined to arrest husband because defendant had not seen husband on the premises. Husband later threatened and assaulted plaintiff's friend in plaintiff's presence.)

Oregon Court of Appeals

G.M.P. v. Patton, 278 Or. App. 720 (2016)

Respondent and Petitioner were married in 2011 and do not have any joint children. On August 18, 2014, Petitioner and Respondent went to a marriage counseling session where they decided that they would separate temporarily and Respondent would remove his trailer from their property. The next day, the two had an argument when Respondent said he would not be removing his trailer that day. During the argument, Respondent threatened to smash Petitioner's car and destroy her belongings. Respondent also cornered Petitioner in a bedroom, pushed and kicked Petitioner, and told Petitioner she could not call the police. On August 22, Petitioner filed for a restraining order. Respondent requested a hearing.

At the hearing, Petitioner testified that Respondent had been moody and angry, that he stole Petitioner's prescription medication, and that he said that he was going to get a gun a few months previously. The restraining order was granted, and Respondent appealed.

Relying on *Hubbell*, the court said that the question to consider was whether the evidence suggested that Petitioner was in imminent danger of further abuse from Respondent and whether Respondent represented a credible threat the Petitioner's safety. The court concluded that Respondent's aggressive behavior, threats to destroy Petitioner's belongings, and statement that he was going to get a gun did not demonstrate that Respondent created or continued to create an imminent danger of further abuse or a credible threat to petitioner's physical safety. Reversed.

Decker v. Klapatch, 275 Or. App. 992 (2015); (EPPDAPA case)

Petitioner appealed an order dismissing a restraining order he obtained under the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA). Petitioner argued that the trial court erred first, in denying his motion for a continuance in order to have time to present his witness, and second, in refusing to allow him to call his witness. The court limited its discussion to the first assignment of error only, and held that the trial court abused its discretion in denying Petitioner's motion for a continuance.

Respondent was Petitioner's former landlord. In his petition, Petitioner stated that he had disabilities relating to his speech, his left leg, his right hand, and that Respondent had harassed and abused him. Petitioner stated that he was in fear for his physical safety and that Respondent had used "derogatory or inappropriate names." At the contested hearing, Petitioner testified that

Respondent had attempted to run him over, followed him, and reported him to the police over 150 times.

Petitioner's testimony also included several references to a witness he had that would testify in support of his petition. Following a lengthy cross examination of Petitioner by Respondent's attorney, the trial court denied Petitioner's request to continue the matter to give him time to call his witness.

The court found that there was no indication Petitioner was dilatory in presenting his witness or was manipulating the judicial process; rather, Petitioner was testifying on his own behalf without understanding that there was a strict time limit being imposed on him. Based on the circumstances, the court concluded that the trial court abused its discretion in denying Petitioner's motion for a continuance.

T.P.O v. Jeffries, 267 Or. App. 118 (2014)

Mother and Father were not married, but had one child together. Father filed a FAPA petition for a restraining order, as well as a domestic relations petition for dissolution. In a hearing on March 9, 2012, the court consolidated the cases and continued the restraining order. On March 16, 2012, the trial court entered an Order After Hearing. Mother filed an appeal on July 2, and contended to the court that her appeal was timely because the trial court did not dispose of the FAPA case until the general judgement was entered on June 13. The court held that the proper date of reference for the 30-day window to file an appeal was the date which the Order After Hearing was entered, not when the general judgement was entered. The court affirmed the trial court's judgement in the domestic relations case without a written discussion and dismissed the appeal in the FAPA case as untimely.

State v. Crombie, 267 Or. App. 705 (2014)

The court held that Defendant violated a FAPA restraining order when he used court documents to communicate with Victim. In a five-page document entitled "Addendem [*sic*] to Response and Counterclaim" Defendant disputed Victim's claim of irreconcilable differences in regard to their pending divorce and professed his love for Victim and their children. Defendant then proceeded to provide his account of events that had transpired in his and Victim's marriage, and, referring to Victim in the 3rd person, gave reasons the two should not divorce. In the concluding paragraphs, Defendant addressed Victim directly with phrases that included: "Bye Baby. ☺ I will ALWAYS love you!" The court held that the documents were a violation of the FAPA order because had Defendant expressed the content that was in the court materials in a letter written directly to Victim, Defendant would be in clear violation of the FAPA order, and the court would not allow Defendant to use the court system to accomplish the same aim.

F.C.L. v. Agustin, 271 Or. App. 149 (2015)

Defendant was charged with two counts of violating a FAPA restraining order that his longtime domestic partner had filed. Defendant was unable to read English and his primary language was Spanish. The Washington County Sheriff served defendant, and explained parts of the restraining order in English. Among other things, the Sheriff explained the distance and contact rules. Petitioner was stopped for a traffic violation a few months later. She called

defendant and asked him to come by. Defendant drove to petitioner's location to help petitioner, and was arrested to violating the restraining order.

At trial, the court indicated that it found the petitioner and the sheriff's testimonies credible when they testified that the defendant understood the restraining order. After the state rested, Defendant's lawyer called Defendant to the stand. Before he began to testify, the Court cautioned the Defendant about testifying. Among other things, the court said: "I should put it this way. If a middle class person with 35 years of legal experience thinks he's lying, you may have a different result than if he exercises his right to remain silent."

The court of appeals held that the trial court's advice crossed the line from a permissible warning to impermissible coercion, which violated Defendant's rights under the Fourteenth Amendment. The court said that the trial court's colloquy caused Defendant not to testify, even though Defendant had planned to testify, and that precluded Defendant from presenting a defense. Reversed and remanded.

C.M.V. v. Ackley, 261 Ore. App. 491 (2014)

Petitioner and Respondent were in a three and a half year, live-in intimate relationship. The two also worked together. Respondent and Petitioner had a volatile relationship, which led Petitioner to obtain an *ex parte* FAPA limiting contact to emails. The parties continued to work together following a work separation plan. The Respondent ended the relationship over email and resigned from a music-event group both participated in over email. Petitioner testified that Respondent violated the *ex parte* FAPA on at least two occasions, once by entering her side of the building at work, and once by responding to a group email that he was planning on attending an event at which Petitioner was performing. However, Respondent did not end up attending the event.

The Court of Appeals held that a Petitioner's subjective fear is not enough evidence to show an imminent danger or a credible threat. Although the relationship was volatile, once it ended and the parties stopped living together, the volatility ended. The parties continued to work together and have common social circles and have not had an incident since. Thus the Court of Appeals reversed the trial court and the FAPA was dismissed.

N.R.J. v. Kore, 2013 Or. App. LEXIS 526 (2013)/ N.R.J. v. P.K., 256 Or. App. 514 (Or. App. 2013)

Petitioner filed a FAPA against respondent. At the FAPA hearing, the court dismissed the FAPA petition and then issued a SPO under a new case number against the respondent. The respondent had no warning and was not given a chance to object to the SPO. The Court of Appeals reversed after noting the relevant statutes and the fact that the petitioner never requested a SPO and held that a circuit court does not have the authority to impose a SPO *sua sponte*.

S.K.C. v. Pitts, 258 Or. App. 676 (2013)* *Overturned on Reconsideration in S.K.C. v. Pitts, 259 Or. App. 543 (2013).

Defendant was found in contempt of court and ordered to pay attorney fees, a unitary assessment, and an offense surcharge. Defendant appealed and Court of Appeals held that the trial court erred in assessing a unitary assessment and an offense surcharge.

C.J.P. v. Lempea, 251 Or. App. 656 (2012)

Petitioner and Respondent lived together between March 2009 and December 2010. On January 4, 2011, Petitioner requested, and was granted, a restraining order preventing Respondent from entering Petitioner's property. This restraining order was dismissed on January 13, 2011. On January 23, 2011, Respondent and his son arrived at Petitioner's property to get his things. Petitioner refused him entry and called 911. On January 25, 2011, Petitioner sought a second restraining order. This restraining order was continued at the contested hearing. Respondent appealed, contending that Petitioner failed to present sufficient evidence to support issuance of the order. The Court of Appeals assumed for sake of discussion that Petitioner's statement that "he squished me in doorway," constituted abuse under ORS 107.705. The Court held, however, that "there was no evidence that Respondent posed an imminent danger of further abuse to the Petitioner and represents a credible to threat to her physical safety." Thus, under the totality of the circumstances, the Court concluded that the trial court had erred in continuing the order. The Court of Appeals declined to exercise *de novo* review.

S.M.H v. Anderson, 251 Or. App. 209 (2012)

Petitioner obtained a FAPA in 2009 upon learning that after years without contact, the respondent had called a mutual friend and asked about her. Petitioner testified that she was afraid he would come to Oregon and kill her, based on past threats and acts of abuse, and the trial court granted the ex parte protective order and continued it in 2010. Petitioner's evidence was found to be legally insufficient to meet the "imminent danger of further abuse" requirement upon challenge by respondent, and the Oregon Court of Appeals reversed the trial court's grant of the original FAPA restraining order.

The court contrasted this case with cases (*Hubbell* and *Lefebvre*) where the respondent had made recent communication that "reasonably could be construed as threatening imminent harm" because their actions demonstrated an obsession with petitioner. (Respondent in *Hubbell* had trespassed on petitioner's property, chased her in his car, and made veiled threats to her directly; respondent in *Lefebvre* lurked near petitioner's house and called her describing the sleeping clothes she was wearing.) The court acknowledged this petitioner's genuine fear and the fact that "long-past acts or threats of violence, combined with evidence of a respondent's *present* overtly or implicitly threatening behavior may justify issuance of a restraining order." Although the court stated this was a "close case," they found no evidence on record "from which a factfinder reasonably could infer that petitioner is in *imminent* danger." Petitioner presented evidence of the phone call in 2009 and a letter sent to her in 2005 wherein respondent stated he wanted to come get his possessions from her. The court reasoned that because neither of these contacts contained overt or implicit threats, an inference of imminent danger "falls on the speculative side of the line," and therefore would not be reasonable. Because the court found that petitioner's evidence was insufficient to uphold the imminent danger prerequisite, the court did not decide the issue of whether the petitioner was a victim of abuse. (Petitioner was strangled by respondent in the late 1990s when they lived together, and argued that the FAPA tolling provision applied; respondent argued that ORS 12.140 applied.)

Hemingway v. Mauer, 247 Or. App. 603 (2012)

Wife and Husband, in the process of dissolution, were disputing the child custody provisions. Wife obtained a FAPA restraining order against Husband after he threatened to kill her over the phone and, on another day, struck the hood of her car. Husband denied ever threatening to kill Wife. At the FAPA hearing, a DHS social worker was allowed to testify against Husband; however, Husband, appearing *pro se*, was not allowed to cross-examine the social worker. The trial court continued the restraining order and temporarily ordered Husband not to have any contact with their children. Husband asked the trial court if he could ask the social worker questions, but the judge told him "You know what, we ran out of time, can't do it." Husband appealed, now represented by counsel, arguing the trial court abused its discretion when it did not allow him to cross-examine the DHS social worker. The Oregon Court of Appeals agreed with the husband, vacated the order continuing the restraining order, and remanded to the trial court.

The court cited Howell-Hooyman and Hooyman,113 Or App 548 (1992), concluding that a trial court has the authority to reasonably control the presentation of evidence and the examination of witnesses – but this authority is only reasonable if it is fundamentally fair and allows opportunities for a reasonably complete presentation of evidence and argument. At the hearing, the trial court allowed the DHS social worker to make a statement, which appeared to affect the court's decision in favor of the wife. Husband was denied a "fundamentally fair" hearing when he was not allowed to cross-examine the social worker.

Also see Nelson v. Nelson, 142 Or App 367 (1996) and Miller v. Miller, 128 Or App 433 (1994) discussing the parameters of FAPA hearings and the right to call witnesses and present evidence.

Holbert v. Noon, 245 Or. App. 328 (2011)

In Holbert, Respondent told Petitioner, numerous times, that he would kill her if she "took [his] children and left." Respondent also sent several text messages, including "you f----- up bad this time, *I won't rest and neither will my resources*," and "one chance to set it right. No guy friends, no Wal-Mart, no cell phone, no old friends. Think hard if you want your life back and what you're willing to sacrifice for it. No more games. *Last shot or it's all over and not just us*." (Emphasis added).

First, the court provided a brief summary of the proper standard of review for FAPA cases – the court is bound by the trial court's finding of facts that are supported by *any* evidence in the record. A request to review a matter *de novo* must be requested pursuant to ORAP 5.40(8)(a) and should reference ORS 19.415(3)(b).

Next, the court focused on the interpretation of "imminent bodily injury". *See* ORS 107.705(1)(b), defining "abuse". Respondent alleged that Petitioner could not be in fear of imminent bodily injury using the totality of the circumstances. The Respondent's counsel relied entirely on how the Oregon Court of Appeals construed the word 'imminent' in a juvenile delinquency case, Dompelling v. Dompelling. 171 Or App 692 (2000). In Dompelling, "imminent" was defined as, "near at hand," "impending," or "menacingly near." The court concluded that this interpretation was appropriate for FAPA cases. Additionally, the court of appeals reviewed how it had construed "imminent" in previous FAPA cases, concluding the totality of the circumstances may be considered when interpreting "imminent bodily injury". *See* Lefebvre v. Lefebvre, 165 Or App 297 (2000) and Cottongim v. Woods, 145 Or App 40 (1996). Viewed in the totality of the circumstances, the multiple death threats and text messages were

enough to show obsessive conduct and threats towards the Petitioner. The court of appeals also included a "practical observation" that if they adopted Respondent's argument, an estranged spouse could tell the other "I'm going to kill you tomorrow" or "If you get custody, you're dead" and that would not be enough for a FAPA restraining order. "We would be sponsoring a parade of horribles . . . [w]e decline to do so."

Compare these facts and context of the text messages with Sacoman v. Burns.

Hubbell v. Sanders, 245 Or. App. 321 (2011)

In Hubbell, after their relationship had ended, Respondent was frequently seen in Petitioner's neighborhood and at one point arrested after he was found intoxicated in Petitioner's back yard. After the Petitioner obtained an *ex parte* FAPA order, Respondent chased her, at high speeds, in his car. Respondent challenged that there was sufficient evidence of 'imminent danger' even though he admitted his actions were 'creepy'. The court of appeals disagreed, concluding that the Petitioner was in fear of imminent bodily injury and upheld the FAPA restraining order.

The court cited Lefebvre, saying overt threats or physical violence are not required to establish a fear of imminent bodily injury. "For example, behavior that is 'erratic, intrusive, volatile, and persistent' conduct combined with an 'obsession with the idea of killing another person' may place a Petitioner in 'fear of imminent serious bodily injury and in immediate danger of further abuse'." Lefebvre v. Lefebvre, 165 Or App 297, 301-02 (2000). "Fear of imminent serious bodily injury" can be established by the totality of the circumstances. Fielder and Fielder, 211 Or App 688 (2007). If a Petitioner makes a subjective claim of fear, there must be sufficient evidence that the conduct creates an imminent fear of further abuse. Roshto v. McVein, 207 Or App 700, 704-05 (2006).

The court labeled Respondent's behavior as "chilling" and there was sufficient evidence establishing Petitioner was in imminent danger of further abuse by Respondent. The same evidence also showed Respondent's actions were credible threat to Petitioner's physical safety. Therefore, the court upheld the FAPA restraining order against Respondent.

Maffey v. Muchka, 244 Or. App. 308 (2011)

Petitioner and Respondent were in an 18-month relationship and the parents of a young child. Respondent has post-traumatic stress disorder, which causes him to occasionally act in a highly emotional manner, becoming "extremely angry" over "very small, little things." Respondent was also "extremely controlling" and had limited Petitioner's ability to access her money and contact other people. Respondent had made verbal threats to Petitioner, telling her that he could make her life "a living hell" and that he would take their child away from Petitioner "not because I want him but because I'm going to take what you love most." Respondent had previously pushed Petitioner into a wall in 2009. In 2010, Petitioner was preparing an Easter dinner when Respondent became angry and swore at Petitioner. Respondent pushed Petitioner against a wall told her to leave. Respondent became "eerily calm" and walked away, which he had previously told Petitioner was an indication that he was about to become violent. Petitioner and the child moved out, eventually to a safe house, and a temporary FAPA restraining order was issued against Respondent. Respondent violated that order by going near the safe house and

having a friend call Petitioner. The trial court continued the FAPA restraining order against the Respondent.

The Oregon Court of Appeals affirmed the decision of the trial court, finding that the Petitioner had presented sufficient evidence, which was essentially not disputed, to support continuation of a restraining order under FAPA. The Court of Appeals provided a straight forward explanation of ORS 107.718(1). Respondent argued that Petitioner had failed to prove that he had either committed abuse or that there was an imminent danger of further abuse; however, the Court of Appeals quickly dismissed this argument, concluding under ORS 107.705(1)(a) and (b) "a person can commit 'abuse,' . . . even if the person does not actually cause bodily injury." Petitioner's testimony was completely credible; therefor there was sufficient evidence of abuse and imminent danger that Respondent would abuse Petitioner again.

Sacomano v. Burns, 245 Or. App. 35 (2011)

Petitioner and Respondent began a sexual relationship after Respondent swore to Petitioner she did not have any sexually transmitted diseases. Their relationship ended after Respondent contracted genital herpes. Petitioner then admitted she had genital herpes. Later, Respondent discovered that Petitioner was using a "swingers" website and not disclosing her disease. Respondent sent Petitioner several text messages, essentially threatening to inform her other sexual partners and co-workers that she had genital herpes and that "[her] payback is coming soon." Petitioner filed for a restraining order, which was granted by the trial court.

The Oregon Court of Appeals reversed, concluding that text messages sent by Respondent do not qualify as "abuse" that would support a restraining order under FAPA. *See* ORS 107.705(1). The court decided that sending a text message, threatening to tell others that one has genital herpes and "your payback is coming soon" did not meet the requirements for FAPA; specifically, there was no threat of physical violence that could have placed Petitioner in fear of imminent bodily injury.

Compare these facts and content of the text message with Holbert v. Hoon.

State v. Trivitt, 247 Or. App. 199 (2011)

Defendant was appealing a contempt of court conviction for violating a restraining order. The court found that Defendant's behavior did not fall under the definition of "interfering" contained in the statute.

While the FAPA order was in effect, Defendant went to Petitioner's current girlfriend's home and placed a small sign at the end of the current girlfriend's driveway. The sign read: "[Petitioner] has Genital Herpes[.] He won't tell you unless he has an outbreak[.] Ask his ex-wife she lives just up the street." The trial court found that Defendant had violated the restraining order "beyond any doubt." However, Defendant contended that the restraining order did not prohibit her from communicating with the current girlfriend or going to the current girlfriend's residence.

The State argued that Defendant's behavior was an attempt to "interfere" with Petitioner through a third party. The court examined the definition of "interfere" and agreed with Defendant that the purpose of a FAPA restraining order is to protect a victim from further abuse, and that Defendant's conduct, analyzed within the context of the statute, was simply "offensive."

The court noted that the legislative history indicated that the word "bother" had been left out of the statute, and suggested that Defendant's behavior fell more squarely under that definition.

State v. Cervantes, 238 Or. App. 745 (2010)

Defendant was charged with contempt for violating a Family Abuse Prevention Act restraining order. The trial court permitted defendant to represent himself, but it did so without first determining whether defendant's waiver of his right to counsel was voluntary, knowing, and intelligent. This omission was legal error requiring reversal.

Travis & Travis, 236 Or. App. 563 (2010)

In a modification of custody case in which the trial court had changed custody to Father, the Court of Appeals reviewing the record *de novo* disagreed with the trial court's determination that Mother was unfit due to abuse of the legal process (not related to the FAPA case) and false accusations resulting in police incidents. The Court of Appeals noted that the children were absent from these scenes of police involvement and no evidence existed of detriment to the children from these incidents. The appellate court also noted that mother had obtained a FAPA order against Father, thereby establishing a rebuttable presumption that it is not in the best interests and welfare of the child to award custody to Father. Because the other statutory factors weighed in favour of Mother, the Court did not decide whether the presumption had been rebutted.

Martinez v. Martinez, 234 Or. App. 289 (2010)

Without explaining how the evidence was insufficient, the court held petitioner had not shown by a preponderance of the evidence that respondent committed abuse, as defined in ORS 107.705(1) against petitioner within 180 days preceding the filing of the petition.

Pavon v. Miano, 232 Or. App. 533 (2009)

Respondent did not preserve for appeal the argument that the circuit court lacked authority to include custody and parenting time restrictions in the restraining order. His request-for-hearing form conveyed to petitioner and to the trial court that he did not contest the parts of the order granting child custody to the petitioner or the terms of the parenting time order. Moreover, his factual assertion at trial that petitioner took the children does not place the custody provision at issue. Finally, his mere assertion of the claim that petitioner was not a biological parent does not, by itself, preserve challenges predicated on petitioner's legal relationship to the children.

Weismandel-Sullivan and Sullivan, 228 Or. App. 41 (2009)

Entry of a FAPA order against a respondent after an ex parte appearance by petitioner did not constitute a finding of abuse sufficient to trigger ORS 107.137(2) presumption that awarding custody to respondent was presumptively not in the best interests of the children. No hearing was held on the FAPA order because the parties reached a temporary settlement prior to a

dissolution proceeding and petitioner agreed to vacate the restraining order as a part of that settlement.

Ringler and Ringler, 221 Or. App. 43 (2008), distinguished by Weismandel-Sullivan, supra.

Mother's FAPA order against father that was upheld at a contested hearing at which father was represented by counsel established the ORS 107.137(2) presumption that it was not in the best interests of the children to award custody to the father. Evidence presented at trial was insufficient to rebut the presumption.

State v. Montgomery, 216 Or. App. 221 (2007)

Merely accidental conduct was not wilful violation of a restraining order to sustain a contempt action.

Baker v. Baker, 216 Or. App. 205 (2007)

Where petitioner testifies that the respondent had not threatened him and there was no evidence he was afraid of her when applying for the restraining order or at the time of the hearing, there was not sufficient proof of imminent danger of further abuse to uphold an order.

State v. Dragowsky, 215 Or. App. 377 (2007), rev denied 343 Or. 690 (2007)

The Defendant's conviction for willfully entering or attempting to enter within 150 feet of the petitioner was upheld in this contempt case. The evidence viewed in the light most favorable to the State and the trial court's findings that the Defendant was not credible allow a reasonable trier to disbelieve the Defendant's testimony that the victim attacked him and caused him to fall on top of her. Evidence was sufficient to support a finding that after discovering the victim in his residence, the Defendant approached and assaulted her, thereby willfully entering an area that he was prohibited from entering by the restraining order.

State v. Maxwell, 213 Or. App. 162 (2007)

Defendant was charged with burglary and assault for unlawfully entering and remaining in victim's home and assaulting her. Victim had obtained a FAPA restraining order against Defendant, and the court held that even if she had invited him into her house, because the FAPA order prohibited him from doing so, any invitation by her was unlawful and could not give defendant license to do so. Burglary conviction was upheld.

Hayes v. Hayes, 212 Or. App. 188 (2007)

Petitioner was not in fear of imminent bodily injury, where petitioner did not show that respondent made threats that put him in imminent fear. Threats were made to petitioner in November 2005 that respondent's brother would "kick his ass." Restraining order was sought in April 2006, after an incident where any threats made by respondent were only to petitioner's girlfriend. The court did not address whether threats against a third party (petitioner's girlfriend) could sustain an order.

Fiedler and Fielder, 211 Or. App. 688 (2007)

The Family Abuse Prevention Act does not require the petitioner to prove subjective fear when the claim of abuse is the respondent's "intentionally, knowingly or recklessly placing [the petitioner] in fear of imminent bodily injury." *Cottongim, below*. Nor are overt threats required. *Lefebvre, below.* The test is whether a reasonable person faced with the described behavior would be placed in fear. Here an incident in which an apparently intoxicated respondent kicked and punched petitioner and an additional situation in which she struck petitioner sufficiently hard to cause a black eye meet the articulated threshold under a totality of circumstances. Furthermore, the requirement of imminent danger of further abuse is satisfied by the evidence of direct and ongoing physical abuse correlated to respondent's alcohol consumption.

State ex rel DHS v. L.S. and J.L.W., 211 Or. App. 221 (2007)

This termination of parental rights case finds insufficient the State's claims that the father is unfit due in part to his history of criminal convictions and FAPA orders obtained by three of his former domestic partners. Noting father's engagement in anger management and domestic violence education programs and the lack of evidence that he had participated in any violent or abusive conduct since DHS became involved with the family more than 3 years earlier, the Court of Appeals found that he had sufficiently adjusted his behavior. The opinion addresses and finds lacking other claims regarding unfitness.

Magyar v. Hayes, 211 Or. App. 86 (2007)

This case involved the sufficiency of evidence needed to uphold a stalking protective order between an unmarried couple litigating claims to their jointly owned real property. The Court of Appeals found that the existence of a FAPA order between the parties not relevant for two reasons: (1) the FAPA order had been issued for the protection of the stalking order respondent [X] rather than the stalking order applicant [Y] and (2) although the original FAPA order had ordered X to vacate certain jointly-owned property, the effect of a modifying FAPA order almost one year after the FAPA order was first issued was merely to reflect the ruling of a separate domestic relations court that Y was the sole owner of that property. The modification action was not a renewal of the FAPA order as X had made no renewal request and the court made no findings necessary for renewal. The modification order therefore did not extend the effective date of the original FAPA order past its original one-year duration so no FAPA order existed at the point X entered the home in a manner Y asserts caused him reasonable apprehension for his personal safety.

Rosiles-Flores v. Browning, 208 Or. App. 600 (2006)

Petitioner's sworn allegations (in petition for restraining order), along with her personal appearance at an ex parte hearing, satisfied the statutory requirements for obtaining an ex parte restraining order under FAPA. The existence of a restraining order by respondent against petitioner was not a proper basis for denying petitioner a restraining order, and the text and

context of FAPA support the opposite conclusion. Each party must separately establish his or her eligibility for a FAPA order.

The petitioner need only make a "showing" that she has met the requirements for issuance of a FAPA order at the ex parte hearing. Because the allegations in the petition are sworn, they constitute evidence in support of the "showing" requirement. If, at the end of the ex parte hearing, there are no unremedied deficiencies in the petition or contradictions between the petition and the petitioner's testimony, the trial court lacks discretion to deny the petition and "shall" issue the requested order.

Roshto v. McVein, 207 Or. App. 700 (2006)

An "inundation" of email and telephone messages, plus several uninvited visits to petitioner's house, did not amount to a credible threat to her safety. Without threats of physical harm or actual physical harm, the behavior was not enough to uphold a restraining order, despite petitioner's knowledge that respondent was "on medication," had "mental problems," and had erratic behavior such as leaving beef jerky in the yard for her dogs to eat and asking institutions to send her junk mail. This case was distinguished from LeFebvre v. LeFebvre, 165 Or App 297 (2000) because of the imminence of the threat and the credibility of respondent's behavior. Lefebvre involved behavior that was "more heightened, persistent, and alarming."

Pooler v. Pooler, 206 Or. App. 447 (2006)

Mother's unchallenged testimony about father's prior abuse, including violence in front of their children, imposed on the court a duty to put adequate safeguards in place. Where a parent has "committed abuse, the court shall make adequate provision for the safety of the child."

Edwards v. Biehler, 203 Or. App. 271 (2005)

The Legislature intended that the criteria for terminating unlimited duration Stalking Protective Orders be similar to the criteria for removing FAPA orders. This conclusion is based on the analogous nature of SPO and FAPA orders (both statutory schemes are directed at similar harms and address those harms through entry of orders requiring, among other things, that the respondent avoid contact with the petitioner) and the practical application FAPA termination procedures have for SPOs. Furthermore, legislative history supports the inference that legislators anticipated the terminabilty of unlimited SPOs. An SPO may be terminated on the respondent's motion when the Court finds that the petitioner no longer continues to suffer reasonable apprehension based on the respondent's past acts.

Wilson and Wilson, 199 Or. App. 242 (2005)

In Father's suit under ORS 109.119 for custody of Mother's non-joint child, Father did not overcome presumption favoring Mother as legal parent. Father alleged, among other factors, that Mother unreasonably denied or limited his contact with the non-joint child by obtaining a Family Abuse Prevention Act order that alleged physical abuse by Father's cohabitant-girlfriend and prohibited his parenting time until the child was interviewed by a child abuse team in a few days, after which point unsupervised contact could occur. Father ended up

with no contact for one month. The Court found Mother's actions reasonable given that she had acted out of concern for the safety of the children and had intended the restriction to be resolved in a matter of days.

Housing and Community Services Agency of Lane County v. Long, 196 Or. App. 205 (2004)

Defendant prevailed against Housing Agency that was attempting to evict him for violating his lease by failing to disclose that Defendant's Wife was residing with him when not listed on lease (and was not just a guest). Defendant argued successfully that Agency had accepted rent while knowing that Wife was residing with Defendant, and therefore had waived its claim of lease violation. Agency argued unsuccessfully that it had only a suspicion Wife resided there until Agency obtained copy of Wife's affidavit in support of FAPA order, which affidavit alleged the co-residence. Agency's position failed because Agency accepted at rent for at least 2 rental periods after its receipt of the affidavit, which is the minimum standard for such waiver under ORS 90.415.

Bergerson v. Salem-Keizer School District, 194 Or. App. 301 (2004), review accepted, 337 Or 616 (2004)

Fair Dismissal Appeals Board's reasoning was insufficient to support its determination reversing the dismissal of a third-grade teacher on grounds of immorality and neglect of duties. The Court found that the Board did not explain why dismissal was clearly an excessive remedy for an isolated incident in which depressed Wife, after ingesting medication in a suicide attempt after emotional confrontation with her estranged Husband, drove her vehicle into the back of his pick-up truck at his girlfriend's home where he was living and pushed it into the garage. The Court was unpersuaded, among other things, with the Board's notion that crimes committed against family members are less serious than crimes committed against strangers. The Court noted that teacher/Wife had damaged house of Husband's girlfriend (who was *not* a family member), that the incident regarding Husband was likely subject to FAPA law and mandatory arrest, and that the Oregon criminal code provided an enhanced penalty for assaults against family members. Case was remanded to Appeals Board for further proceedings.

Majka v. Maher, 192 Or. App. 173 (2004)

At hearing in which Respondent contested FAPA restraining order, undisputed evidence that Respondent assaulted Petitioner causing injury, for which Respondent was immediately arrested, and threatened both Petitioner and her husband, implying he had found someone to kill them, satisfied requirements for continuation of the restraining order.

Frady v. Frady, 185 Or. App. 245 (2002)

Although the trial court erred in taking judicial notice of the contents of the return of service of the restraining order, this error was harmless, as the document was otherwise admissible under OEC 803(8)(b). Because service of the order and the reporting of that service were routine, non-adversarial matters, the exclusion from the official records exception for

matters observed by police officers was inapplicable. Based on the return of service, the trial court was entitled to find beyond a reasonable doubt that Defendant was served with the restraining order and to infer that Defendant's violation of the order was knowing.

Strother v. Strother , 177 Or. App. 709 (2001)

A minor applying for a FAPA restraining order must meet the criteria set out in ORS 107.726. A twelve-year-old child requesting a FAPA restraining order (through his mother as guardian ad litem) against his father for alleged physical abuse does not meet the criteria set out in 107.726.

State v. Bachman, 171 Or. App. 665 (2000)

Prosecution for violation of a restraining order must take place in the county that issued the restraining order. In this case, Defendant was subject to a restraining order issued by the Multnomah County Court. Defendant violated the order in a different county. The issuing county asserted venue for the prosecution, and Defendant appealed the denial of his motion to dismiss for improper venue.

The Court of Appeals decided the case on statutory construction and on state constitutional grounds, and affirmed the trial court's decision. The Court held that the sanctions for contempt are to provide legal teeth for enforcement of court orders and not to replace criminal sanctions. Criminal contempt is not a criminal prosecution within the meaning of Article I, Section II of the Oregon Constitution. Contempt is a violation of a court order, and the court that issued the order has the power to impose sanctions upon the defendant for violations.

State v. Ogden, 168 Or. App. 249 (2000)

Expert testimony concerning battered women's syndrome (BWS), offered to buttress victim's credibility by providing an alternative explanation for her behavior in continuing to see defendant, was irrelevant and inadmissible in prosecution for coercion, where state did not establish that victim *herself* suffered from BWS.

LeFebvre v. LeFebvre, 165 Or. App. 297 (2000)

The "totality of the circumstances" may be considered in support of Petitioner's assertion that Respondent has recklessly placed her in fear of imminent serious bodily injury and that she is in immediate danger of further abuse. "Remote" behavior (behavior which took place outside FAPA's jurisdictional window) is part of a "factual context" that may be considered in upholding a FAPA order, even if the remote behavior did not consist of physical violence or the threat of violence towards Petitioner.

In this case, the court considered the totality of the circumstances to uphold the issuance of a restraining order even though Petitioner alleged no actual or overtly threatened physical violence on the part of Respondent. The court considered the facts that within the six months preceding the filing of the petition, Respondent had screamed obscenities at Petitioner in child's presence, barricaded Petitioner out of her house, telephoned Petitioner's friends to tell disparaging stories about her, made numerous hang up phone calls to Petitioner's home,

rummaged through Petitioner's possessions, and called her late at night to accurately describe the clothes he observed her wearing as he lurked outside her home. The court considered this information in light of Petitioner's testimony that Respondent had access to guns and that, nine years earlier, Respondent had been obsessed with the idea of killing his former employer.

The court upheld the issuance of the restraining order despite the fact that there was no history of physical or overtly threatened abuse between the parties because the totality of the circumstances and the ominous factual context (taking into account both recent and remote behavior) supported Petitioner's assertion that Respondent had recklessly placed her in fear of imminent serious bodily injury and in immediate danger of further abuse.

Note: Although the Court seemed to consider the remote behavior as relevant to both the issue of whether Respondent placed Petitioner in fear of imminent serious bodily injury *and* to the issue of whether Petitioner was in immediate danger of further abuse, it summed up its decision by saying only that remote behavior was relevant to the issue of whether Petitioner was in immediate danger of further abuse.

Heusel v. Multnomah County District Attorney's Office, 163 Or. App. 51 (1999)

Boyfriend brought claims for false imprisonment and negligence against the district attorney's office after he was arrested on a warrant for violation of a restraining order issued on behalf of his former girlfriend. The warrant was issued by the court upon the deputy district attorney's mistaken representation that the restraining order had not expired at the time of the abuser's purported violation. The victim told the district attorney that the "violation" had occurred just after she had renewed her restraining order. In fact, the victim had not renewed the restraining order. The boyfriend was arrested. The court ruled that the district attorney's applying for a warrant upon the mistaken belief that there had been a violation amounted to an "erroneous exercise of jurisdiction" and not a "total absence of jurisdiction" and therefore did not deprive the district attorney's office of total immunity from negligence and false imprisonment claims brought by Boyfriend.

Boldt v. Boldt, 155 Or. App. 244 (1998)

**** ORS 107.710 (2) (1999) overruled Bolt. The requisite burden of proof is now a preponderance of the evidence. Also see ORS 107.718 (1) (1999) requiring that Petitioner show the imminent danger of further abuse, rather than the previously required "immediate and present danger of further abuse."***

In addition to showing that Respondent "abused" Petitioner within the meaning of the Family Abuse Prevention Act, the Petitioner must show that she is in immediate and present danger of further abuse. This showing must be made by clear and convincing evidence given the extraordinary nature of injunctive relief. Petitioner did not meet this burden where there was no evidence that Petitioner feared a repetition of the conduct in question or that it was part of a cycle of abuse likely to repeat and from which she could not extricate herself.

The facts of this case involved a relationship between a Russian immigrant and a respondent with whom she engaged in physically painful but consensual sexual acts throughout their marriage. In light of the holding on imminent danger, the court declined to address the question of whether and when consensual conduct may constitute abuse under the FAPA statute.

The court stated that it was not prepared to declare that consensual pain-inflicting conduct necessarily constituted abuse, but noted that "notions of consent, agreement, or mutuality must be approached with particular care in domestic contexts" given the "complicated emotional dynamics that preclude free choice and voluntary behavior."

Fogh and McRill, 153 Or. App. 159 (1998)

In this action involving a real estate partnership, the Petitioner's obtaining of a Family Abuse Prevention Act restraining order ousting Respondent from their home constituted breach of that agreement where the Petitioner lacked sufficient cause for the restraining order. (The FAPA order was continued for 60 days at the contest hearing without objection by the respondent and then dismissed by apparent stipulation of the parties.) Regardless of whether the trial court improperly applied claim preclusion by excluding evidence of the facts behind the restraining order, a *de novo* review of the record of the FAPA proceedings supports the conclusion that petitioner lacked sufficient cause for the order and thus materially breached the agreement by the "eviction." Because Respondent incurred motel expenses as a direct result of Petitioner's breach, an award for those damages is proper.

Gerlack v. Roberts, 152 Or. App. 40 (1998)

"No contact within 150 feet" requirement in this restraining order followed language referring to listed types of premises (home, school, business, place of employment, Copperlight bar, etc.) and therefore should not be read as preventing Defendant from coming within 150 feet of Petitioner at *any* location. The provision corresponds to ORS 107.718(1)(g) allowing restraining from entering any premises and reasonable area surround the premises, and contempt can lie only for violation of what the order prohibits. Defendant's conviction for being in video store at same time Petitioner was, when Defendant said nothing to her, did not look or stare at her, left after she did without any contact with her, and did not discuss her presence with his passenger afterward must be reversed. Nor on these facts did Defendant interfere with, menace, or molest Petitioner.

Obrist v. Harmon, 150 Or. App. 173 (1997)

Where vacation of Petitioner's restraining order is due to her failure to appear at the contest hearing, issue preclusion does not bar a subsequent petition based on the same facts. The vacation was not a final decision on the merits of the first petition.

Nor does claim preclusion bar the second petition when defendant does not argue that the order of vacation is a final judgment and no other record from the first proceeding is provided. When the parties' testimony is irreconcilable on the question of whether Respondent struck Petitioner and each party offers witnesses providing some support, the issue turns on the credibility of the parties. Great reliance is placed on the trial court's determination of credibility in this circumstance, even on *de novo* review, and the implicit finding favoring petitioner will not be disturbed on this record.

Exclusion of testimony from Respondent's eight-year-old daughter was error where the Petitioner did not object and the offer of proof indicated the relevance of the evidence in possibly undermining Petitioner's testimony and touching on issues of self-defense.

Cottongim v. Woods, 145 Or. App. 40 (1996)

Expiration of Family Abuse Prevention Act restraining order during pendency of appeal does not render appeal moot when Respondent's career *may* be impaired by the judgment, even if no evidence is offered of actual consequence. Respondent was a second year law student and commissioned military officer; restraining order judgment could call into question his fitness to practice law or be suggestive of unlawful conduct.

Evidence is sufficient to support a FAPA restraining order when Respondent became verbally abusive after consuming alcohol; entered her home against her expressed wishes after they broke up, holding her down on the couch and trying to kiss her, leaving bruises on her arms; telephoned her repeatedly, once stating that he could not live without her and if he were going to die, she should too; stated he would do anything he could to make her life hell; sent her letter stating he despised her and wished her a long, slow, painful death; and harassed her at new boyfriend's home by repeatedly phoning and buzzing the intercom. Reasonable person would be "placed in fear of imminent serious bodily harm" and face an "immediate and present danger of further abuse."

State ex rel Langehennig v. Long, 142 Or. App. 486 (1996)

A Family Abuse Prevention Act restraining order is not a "no contact" order unless a specific term prohibiting contact is included. Mere contact is not otherwise a violation. [Import not discernible from per curiam decision but from State's concession in brief of insufficient evidence].

Nelson v. Nelson, 142 Or. App. 367 (1996)

Under ORS 107.718(8), a party contesting a restraining order is entitled to a full hearing on the merits as provided in Miller v. Miller, 128 Or App 433 (1994). Respondent argued that the court denied her such a full hearing by (1) not allowing her to introduce evidence and (2) by only briefly questioning the husband/petitioner as to the truthfulness of his allegations. However, wife had not made an offer of proof concerning testimony the judge disallowed in an off-record discussion in chambers, and did not clarify this ruling adequately on the record, so the record is insufficient to show error.

Hetfeld v. Bostwick, 136 Or. App. 305 (1995)

Ex-Wife's interference with ex-husband's visitation rights, encouragement of children calling their father by his first name, changing the children's last names, and insulting him did not constitute the tortuous intentional infliction of emotional distress because this conduct aimed at estranging the father from his children is not an "extraordinary transgression of the bounds of socially tolerable conduct." In substantiating the "prevalence of such conduct" by the ex-wife, the court cited the existence of the Family Abuse Prevention Act. If there is a statute, which responds to such conduct, the court reasoned that the conduct must not be that outrageous.

Pearson and Pearson, 136 Or. App. 20 (1995)

Court's failure to warn alleged restraining order contemnor of the risks and difficulties of self-representation warrants reversal of contempt adjudication.

Strother and Strother, 130 Or. App. 624 (1994)

An order entered after a twenty-one-day hearing under the Family Abuse Prevention Act is appealable. The standard of review is de novo.

"Immediate danger" can be proven by respondent's calling victim "incredibly stupid" where similar statements usually preceded battering during the marriage. It was not error to hold the hearing more than 21 days after the Respondent's request where he had affidavited the judge, his attorney was unavailable for numerous alternate hearing dates, and the Respondent did not object to the delay before or during the hearing.

Even though unsupervised visitation was ordered in a California divorce, monitored contact may be ordered in a Family Abuse Prevention Act case where police contact, alcohol, and the child's fears are present. (Decision did not mention any UCCJA issues and instead summarily stated that the FAPA statute gives the court the power to order temporary visitation.)

Miller and Miller, 128 Or. App. 433 (1994)

Contested hearings under the Family Abuse Prevention Act are similar to trials and parties have the right to be heard and have legal and factual issues determined. A respondent must be allowed to call witnesses.

(The opinion rejects without discussion two other assignments of error made by Respondent, the substance of which are identifiable only from the briefs: (1) abuse occurring before 180 days may not be considered in evaluating current fear and (2) a protective order prohibiting the deposition of the Petitioner was error.)

State v. Delker, 123 Or. App. 129 (1993)

Double jeopardy is not implicated after contempt adjudication (for presence at Petitioner's residence) is followed by criminal prosecution for arson. The charges have different elements and are not part of a continuous, uninterrupted course of conduct.

Pyle and Pyle, 111 Or. App. 184 (1992)

Under former contempt statutes, a defendant in Family Abuse Prevention Act contempt waives objections to imprecise allegations in the show cause affidavit when he neither demurs under ORS 135.610 nor moves to make them more definite and certain.

If a court of equity has subject-matter jurisdiction and personal jurisdiction over the parties, it may mandate or prohibit actions inside or outside the state. Thus telephonic harassment initiated when both the Petitioner and Respondent were out of state was properly enjoinable and thus properly contemptible.

Pefley v. Pefley, 107 Or. App. 243 (1991)

Under the former contempt statutes, contempt orders entered in Family Abuse Prevention Act cases must be vacated when the trial court failed to make findings of the defendant's bad faith.

State v. Stolz, 106 Or. App. 144 (1991)

The violation of a restraining order (for failure to leave premises) and resisting arrest are not the "same criminal episode" within the meaning of ORS 131.515(2), which bar two prosecutions the "same act or transaction."

State ex rel Emery v. Andisha, 105 Or. App. 473 (1991)

A father who telephones his 14-year-old step-son to tell him the mother/petitioner is sick and needs mental help and that the father wants to meet with the boy has acted in violation of a restraining order prohibiting him from molesting, interfering, or menacing the mother and her children. The prohibited conduct is not so vague that a reasonable person could not understand. The plain and ordinary meanings of "molest," "interfere," and "menace" apply.

State ex rel Delisser v. Hardy, 89 Or. App. 508 (1988)

A contempt judgment under Family Abuse Prevention Act must include the statutory basis for it. Former ORS 33.020 does not preclude enhanced penalties for violating a Family Abuse Prevention Act restraining order when the conduct, which constitutes the contempt, occurred before the show cause hearing. To support an enhanced penalty, however, a contempt judgment under the Family Abuse Prevention Act must contain the court's findings of fact respecting defendant's contemptuous conduct that defeated or prejudiced plaintiff's right or remedy.

State v. Steinke, 88 Or. App. 626 (1987)

Police officer, who received report of abuse prevention restraining order violation and saw a car matching the description in the report near the scene of the reported violation shortly after receiving the report, was justified in making an investigative stop of that vehicle.

If a police officer has probable cause to believe that a person has violated an abuse prevention restraining order, that officer is implicitly authorized under ORS 133.31(3) to stop that person, even it's later shown that the restraining order is invalid.

State ex rel Streit v. Streit, 72 Or. App. 403 (1985)

A defendant cannot legally have been in contempt of court unless his violation of a Family Abuse Prevention Act restraining order was willful. Evidence that Defendant was very depressed and anxious about overwhelming personal problems and did not remember contacting his former wife is not sufficient to support a finding that his violation was willful or with bad intent.

Burks v. Lane County, 72 Or. App. 257 (1985)

This case involved the question of whether state law requires a county to appropriate a particular funding level for the sheriff's performance of law enforcement duties. Plaintiff - sheriff cited Nearing v. Weaver, supra, for his position that a "reasonable" level of funding was required by statute. The appellate court found that Nearing was not on point because the specific question in the case at hand did not involve the county's potential liability if its funding decision resulted in injuries attributable to the sheriff's inability to perform his duties.

State v. Smith, 71 Or. App. 205 (1984)

This case involved an appeal from a civil commitment hearing in which the appellant argued that his acute and chronic alcoholism did not constitute a mental disorder within the meaning of civil commitment statutes. The Family Abuse Prevention Act was cited in the opinion's discussion of the factual record below. The Appellant's father had filed for a restraining order under FAPA, which put the appellant out of the home because Appellant repeatedly fought with, hit, and knocked down his elderly father.

UNREPORTED DECISIONS

State ex rel. Evans v. Phillips, Supreme Court No. S50947, ordered 12/17/03. Linn County

Alternative writ of mandamus issued compelling compliance with mandatory ex parte custody provision of FAPA, or show cause for not doing so. Petitioner Danielle Rae Evans had filed a FAPA action alleging that respondent R. C. Phillips, the father of the couple's two minor children, had abused her. Shortly before initiating her action, petitioner had sent the children to live with respondent. Under the statute, upon a showing that a petitioner has been abused by a respondent within 180 days of instigating a FAPA complaint, a court must, if requested by the petitioner, grant the petitioner temporary custody of the parties' children. In this case, although the circuit court found that respondent had abused petitioner, it nevertheless declined petitioner's child custody request.

State ex rel. Wardell v. Abram, Supreme Court #S36430, ordered 9/7/89. Klamath County.

Alternative writ of mandamus issued compelling amendment of ex parte restraining order to award custody of minor child to Petitioner, or show cause with 14 days why such amendment was not made. Defendant judge complied by amending order.

State of Oregon ex rel. v. Allen, Supreme Court No. S31484, ordered 2/28/85. Lane County.

Alternative writ of mandamus issued compelling amendment of Family Abuse Prevention Act ex parte restraining order to require respondent to move from and not return to the marital residence or show cause within 14 days why such amendment was not made. Defendant judge complied by amending order.

Prepared by: Oregon Law Center and Legal Aid Services of Oregon
Updated: July 2016

OREGON STALKING LAW
AND RELATED FEDERAL PROVISIONS

ORS 163.730	Definitions in Stalking Laws
ORS 163.732	Crime of Stalking
ORS 163.750	Crime of Violating Stalking Protective Order
ORS 163.735-744	Police Citation and Court Issuance of Stalking Protective Order
ORS 30.866	Civil Action for Stalking Protective Order
ORS 133.310 (3)	Mandatory Arrest for Violation of Stalking Protective Order
ORS 166.293 (3)-(6)	Revocation of Handgun License for Violation of Stalking Protective Order
18 U.S.C. §922(d) and (g)	Federal Prohibition Against Purchase or Possession of Firearms or Ammunition by Stalking Order Respondent

OVERVIEW

The basic statutory schemes for stalking protective orders are set forth in two separate areas of the Oregon statutes. ORS 30.866 provides authority for a petition to obtain a stalking protective order via an *ex parte*, civil-petition process. ORS 163.730-163.755 provide authority for issuing a stalking protective order after a law enforcement officer has issued a citation as a result of a citizen complaint. The citation does not charge a defendant with the crime of stalking under ORS 163.732 or prohibit contact but rather initiates a process that can lead to a court-issued stalking protective order.

Note that ORS 30.866(2) and (11) cross reference ORS 163.730 and ORS 163.742–statutes that are part of the officer citation process. Under ORS 163.732, stalking is a crime. While significant overlap exists, the elements for the crime of stalking differ slightly from those required for issuance of a stalking protective order. The mandatory arrest statute, ORS 133.310(3), applies to violations of stalking protective orders. Violation of a Court's Stalking Protective Order is a Class A Misdemeanor or a Class C Felony if the respondent has a prior conviction for Stalking or Violating a Court's Stalking Protective Order. ORS 163.750(2).

A summary of Oregon appellate stalking cases follows this outline and review of the summaries

is essential, as these cases are very fact-specific. The vast majority of these cases involve the issuance of civil stalking protective orders. **These cases make clear that the trial court record must contain facts that support each element of a claim for a stalking protective order to survive reversal.** Finally, Chapter 4 of the OSB Family Law BarBook at §4.9 provides an additional and more in-depth explanation and analysis of Oregon's stalking laws.

I. CRIME OF STALKING

A. ELEMENTS OF THE CRIME. ORS 163.732.

(Many of the cases cited in this section involve review of civil stalking protective orders.)

1. Knowingly

   "Knowingly" or with knowledge, when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists. ORS 163.085(8).

2. Alarms or coerces
   a. "Alarm" means causing apprehension or fear resulting from the perception of danger
   b. "Coerce" means restraining, compelling, or dominating by force or threat

   ORS 163.730(1) and (2).

3. Another person or member of that person's immediate family or household
   a. "Immediate family" means father, mother, child, sibling, parent, spouse, grandparent, stepparent, and stepchild. ORS 163.730(5).
   b. "Household member" means any person residing in the same residence as the victim. ORS 163.730(4).

4. By engaging in **repeated and unwanted contact** with the other person
   a. "Repeated" means two or more times. ORS 163.730 (7); *State v. Jackson*, 259 Or App 248 (2013).
   b. Whether a contact is "unwanted" may be determined by considering all contacts in the context of the relationship between the parties. *See Tumbleson v. Rodriguez*, 189 Or App 393 (2003) (contact not unwanted when petitioner's mother, not petitioner, told respondent to stop calling petitioner or when Petitioner told respondent to leave but changed his mind and agreed she could stay the night); *Jones v. Lindsey,* 193 Or App 674, 680 (2002) (voluntary contacts not "unwanted" within meaning of stalking statute); *Wayt v. Goff*, 153 Or App 357 (1998) (contacts not unwanted when petitioner initiates them).
   b. "Contact" includes, but is not limited to:
      (1) Coming into the visual or physical presence of the other person

(2) Following the other person
(3) Waiting outside the home, property, place of work or school of the other person or a member of that person's family or household
(4) Sending or making written or electronic communications in any form to the other person
(5) Speaking with the other person by any means
(6) Communicating with the other person through a third person
(7) Committing a crime against the other person
(8) Communicating with a third person who has some relationship to the other person with the intent of affecting the third person's relationship with the other person
(9) Communicating with business entities with the intent of affecting some right or interest of the other person
(10) Damaging the other person's home, property, place of work or school, or
(11) Delivering directly or through a third person any object to the home, property, place of work or school of the other person

ORS 163.730 (3)(a-k).

This list is not exclusive. *Boyd v. Essin*, 170 Or App 509, 512-13 (2000).

5. When it is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact, ORS 163.732(1)(b), the element of "alarm" may be inferred from the petitioner's testimony in some circumstances. *See Soderholm v. Krueger*, 204 Or App 409 (2006) (nature of the contacts and the history of the relationship between respondent and petitioner and her family did not give rise to inference of alarm); *Boyd v. Essin*, 170 Or App 509, 517-518 (2000) (subjective alarm inferred); *Cress v. Cress*, 175 Or App 599, 601-602 (2001) (subjective alarm not inferred). Alarm or coercion cannot be inferred when there is no testimony to that effect. *See Travis v. Strubel*, 238 Or App 254 (2010).
6. The unwanted contact causes the victim reasonable apprehension regarding her personal safety or that of her immediate family or household members. ORS 163.732(1)(c*). J.L.B. v. Braude/K.P.B.*, 250 Or App 122 (2012) (because parties were not strangers to each other and were required to communicate periodically about parenting time and financial matters, seeing the respondent drive past would not have caused a reasonable person in petitioner's position to feel apprehension for her personal safety).
7. In both the criminal and civil context, Oregon case law has established that **expressive or communicative contacts** must meet a more stringent standard than what is set out in the statute, because speech is protected under Article 1, section 8 of the Oregon Constitution. The standard was enumerated first in *State v. Rangel*, 328 Or 294 (1999). The *Rangel* test requires proof that threats or contacts that involve expression: a) instill a fear of imminent and

serious personal violence; b) are unequivocal; and c) are objectively likely to be followed by unlawful acts. Numerous appellate cases have applied the *Rangel* test. *See e.g., C.J.L. v. Langford*, 262 Or App (2014); *State v. Sierzega*, 236 Or App 630 (2010); *Swarrington v. Olson*, 234 Or App 309 (2010); and *Putzier v. Moos*, 193 Or App 290 (2004). An objective standard applies to the court's determination of whether the respondent intended to carry out a threat. *See V.A.N. v. Parsons*, 253 Or App 768 (2012).

a. In a line of cases involving issuance of stalking protective orders, the Court of Appeals has held that expressive contacts may be considered contextually for purposes of determining whether other non-expressive contacts support issuance of an order. *Christensen v. Carter/Bosket*, 261 Or App 133 (2014); *Castro v Heinzman*, 194 Or App 7 (2004)

b. Contacts that involve both speech and coming into a person's visual presence or other contacts listed in ORS 163.370 are not purely communicative. The act of e-mailing and calling, regardless of content, may still alarm the victim even if it does not meet the higher standard for expressive contacts. *State v Maxwell*, 165 Or App 467 (2000); *Smith v DiMarco*, 207 Or App 563 (2006); *Habrat v. Milligan*, 208 Or App 229 (2006).

B. CLASSIFICATION. ORS 163.732 (2)

1. Class A Misdemeanor
2. Class C Felony if prior conviction for:
   a. Stalking
   b. Violation of court's stalking protective order
3. When a Class C Felony, stalking is a "person felony" and "crime category 8" under sentencing guidelines.

II. CIVIL REMEDIES -- OFFICER'S CITATION TO APPEAR IN COURT

A. ISSUANCE OF OFFICER'S CITATION

1. Complaint is presented by any person to any law enforcement officer or agency. ORS 163.744 (1).
   a. Complaint must affirm truth of facts stated, but a parent may petition to protect child, and a guardian may present a complaint to protect a dependent person. ORS 163.744(1) and (3).
   b. The Oregon State Police must develop and distribute the complaint form, in substantial conformity with the statute, and include in it "standards for reviewing the complaint and for action". ORS 163.744(2).
2. Issuance is *required* when the officer has probable cause to believe that:
   a. The respondent has intentionally, knowingly, or recklessly engaged in repeated [at least twice] and unwanted contact with another person or a member of that person's immediate family or household thereby alarming or coercing the other person; and

b. It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and
c. The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household. ORS 163.735(1).

3. An officer acting in good faith has immunity in civil actions for issuing and failing to issue a citation to appear in this context. ORS 163.753.
4. Results from any investigation must be reported to the District Attorney within three (3) days after the complaint is presented. ORS 163.738(7).

B. THE CONTENT OF THE OFFICER'S ORDER

1. The form of the citation must be uniform statewide and developed by the Oregon State Police in conformity with statutory minimums. ORS 163.735(2).
2. The citation must include:
   a. A copy of the stalking complaint
   b. Information regarding the date, time, and place the respondent must appear in circuit court for a hearing on whether a court's stalking order of unlimited duration should be entered
   c. Notice of the issuing officer's name, and the date, time, and place the citation was issued
   d. Notice that if the respondent fails to appear at the circuit court hearing, an arrest warrant will issue and a judicial stalking order will be entered. ORS 163.738(1).
3. The statutory form for the citation also includes notice that it has been alleged that respondent has alarmed or coerced the petitioner and if engaged in, will subject the respondent to arrest for the crime of stalking and further includes notice that certain federal laws relating to crossing state lines for certain purposes and possessing firearms may apply. ORS 163.735(2).
4. The officer must notify the complainant in writing of the date, time and place of the hearing. ORS 163.738(1)(b),

C. COURT HEARING ON OFFICER'S CITATION

1. The hearing must be held by the third judicial day from issuance. The court may allow a continuance for up to 30 days. ORS 163.738(2)(a); ORS 163.735(1).
2. The petitioner may appear in person or by telephone. ORS 163.738(2)(a). The respondent must appear in person; if he does not, an arrest warrant and a stalking protective order must issue. ORS 163.738(4).
3. At the hearing, the court:
   a. May enter temporary stalking protective orders pending further proceedings. ORS 163.738(2)(a)(A).
   b. May enter a stalking protective order of unlimited duration if the

court finds by a preponderance of the evidence that the respondent has engaged in stalking (see II.A.2. a-c above; see also II.A.7. above regarding expressive contacts). ORS 163.738 (2)(a)(B).

c. In the order, the court must specify the conduct from which the respondent is to refrain and may include all contact listed in ORS 163.730 and any attempt to make contact listed in ORS 163.730. ORS 163.738(2)(b).
This list is not exclusive. *Boyd v. Essin*, 170 Or App 509, 512-13 (2000).

d. May order the respondent to undergo a mental health evaluation, and if the evaluation indicates, treatment.
   (1) The court must refer the respondent to county mental health if the respondent is unable to pay for evaluation, treatment, or both. ORS 163.738(5).
   (2) Civil commitment procedures must be initiated on probable cause that respondent is dangerous to self or others or is unable to provide for basic personal needs. ORS 163.738(6).

e. If the respondent had notice and an opportunity to be heard, the court is required to include in the order, when appropriate, terms sufficient to restrict the respondent's ability to possess firearms under 18 U.S.C. §922(d)(8) and 18 USC §922(g)(8). ORS 163.738(2)(b). See discussion at III.K. below.

4. Except for purposes of impeachment, a statement made by a respondent at a hearing under ORS 163.738 may not be used to prosecute the crime of stalking or violation of a stalking order. ORS 163.738(8).

III. CIVIL REMEDIES -- INDEPENDENT ACTION FOR STALKING PROTECTIVE ORDER UNDER ORS 30.866

A. PETITIONER - Any person may petition for a court's stalking protective order or damages, or both. ORS 30.866(1). A relationship, familial or otherwise, between the respondent and the person to be protected is not required.

B. ELEMENTS OF THE CLAIM - The same as for issuance of an officer's citation (*see* II.A.2.(a-c) regarding statutory elements and II.A.7. regarding expressive contacts above). ORS 30.866(1).

C. FEES - No court or service fees can be charged. ORS 30.866(9).

D. TEMPORARY RELIEF - When a petition is filed, a court that finds probable cause of stalking based on the petitioner's allegations at an ex parte hearing, *must* enter a temporary stalking protective order. The petition and temporary order are served on the respondent along with an order to appear to show cause why the

temporary order should not be continued for an indefinite period. ORS 30.866(2).

E. SHOW CAUSE HEARING

1. Whether or not the respondent appears, the court may grant a 30-day continuance or enter a protective order and take other action available at hearings on officer's citations. ORS 30.866(3)(a); ORS 163.738. *See* II.C.3. above.
2. If the respondent fails to appear, the court may issue an arrest warrant. ORS 30.866(3)(b).

F. OTHER RELIEF - The petitioner may recover specific and general damages (including damages for emotional distress), punitive damages, and attorney fees and costs. ORS 30.866(4). Respondents are entitled to a jury trial on any claims for damages. *M.K.F. v. Miramontes*, 352 Or 401 (2012).

G. MINOR RESPONDENTS - The court may enter an order against a minor respondent without appointment of a guardian ad litem. ORS 30.886(5).

H. STANDARD OF PROOF - The petitioner must prove his or her case by a preponderance of the evidence. ORS 30.866(7).

I. STATUTE OF LIMITATIONS - The petition must be filed within two (2) years from the time the claim arose (i.e., from when the conduct occurred). ORS 30.866(6).

J. CUMULATIVE REMEDY - The protective order and damages available are *additional* to any other civil or criminal remedies the law provides for the respondent's conduct. (FAPA relief is available at the same time.)

K. FIREARMS POSSESSION- If the respondent had notice and an opportunity to be heard, the court is required to include in the order, when appropriate, terms sufficient to affect the respondent's ability to possess firearms under 18 U.S.C. §922(d)(8) and 18 USC §922(g)(8). ORS 30.866(10). 18 USC §922(g)(8) makes the possession of firearms by respondents who are subject to a qualifying court order a federal crime. Certain stalking protective orders are qualifying court orders.

1. For an explanation of the elements of a qualifying court order, see the "Qualifying Order of Protection/Restraint" (Federal Firearms Prohibitions – Oregon Benchsheet) at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx

2. The purpose of the requirement that the court include terms in the order is to ensure that respondents are apprised that they may be subject to the federal prohibition and to make it easier to identify disqualified

firearms purchasers under the Brady Handgun Violence Prevention Act. A firearms certification is incorporated in the model stalking protective order form that can be found at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Stalking.aspx

3. For more information about federal firearms laws that protect victims of domestic violence, see the OJD publication, "Firearms Prohibitions in Domestic Violence Cases: A Guide for Oregon Courts" at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx

L. LIMITATION ON USE OF RESPONDENT STATEMENTS - Except for purposes of impeachment, a statement made by a respondent at a hearing under ORS 30.866 may not be used to prosecute the crime of stalking or violation of a stalking order. ORS 30.866(12).

M. FORMS – Model stalking protective order forms are available at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Stalking.aspx

IV. SERVICE/ENFORCEMENT/TERMINATION OF STALKING PROTECTIVE ORDERS

A. SERVICE

Service on the respondent is by personal delivery of a copy of the order unless the order notes that the respondent has appeared in person before the court. ORS 163.741(1).

B. ENTRY INTO LEDS AS STATEWIDE NOTICE TO ALL LAW ENFORCEMENT

The person who serves a stalking order must deliver a true copy of the order and a proof of service to the county sheriff, as with Family Abuse Prevention Act Restraining orders, for entry into the Law Enforcement Data System (LEDS) and the database of the National Crime Information Center (NCIC) of the U.S. Department of Justice. Entry of the order into LEDS constitutes statewide notice of the order to all law enforcement agents. County sheriffs are required to cooperate with law enforcement agencies in other jurisdictions who request verification of or copies of existing orders. When a stalking protective order is terminated, the court must send the order to the county sheriff, and the county sheriff must immediately remove the original order from LEDS. ORS 163.741; ORS 30.866(11).

C. VIOLATION OF STALKING PROTECTIVE ORDER and MANDATORY ARREST

A peace officer *must* arrest and take a respondent into custody without a warrant when the officer has probable cause to believe:

1. A stalking protective order exists (whether it is the court's order subsequent to an officer's citation or an order resulting from an independent civil action);
2. A true copy of the order and proof of service has been entered into LEDS; and
3. The respondent has violated the terms of the order. ORS 133.310(3).

D. VIOLATION OF STALKING PROTECTIVE ORDER -- CRIMINALIZED

1. Violation of a court's stalking protective order is a crime. ORS 163.750
2. Elements:
   a. Intentionally, knowingly, or recklessly engaging in conduct prohibited by the court's stalking protective order after service of the order; and
   b. If the prohibited conduct is communicating or speaking with a protected person, even through a third party, or with a business entity, the conduct must have created reasonable apprehension regarding a protected person's personal safety. ORS 163.750 (1). When relying on expressive contact violations, the state is *not* required to present evidence of "an unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm," as required by *State v. Rangel,* 328 Or 294 (1999). Rather, the *Rangel* standard is only applicable at the time the underlying stalking protective order is obtained. *State v. Ryan*, 350 Or 670 (2011)
3. Classification -- Class A Misdemeanor, except is Class C Felony if prior convictions exist for stalking or violation of stalking orders. As Class C felony, stalking is a "person felony" and "crime category 8" under sentencing guidelines. ORS 163.750(2).

E. VIOLATION OF STALKING PROTECTIVE ORDER - HANDGUN LICENSE REVOCATION

Violation of a condition of a stalking order by a licensee subject to the order is cause for revoking a concealed handgun license. ORS 166.291 and 166.293.

F. TERMINATION OF STALKING PROTECTIVE ORDERS

The issue of whether stalking protective orders were permanent or subject to modification or termination had been a topic on which there was disagreement among the bench and bar. In *Edwards v. Biehler*, 203 Or App 271 (2005**),** the

Oregon Court of Appeals addressed for the first time the issue of whether a stalking protective order can be terminated. The Court of Appeals held that a court may terminate a stalking protective order under ORS 163.741(3). Such orders allow for termination by the court when, "on the respondent's motion, a court finds that the criteria for issuing the order under (the statute) are no longer present." In such situations, courts' inquiries shall focus on "whether petitioner continues to suffer 'reasonable apprehension' due to the past acts of the respondent under ORS 163.738(2)(a)(B)(iii)." *See also Stuart v. Morris***,** 231 Or App 26 (2009***)***; *Benaman v Andrews***,** 213 Or App 467 (2007).

V. EXEMPTIONS FROM STALKING REMEDIES/PROSECUTION

Stalking provisions are not intended to permit prosecutions for, or civil orders against, activities permitted by federal and state labor laws. ORS 163.755(1)(a). *But see, State v. Borowski*, 231 Or App 511 (2009) voiding similar exemption for activities connected with a "labor dispute" in ORS 164.887. Stalking orders cannot be obtained by persons who are in law enforcement custody or by anyone against certain law enforcement personnel acting within the scope of their duties. ORS 163.755.

DECISIONS FROM THE OREGON APPELLATE COURTS CITING OREGON STALKING LAW

(through September 2016)

Oregon Supreme Court

L.E.A. v. Taylor, 279 Or. App. 61 (2016)

Respondent appealed, claiming that the trial court erred in denying his motion to set aside a stalking protective order.

Respondent was never served the petition or the notice of that a temporary SPO had been entered, and he had not no notice regarding the hearing. Neither party appeared and the court entered a final SPO and judgement. Respondent filed a motion to set aside the final SPO, asserting that ORS 30.866(2) required service of the petition and temporary order on the respondent. He also asserted that entering the order without notice violated his due process rights. The lower court denied respondent's motion.

The Oregon Court of Appeals reversed and remanded. It found that entry of the final SPO was improper without service of the petition and temporary SPO. The court agreed with the respondent's argument on appeal that the court lacked personal jurisdiction to enter the final order without service.

M.K.F. v. Miramontes, 352 Or. 401 (2012)

Plaintiff filed a civil action pursuant to ORS 30.866, which authorizes issuance of a stalking protective order (SPO) as well as claims for compensatory damages and reasonable attorney fees. Over defendant's objection, the trial court conducted the trial on all three claims without a jury. Defendant did not seek review in the Supreme Court of the part of the trial court's order awarding attorney fees. The Supreme Court reversed the Court of Appeals determination on the claim for compensatory damages, holding that defendant was entitled to a jury trial on this claim. The court remanded the case to the trial court for a jury trial on plaintiff's claim for compensatory money damages.

State v. Ryan, 350 Or. 670 (2011)

Overturned Court of Appeals' decision in *State v. Ryan*, 237 Or.App. 317 (2010) (see below). Defendant had violated a stalking protective order by contacting victim through a third party and was found guilty at a jury trial. Defendant appealed the conviction for violating the order, though he conceded the validity of the underlying protective order. The Court of Appeals held that Article I, section 8, required that ORS 163.750 be judicially narrowed to require "an unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm." The Supreme Court reversed, holding that "because defendant's communications with the victim were already prohibited by the stalking protective order, the state was not required by Article I, section 8, to prove under ORS 163.750 that defendant had communicated an unequivocal threat to the victim." 350 Or. at 672.

The Court held that, because ORS 163.750 punishes a person for violating a valid court order, it is not an unconstitutional limitation on protected speech, nor is it impermissibly vague.

The same principles apply to a violation of a stalking protective order as to a criminal contempt finding; in both instances, a defendant must challenge the underlying order, rather than attacking the court's finding of a violation of that order.

Any restriction on defendant's speech rights occurred at the time of trial, when defendant was subjected to a stalking protective order that barred him from communicating with the victim. Because ORS 163.750 does not reach any speech not otherwise prohibited by a lawful order, a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds first must successfully attack the underlying stalking protective order.

Delgado v. Souders, 334 Or. 122 (2002)

Affirmed lower court's decision in *Delgado v. Souders*, 146 Or. App. 580 (1997) (see below*)*. The procedures set out in ORS 30.866 for obtaining a stalking protective order fall within an historical exception to Or. Const. Art. I, § 11, and, therefore, cannot be characterized as a "criminal prosecution" within the meaning of that provision. The respondent is thus not entitled to the constitutional safeguards set out in that provision, such as the right to a jury trial. The only "penalty" that results from ORS 30.866 is the entry of a stalking protective order that restricts a respondent from contacting the protected person. Such an order, by itself, cannot be considered a punishment that is criminal in nature for purposes of Or. Const. art. I, § 21. Consequently, a vagueness challenge under art. I, § 21 is without foundation.

The context of the stalking statutes as a whole demonstrates that prohibitions on contact must relate to the type of contact that gave rise to the entry of a stalking protective order in the first instance. The means of achieving the legislative purpose of preventing the commission of certain crimes set out in ORS 30.866(2), (3)(a), and ORS 163.730(3)(a) are sufficiently narrowly drawn so as to satisfy the Due Process Clause.

State v. Rangel, 328 Or. 294 (1999)

The court affirmed the lower court's decision in *State v. Rangel*, 146 Or App 571 (1997). (See below). As construed, ORS 163.732 was not facially overbroad under Or. Const. art. I, § 8, because under ORS 163.732, a contact based on communication is limited to threats that instill in the addressee a fear of imminent and serious personal violence, are unequivocal and unambiguous and are objectively like to be followed by unlawful acts.

In order to fall under activity proscribed by ORS 163.732, a threat must convincingly express to the addressee the intention that it will be carried out and that the actor has the ability to do so. Communications that reflect hyperbole, rhetorical excesses and impotent expressions of anger or frustration are excluded. This construction eliminated overbreadth while maintaining reasonable fidelity to the legislature's words and apparent intent. Similarly, when the court construed ORS 163.732 to require a genuine threat and intent to carry out the threat, the statute was not facially overbroad under the U.S. Constitution.

Oregon Court of Appeals

N.M.G. v. Jeffrey Scott McGinnis, 277 Or. App. 679 (2016)

Petitioner filed petition for stalking protective order (SPO) against respondent who was one of her customers when she worked as a lingerie model for individual customers. Respondent sent petitioner text messages and voice messages, to which petitioner never responded. Respondent appealed the trial courts entry of SPO, disputing trial courts basing the protective order on the text and voice messages which were constitutionally protected speech. The Court held that to establish the basis for a stalking protective order, speech-based contacts must be threats that instill a fear of imminent and serious personal violence that is objectively likely to be followed by unlawful acts. *See State v. Rangel*, 328 Or. 294 (1999). Since the messages were too ambiguous and could not be objectively construed to cause fear of imminent bodily harm, the Court reversed the trial court.

King v. W.T.F., 276 Or. App. 533 (2016)

Petitioner and Respondent were in a three-year romantic relationship while they were married to other people. After the relationship ended, they continued to be friends until late December of 2013 when Petitioner instructed Respondent via text message to cease contact with her. Subsequent to that request, Respondent continued to contact Petitioner via email, text, social media, and letters. During April of 2014, Petitioner received flowers she believed to be from Respondent. Around this time, Respondent was also viewing Petitioner's online dating profile daily. In August of 2014, Respondent accepted a job in the city where Petitioner lived. The two had several encounters at Starbucks.

On Petitioner's birthday, she arrived at Starbucks with her son. Respondent was sitting alone at a table and left without making eye contact with Petitioner. On her way out, Petitioner saw a card with her name on it and a bag of coffee. The card was signed by several Starbucks employees who worked at different Starbucks locations. Later that day, Petitioner filed for an SPO.

At the SPO hearing Petitioner testified that while Respondent never threatened her, she believed Respondent to be "capable" of hurting her. The trial court found that "an unwanted sexual relationship by definition is a danger to one's personal safety" and granted the SPO. The appellate court reversed, holding that Petitioner's fear for her personal safety was not objectively reasonable. The court stated that in the absence of inherently threatening contacts, something more must be present in order to justify issuance of an SPO. The court acknowledged that while Respondent had engaged in a series of unwanted contacts with Petitioner, there was no basis for finding that Respondent's behavior caused Petitioner objectively reasonable fear for her safety.

A.M.M. v. Hoefer, 269 Or. App. 218 (2015)

Petitioner and Respondent dated for several months before Petitioner broke off the relationship. Within about a month, Respondent had returned items to Petitioner that he had in his possession and set up a fake Facebook profile under the name "Shauna Blaze." Posing as Shauna Blaze, Respondent began a correspondence with a male friend of Petitioner. The male friend had invited "Blaze" to a nightclub where Petitioner was. In the nightclub, Respondent called Petitioner a "whore" and Petitioner asked for security, who asked Respondent to move

away from Petitioner. Petitioner testified that as she was leaving, Respondent followed behind "saying things trying to cause a disturbance." Later that morning, Respondent entered Petitioner's yard and took back the items he had returned to her. Also on that morning, Respondent sent five emails to one friend of Petitioner's, and a few other emails to an acquaintance of Petitioner's asking where Petitioner had been on New Year's Eve. Petitioner noticed that evening the items were again returned, this time placed at the end of her driveway.

Four days later Petitioner filed for an SPO. At the hearing on February 11, Petitioner testified that Respondent had continued to contact her friends "in order to to find out what I am doing or even like what [I] was doing."

On appeal, Respondent contends that his communications with Petitioner's friends and his communication with Petitioner at the nightclub do not constitute threats. The court agreed, saying that the communications amounted to little more than hyperbole, rhetorical excesses, and expressions of impotent frustrations. As to the contacts regarding the taking and leaving of Petitioner's personal items and the contact at the nightclub, the court found that those contacts were not sufficient to cause Petitioner objectively reasonable alarm or apprehension regarding her personal safety or the safety of her children. Reversed.

R.M.C. v. Zekan, 275 Or. App. 38 (2015)

Respondent appealed a SPO Petitioner obtained following instances where Respondent paced back and forth in front of Petitioner's restaurant in a rat suit. Petitioner, who had an SPO against Respondent's father, contended that Respondent had "picked up where his father left off in pursuit of closing down [her] business" and to that end, donned a rat suit and paced out in front of Petitioner's restaurant. Respondent did not deny Petitioners allegations; Respondent confirmed that it was something he did on four consecutive days for 30 minutes to three hours each day.

The court found that while Respondent's behavior was bizarre, the evidence did not support the issuance of the SPO because Petitioner did not have subjective apprehension in response to Respondent's behavior. The court held that in order to affirm the issuance of an SPO, there has to be a finding of repeated and unwanted contacts that cause subjective apprehension regarding personal safety or the personal safety of a member of one's immediate family or household, or that any such apprehension would be objectively reasonable. Further, the court found that the trial court proceeded as though Petitioner's allegations in her Petition were in evidence and unless a Respondent admits a petitioner's allegations at the SPO hearing, the allegations in a petition are not in evidence.

S.J.R. v. King, 272 Or. App. 381 (2015)

Petitioner and Respondent were co-workers who attended the same church and knew each other for approximately 5 years before Petitioner filed a SPO. Around August 8 or 9, Respondent sent Petitioner suggestive text messages and Petitioner sent back several messages asking Respondent to stop contacting her. Petitioner also asked for her house key back, which Respondent had to let Petitioner's dogs out while she was out of town. In response to the text messages from Petitioner, Respondent left several voice messages. One message said that Respondent was at Petitioner's home and would not leave until she came there. Petitioner was alarmed by the messages and went to a police station. A police officer contacted Respondent and told him that his actions toward Petitioner were unwanted, and that Respondent would be arrested for telephonic harassment if he made any more efforts to contact Petitioner.

On August 12, Petitioner saw Respondent at church, but they did not communicate. On August 13, Respondent texted Petitioner. On that day, Respondent was arrested for telephonic harassment and Petitioner filed for a permanent SPO.

The court held that under *Rangel,* Respondent's communications were not threats because they did not "instill in the addressee a fear of imminent and serious personal violence from the speaker"; they were not "unequivocal"; and were not "objectively likely to be followed by unlawful acts." The court found that the communication contained no evidence of a threat "so unambiguous, unequivocal, and specific to the addressee that it convincingly expresses *to the addressee* the intention that it will be carried out" and that the speaker has the ability to carry out the threat. Additionally, the court found that Respondent's actions at the church were insufficient to give rise to objectively reasonable alarm. Because the criteria for issuance of an SPO is at least two qualifying contacts, the court found that they did not need to evaluate the incident regarding Respondent being at Petitioner's home. Reversed.

K.M.V. v Williams, 271 Or. App. 466 (2015)

Approximately one year after Petitioner and Respondent's long term domestic partnership ended, Petitioner filed a lawsuit to divide their property. Approximately two years later, Petitioner filed for a SPO. The first contact alleged in the SPO occurred in September 2010, when the parties were still in a relationship. Petitioner alleged that Respondent struck him in the arm while he was sleeping. A week later, Petitioner learned his arm was broken.

The second contact occurred between 2010 and 2013, when, on several occasions, Respondent parked near Petitioner's workplace and watched him.

The third contact occurred when Respondent made an appointment with a Realtor who was showing the house Petitioner was renting. Petitioner left the house at that time so Realtor could show the home to interested persons, but returned because he was curious as to who was looking at the house. He saw Respondent's car in the driveway, and told Relator and Respondent to leave. Petitioner stepped outside to call the police, and when he returned, Respondent had left. Petitioner testified that he was not concerned for his physical safety until the third contact.

The court found that each contact must independently cause subjective and objective alarm. The subjective component necessitates that the Petitioner must be "alarmed or coerced by the contacts and that the contacts actually cause the petitioner reasonable apprehension regarding his or her personal safety or the personal safety of his or her family." (Quoting *Blastic v. Holm,* 248 Or. App. 414, 418, 273 P.3d 304 (2012)). The court held that the first contact took place outside the required two-year period, and that the second contact did not cause Petitioner subjective alarm. Because two contacts within the two-year period are needed, and neither of the first two contacts were qualifying contacts, the court held it did not need to analyze whether the third contact was a qualifying contact. Reversed.

State v. Meek, 266 Or. App. 550 (2014)

Defendant appealed his convictions for violating a Stalking Protective Order and for contempt of court.

Defendant and the complainant were previously in a relationship. After they separated, defendant sent complainant hundreds of emails and text messages, and once sat outside her house and refused to leave. Complainant sought an SPO which barred specifically defined contacts including "sending or making written communications in any form" to complainant or

"delivering directly or through a third person any object to [her] home, property, place of work or school." Defendant sent complainant a letter 10 months later, and she reported it to the police.

Defendant was originally charged with violating the SPO for sending written communication, but the state later filed an amended information that alleged that he violated it by delivering an "object" to complainant's home through a third party. Defendant argues that the letter is a written communication, which requires the state to prove that it created reasonable apprehension of danger to the protected person, and that complainant and her family had not experienced such apprehension. The trial court found that the letter was an "object" and did not require such proof.

The court concludes that a letter is a "written communication" rather than an "object" and that the state must prove that the complainant had reasonable apprehension regarding her safety. The court finds that allowing the letter to be an "object" and not a "written communication" with it's necessary apprehension elements would render the apprehension element surplus and would allow the state to prove guilt any time they could not prove the apprehension elements. In this case, the state did not prove any reasonable apprehension, so the court of appeals reversed the lower court's verdict.

S.L.L. v. MacDonald, 267 Or. App. 628 (2014)

Respondent was convicted of felony assault for beating and strangling Petitioner. Despite the no contact provision of Respondent's conviction, Respondent continued to contact Petitioner. On at least one occasion, Respondent told Petitioner over the telephone that if she reported him for initiating contact, he would "send his skinhead friends to come take care of [her]" and that Respondent was going to "fuck [her] up."

The court upheld Petitioner's SPO the assault was a qualifying contact. (ORS 163.730(3)(g): committing a crime against another person is a contact.), and the telephonic threats to send Respondent's skinhead friends and "fuck up" Petitioner were also qualifying contacts. The court found that the threats were repeated, credible, knowingly made, caused Petitioner reasonable apprehension regarding her personal safety, and it was objectively likely the threats would be followed by unlawful acts. Further, the court found that the threats were unequivocal and that they threatened imminent serious physical harm to Petitioner. In reviewing the meaning of "imminent" the court made a distinction between "immediate" and "imminent" and concluded that along with Respondent's past conviction for assaulting Petitioner and that Respondent actually knew skinheads from his work release program, the restraining order should be affirmed.

P.M.H., guardian ad litem for M.M.H. v. Landolt, 267 Or. App. 753 (2014)

Petitioner is a 13-year-old child whose guardian ad litem, her maternal grandmother, filed the SPO on her behalf. There is some evidence that Respondent is Petitioner's biological father. Petitioner was removed from her biological mother's care when she was very young and her grandparents adopted her in 2007. Respondent has a history of drug and alcohol abuse, a criminal, and abused Petitioner's biological mother at some point around Petitioner's birth in 1999. Any parental rights Respondent may have had were terminated in 2005.

There were a few contacts between Petitioner and Respondent in 2007 and 2008, including one where Respondent took pictures of Petitioner at a Halloween parade and posted them on his social media page. Petitioner testified she was "very surprised" and "very scared" about the Halloween parade encounter. In 2011, Petitioner and Respondent exchanged some

letters through Petitioner's classmate, but Petitioner originally believed it was the classmate who wrote the letters. Petitioner testified that once she realized it was Respondent, not the classmate, who was authoring the letters, she wished she had never replied to the letters because "if it was him [then] he would hurt me." When Petitioner received a fourth letter, she felt "really alarmed that day."

On Petitioner's 13th birthday, she was contacted by school personnel who said a woman was waiting for her in the school office. It was Respondent's girlfriend who had flowers, perfume, and a card signed "Love, [respondent]." Petitioner sought an SPO a few days later.

The court said that there were two difficulties with Petitioner's argument for an SPO: first, she never tied being "scared and alarmed" by Respondent's behavior to an apprehension for her physical safety; and second, that the record did not show evidence that Respondent had acted aggressively or intimidating, or had threatened Petitioner in any way. Respondent had not been in Petitioner's physical presence since the Halloween parade, several years earlier.

The court held that there was insufficient evidence to support the issuance of the SPO because the legislature has not authorized issuing SPO's for unwanted contact that is unsettling, unusual, or unpleasant. The legislature has authorized issuing SPO's only when the unwanted contacts have caused the petitioner objectively reasonable apprehension for her or her family's personal safety.

W.M. v. Muck 267 Or. App. 368 (2014)

Petitioner is a fourteen-year-old girl. One night, her father contacted the police to complain about Respondent, a neighbor, playing loud music at around 9:00 pm. The next day, Petitioner was playing basketball in another neighbor's driveway when Respondent checked his mailbox, which was near the driveway. Petitioner heard Respondent say over his shoulder that he would call the police on her for making noise by bouncing the basketball. Petitioner then went home. About 20 minutes later, Petitioner returned to the driveway where she had been playing basketball to retrieve some items she had left there. At that time, she overheard Respondent talking on his cell phone. Petitioner testified that Respondent was saying, among other things, "the war was on" and "what goes around comes around." Petitioner said she knew Respondent was talking about her father because of a profane and unflattering term he was using.

The court declined to address all of Respondent's arguments for reversing the SPO, and instead said it was necessary only to conclude that any apprehension regarding the personal safety of Petitioner or an immediate family member or member of household was not objectively reasonable under the circumstances. The court reasoned that a statement of intention to involve the police could prompt many reasonable reactions, but it would not objectively cause Petitioner to fear for her personal safety. As to Respondent talking on his cell phone, the court said that there was no evidence he left his property, made any threatening gestures, brandished any weapons, or even made eye contact with Petitioner. Finally, in reference to an objectively reasonable apprehension for her father's safety, the court said that Petitioner could only reasonably conclude that Respondent meant to make trouble for her father, not that her father's personal safety was in danger. Reversed.

L.M.M. v. Tanner, 265 Or. App. 644 (2014)

The court stated that a detailed discussion of the facts in this matter would not benefit the bench, bar or public. The court reversed a SPO between neighbors finding that the conduct did not satisfy the standards in *Rangel*:

"…[a] communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts…[t]he threat must be so unambiguous, unequivocal, and specific to the addressee that it convincingly expresses *to the addressee* the intention that it will be carried out… and that the actor has the ability to do so…[T]hreats do not include…'the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.'"

K.E.A. v. Halvorson 267 Or. App. 374 (2014)

Petitioner and Respondent divorced in 2009, and Petitioner sought a SPO against Respondent in 2012. The parties agree, despite a somewhat extensive history of contacts, that only three contacts occurred in the two-year period required by ORS 30.866.

The first encounter was in June or July of 2011, when Respondent, who had previously lived in Petitioner's neighborhood, drove in the cul de sac near Petitioner's home. Petitioner described Respondent "weaving again" around the cul de sac and that Respondent did so for "intimidation purposes."

The second encounter took place when Petitioner's husband saw Respondent and Respondent's wife in a car in a neighbor's driveway, but Petitioner's husband and Respondent had no contact at that time.

The third incident occurred when Petitioner's husband took a picture of Respondent's car in another neighbor's driveway for what Petitioner's husband said was documentation purposes to show "what you're [Respondent] doing here." Respondent and Petitioner's husband then had a verbal exchange and Respondent drove away. Three or four minutes later, Respondent was back in the neighbor's driveway and both Petitioner and Respondent had phoned the police. About ten days later, Petitioner sought the SPO.

The court held that any apprehension felt by Petitioner about her own personal safety, the safety of a member of her immediate family, or the safety of a member of her household was not objectively reasonable. The court said that in evaluating the reasonableness of the apprehension, they look at the cumulative effect of the unwanted contacts. Analyzing the contacts cumulatively, the court concluded that Petitioner's apprehension was not objectively reasonable because the first two contacts were relatively innocuous, and the evidence showed that the Respondent had not used threatening language during the third. Based on a lack of evidence that there was objectively reasonable apprehension, the court reversed.

V.L.M. v. Miley, 264 Or. App. 719 (2014)

The Court of Appeals reversed the trial court's granting of a SPO because the unwanted contacts did not cause Petitioner to fear for her personal safety or the safety of an immediate family or household member.

After the parties' divorce, Respondent repeatedly contacted Petitioner by phone, mail, and e-mail and began appearing on Petitioner's street. Respondent also began mailing letters saying horrible things about Petitioner to Petitioner's friends and acquaintances, including her boss. Respondent sent Petitioner a package with a box of condoms and a letter calling Petitioner "a slutty whore." Respondent e-mailed Petitioner telling her he had mailed her a birthday card and a letter. Petitioner did not testify that she was frightened and there was no history of violence or abuse in the relationship. The Court of Appeals held that although the contacts were upsetting and inappropriate, they were not threats. There was no indication that the contacts

caused Petitioner any fear for herself or her family, and nothing to indicate "that any such fear, in context, was objectively reasonable."

E.T. v. Belete, 266 Or. App. 650 (2014)

Petitioner, head priest of a church, resided in the same building as the church meeting hall where congregants gathered after services. A fight erupted between rival factions of the church, one side included Respondent and took issue with Petitioner, and the other side favored Petitioner. Respondent attempted to assault Petitioner while church members defended him. Petitioner did not engage in any physical confrontations. Respondent allowed Petitioner to continue to participate in and attend the church after this incident and attempted formal conciliation. A second incident occurred in the doorway to the petitioner's residence seven months later. Respondent yelled at Petitioner, picked up a 40-gallon plastic garbage can and threw it at Petitioner who was about three feet away. Respondent yelled at Petitioner saying either that the "devil is on you" or that he is "Satan." Respondent also told Petitioner, "You will depart this church either dead or alive." Petitioner obtained a SPO.

Respondent appealed the trial court's entry of a SPO, claiming that Petitioner was not objectively alarmed. Respondent argued that the contacts were merely harassing or annoying. She put forth four reasons to support this argument: (1) the parties knew each other for a number of years preceding the events with no history of violence, (2) the parties' relationship continued at church after the first event, (3) the contacts were related to church politics, and (4) Respondent and Petitioner were not alone during the contacts. Rejecting all four reasons, the Court upheld the SPO, finding Respondent's assaultive acts and statements were sufficient to show Petitioner was objectively alarmed.

C.J.R. v. Fleming, 265 Or. App. 342 (2014)

Respondent appealed the judgment granting Petitioner a permanent SPO. Respondent argued that the court erred in granting the SPO because none of his non-expressive contacts with Petitioner satisfied statutory requirements and that the heightened *Rangel* standard applied to any contacts. The Court agreed that the *Rangel* standard applied to any expressive contacts. However, the Court held that the trial court did not err as there was enough evidence to prove two or more qualifying contacts under ORS 30.866(1). The Court also found that Petitioner was not required to meet the *Rangel* standard because Respondent's non-expressive contacts were sufficient.

One such qualifying contact was when Respondent threw a toy wagon toward Petitioner while yelling at Petitioner and calling her a "bitch." This occurred during a parenting time exchange. A second qualifying contact happened when Respondent lunged at Petitioner and yelled in her face while Petitioner was trying to put her child in her car. The Court held that, though the statements to Petitioner during the contact were insufficient to satisfy Rangel, the nonexpressive conduct, taken "in the context of Respondent's aggressive behavior towards petitioner during their past relationship" when he was physically abusive with her, satisfied the statutory requirements.

C.J.L. v. Langford, 262 Or. App. 409 (2014)

The Court of Appeals reversed the trial court's granting of a stalking protective order (SPO), holding that the evidence at trial was insufficient to support a SPO.

Petitioner and respondent were previously in a romantic relationship and have a son, J. petitioner presented evidence of four separate contacts by respondent. In the first contact, respondent arrived at petitioner's home for a supervised visitation with J. Respondent engaged petitioner in "negative conversation" about J's haircut. She asked respondent to stop and retreated into the garage with J. Respondent followed them, yelling.

The second contact occurred when respondent repeatedly texted petitioner, and threatened to call DHS if she didn't respond. When she didn't respond, he drove by her house and called the police on the home.

The third contact occurred when respondent came to pick up J for a supervised visit. During an argument, respondent advanced towards petitioner and said that he wished she was dead before leaving at petitioner's command.

The fourth contact occurred when respondent issued a missing child report for J and left a voicemail with petitioner threatening to attempt to gain custody if she failed to return his calls in 15 minutes. Petitioner testified that these contacts alarmed her because of past incidents in 2003 and 2004 where respondent physically abused her. She repeatedly asked respondent not to contact her unless it concerned J.

The court considered the second and fourth contacts communicative, and they did not meet Rangel's more stringent requirement that the contact instill fear of imminent and personal violence and is objectively followed by unlawful acts. The court notes that respondent only threatened to use legal methods of ensuring the son's welfare. The court holds that the third incident also doesn't meet the Rangel requirement and that respondent's threat is more like an impotent expression of anger or frustration. The court does not address the first incident because two or more contacts are required.

D.W.C. v. Carter, 261 Or. App. 133 (2014) (consolidated with *Christensen v. Bosket*)

Petitioner appealed the dismissal of his petitions for stalking protective orders (SPOs) against two of his neighbors.

With respect to neighbor Bosket, petitioner presented evidence of two instances: one in which Bosket followed petitioner to his front step and as Petitioner went up the stairs to his condominium unit, Bosket yelled, "Come down here, motherfucker, and I'll show you." The second incident occurred when Bosket forcibly entered petitioner's residence, punched petitioner in the chest, pushed him backwards onto the stairs, and wrapped his hands around petitioner's neck. As he choked petitioner, Bosket yelled at him and addressed him using homophobic slurs. During this incident, the second neighbor, Carter, yelled that petitioner would "pay for what [he's] done" and told Bosket to stop.

The court found that the strangling incident was the only qualifying contact, and affirmed the lower court's dismissal of the restraining order. It found that Bosket's statement at Petitioner's front step did not meet the *Rangel* test for expressive contacts. The statement was only a vague invitation to fight, not an unequivocal threat of imminent and serious personal violence. Although Bosket shook his fist at petitioner, this non-expressive conduct did not give rise to reasonably objective alarm.

As to respondent Carter, Petitioner and his domestic partner, Kirk, were painting a fence outside their condominium when Carter "came out of his garage at a very rapid rate, very aggressively, stormed up to Kirk and started yelling at him" about the paint. Carter clenched his fists violently, leading petitioner to believe that Carter would hit Kirk. Petitioner tried to diffuse the situation, but Carter verbally attacked the couple with homophobic slurs. Later that evening,

Carter was biking on the sidewalk; when he saw petitioner walking there he accelerated towards petitioner, nearly hitting him. On August 12, HOA-contracted tree trimmers arrived outside of Carter's unit. Because Carter he yelled at the workers and petitioner for not getting proper notice of the project. Later that morning, Carter approached petitioner, who was standing in his carport, and started complaining about the HOA and the tree trimming. He said, "when I'm done, you [and Kirk] will be off the [HOA] board * * * by Sunday or you'll be dead."

The court found that at least two of Carter's nonexpressive contacts rise to the level of causing objectively reasonable alarm when considered in context with his use of homophobic slurs and vague expressions of violence. Carter's attempt to run down petitioner with his bike is the first qualifying contact. The court finds that it was objectively reasonable for petitioner to be alarmed for his personal safety. The court also found that when Carter approached petitioner in his carport with clenched fists and angrily yelling, Carter's actions constituted a nonexpressive contact. Although this last incident in isolation might not have met the objectively reasonable alarm requirement, the court analyzed Carter's actions in the context of his expressive contacts using homophobic slurs and expressions of violence.

State v. Jackson, 259 Or. App. 248 (2013)

In this appeal from a conviction for criminal stalking, the Court of Appeals reversed defendant's conviction based on an incident which the state conceded involved expressive speech under *Rangel*. Although there was evidence of a prior incident that may have amounted to a "threat" under *Rangel*, one incident is insufficient to establish the crime of stalking.

N.R.J. v. Kore, 256 Or. App. 514 (2013)

In this case, the trial court had dismissed a petition for a Family Abuse Prevention Act (FAPA) but at the end of the hearing on the FAPA, the trial court issued a stalking protective order (SPO) "[w]ithout any forewarning or an opportunity for respondent to object." The Court of Appeals reversed after noting the relevant statutes and the fact that the petitioner never requested a SPO and held that a circuit court does not have the authority to impose an SPO *sua sponte*.

D.A. v. White, 253 Or. App. 754 (2012)

This case involved a long history of incidents between petitioner and respondent, who had worked together at the Drug Enforcement Agency (DEA). The court held that respondent's actions were sufficient to justify the trial court's issuance of a stalking protective order (SPO) against him by "dry firing" his gun 10 or 15 times over the course of a minute or more while alone with petitioner at work, coupled with an incident where respondent drove his motorcycle to petitioner's house, stopped near the end of petitioner's driveway, and—seeing petitioner through a window—revved his engine and yelled at petitioner for over five minutes to come outside. Petitioner testified that he believed respondent was armed during the second incident, because he had known the respondent for approximately five years and had never seen respondent not carry his duty gun with him. The Court of Appeals upheld the trial court's granting of petitioner's request for a SPO, finding that respondent's behavior created both subjective alarm in the petitioner and an objectively reasonable fear that respondent would harm the petitioner.

V.A.N. v. Parsons, 253 Or. App. 768 (2012)

At some point, respondent developed a romantic interest in petitioner, who is married. In early December 2011, respondent sent petitioner flowers at work with a card signed "Santa Claus." At the stalking protective order (SPO) hearing, petitioner testified that when she discovered that the flowers were from respondent, she took the gift as a "romantic overture" and was "more or less in shock." Petitioner sent respondent a text message saying that she had valued their friendship but that it was "[b]est we keep the friendship in the past" because it was "no longer healthy." Respondent replied with two text messages saying that he was just being honest and telling her his true feelings. Petitioner did not respond to those messages. Respondent apparently suffered an emotional breakdown and voluntarily admitted himself to the hospital for psychiatric treatment. After he was released from the hospital, respondent sent petitioner a series of text messages over the course of the next month. The Court of Appeals reversed the trial court's granting of the SPO and found that none of respondent's texts could be considered "objectively likely to be acted upon," citing *Rangel*. The court explained at p. 775: "[N]othing in the record supports an *objective* determination that respondent intended to carry out any threat that was implicit in his messages to petitioner and probably was going to do so. Indeed, even if the escalating text messages would make it objectively reasonable to believe that respondent likely would follow through on his threat to 'confront' petitioner, no evidence suggests that such a confrontation probably would involve violence or other unlawful acts."

State v. Nahimana, 252 Or. App. 174 (2012)

Defendant appealed from a judgment convicting him of two counts of violating a final stalking protective order (SPO), ORS 163.750 (Counts 3 and 4), and one count of stalking, ORS 163.732 (Count 5), based on two electronic communications sent from defendant's MySpace account to the victim's account. Defendant argued that the trial court erred in denying his motion for a judgment of acquittal as to each of those counts on the ground the contacts were protected speech and did not constitute a "threat" as required under *Rangel*. Relying on *Ryan* (see above), the Court of Appeals affirmed the convictions, reiterating that a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds must first successfully attack the underlying SPO.

State v. Nguyen, 250 Or. App. 225 (2012)

After reversal and remand in light of *State v. Ryan*, 350 Or. 670 (2011), upheld trial court's denial of defendant's motion for acquittal.

Defendant was convicted under ORS 163.750 for sending threatening text messages in violation of a stalking protective order. The victim had obtained an SPO prohibiting defendant from having any contact with the victim, including sending written or electronic messages. Despite that order, over a four-day period, defendant sent the victim several text messages, exemplified by the following two messages:

"U want me 2 pay child support? Fuk u! So u can use my muny 2 fuk sum one else! Fuk u! I give you something bitch!"

"And u want to better myself? But u want to fuk me? Ok! C u soon!"

The court found that the text messages sent by defendant were not protected speech. Under *State v. Ryan,* 350 Or. 670, 683 (2011), "a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds first must successfully attack the underlying stalking protective order." Because, just as in *Ryan*, defendant in *Nguyen* did not bring a successful

challenge to the underlying stalking protective order, the court held that he was barred from challenging his conviction pursuant to ORS 163.750 on free speech grounds, and the trial court did not err in denying his motion for a judgment of acquittal.

J.L.B. v. Braude, 250 Or. App. 122 (2012)

Court of Appeals overturned trial court's grant of stalking protective order, holding that petitioner's apprehension at respondents' actions was not objectively reasonable. Petitioner obtained stalking protective order against her former husband and his current wife after respondents repeatedly drove past petitioner's house and photographed it. Respondents maintained that they were attempting to show that petitioner's boyfriend was residing at her home. The Court of Appeals found that respondents' behavior was "unwelcome and unsettling" but did not evince any threat to petitioner's safety.

The court emphasized that respondents did not enter petitioner's property, did not make threatening gestures or comments or indeed, they did not attempt to communicate at all, and did not wait at the end of her driveway for lengthy periods of time. The court also held that, because parties were not strangers to each other and were required to communicate periodically about parenting time and financial matters, seeing the respondents drive past would not have caused a reasonable person in petitioner's position to feel apprehension for her personal safety.

ORS 30.866(1) requires that respondent's contacts with petitioner cause objectively reasonable apprehension regarding her own personal safety or the safety of a member of her immediate family or household. The Court of Appeals held that petitioner's apprehension in this instance was not reasonable.

J.L.B. v. K.P.B., 250 Or. App.122 (2012)

This was a companion case to *J.L.B. v. Braude* (above). The Court of Appeals held that because the record did not support a determination that the incidents which occurred would have caused a reasonable person in petitioner's position to feel apprehension for her personal safety, the trial court erred when it entered the SPOs. The court specifically recognized that conduct that might appear benign when viewed in isolation can take on a different character when viewed either in combination with or against the backdrop of one party's aggressive behavior toward the other. In this case, however, the court found that the parties' past relationship was not so characterized by violence or abuse as to make the more recent contacts objectively threatening. Rather, respondent's past aggression toward petitioner involved only two isolated incidents that occurred almost five years before petitioner sought the SPOs, at the end of a long-term marriage that did not (as far as the record reveals) involve other abuse.

S.A.B. v. Roach, 249 Or. App. 579 (2012)

Reversed trial court's grant of stalking protective order against petitioner's neighbor, holding that at most one qualifying contact had occurred within the meaning of ORS 30.866.

Neighbors' relationship had become contentious during a dispute over property boundaries and building permits while petitioner was engaged in remodeling. The parties engaged in several shouting matches, including an incident in which respondent sprayed petitioners with a garden hose and shouted obscenities and threats. The court held that respondent's speech-related conduct in cursing and shouting at petitioners did not fall under the definition of "threat" as specified in *State v. Rangel*, 328 Or. 294, 303. Under *Rangel*, "a communication that instills in the addressee a fear of imminent and serious personal violence

from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts," and does not include "the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee." Further, respondent's actions in spraying petitioners with a hose would not have created alarm or apprehension in a reasonable person. Concluding that the requisite two qualifying contacts for a stalking protective order had not been established as required by ORS 30.866, the court reversed.

C.L.C. v. Bowman, 249 Or. App. 590 (2012)

Reversed trial court's termination of a stalking protective order. The Court of Appeals held that the trial court erred in failing to consider statements that respondent had posted on his blog and on petitioner's boyfriend's social networking profile, and reversed and remanded the case for further proceedings.

The court held that the proper inquiry for the court on a motion to terminate an SPO is whether, in view of all of the circumstances, including the respondent's speech, the conduct that gave rise to the issuance of the SPO continues to cause the petitioner to have a subjective apprehension regarding personal safety and that apprehension continues to be objectively reasonable. Therefore, the respondent's speech on the internet should have been considered in determining whether petitioner's ongoing apprehension was reasonable.

The court concluded that a trial court can consider a respondent's speech when determining whether to terminate an SPO even if the speech does not constitute a threat under *Rangel*. Therefore, the trial court erred in concluding that it could not consider respondent's Internet postings. Accordingly, the court reversed.

Reitz v. Erazo, 248 Or. App. 700 (2012)

Reversed lower court's grant of a stalking protective order, holding that respondent's conduct did not meet the statutory requirements for an SPO under ORS 30.866.

Petitioner and respondent, both resellers of used books, clashed repeatedly in the heated and competitive environment of the Hillsboro Goodwill outlet. The trial court based its grant of an SPO on its findings that respondent repeatedly pushed petitioner, on one occasion made a verbal threat to petitioner to the effect that "you should be afraid of me, they're not going to stop me, I can do whatever I want," and on one occasion punched petitioner.

The court of appeals held that only the incident in which respondent punched petitioner was a qualifying contact for the purposes of the SPO. The respondent's verbal conduct did not meet the *Rangel* standard for speech-based contacts. Because only one qualifying contact had occurred, the court held that the "repeated" contacts required by ORS 30.866 were not present, and accordingly reversed.

Blastic v. Holm, 248 Or. App. 414 (2012)

Court of Appeals upheld trial court's issuance of stalking protective order, holding that two actionable "contacts" took place.

Parties were tenants at the same housing complex, and were involved in a dispute involving the homeowner's association. The court upheld the trial court's finding that on two occasions, respondent engaged petitioner in unwanted contact sufficient to support an SPO under ORS 163.738(2)(a)(B). The first incident occurred when respondent, riding on a lawnmower, followed petitioner, who wears a leg brace and walks with the assistance of a cane. Despite petitioner's repeated requests to be left alone, respondent continued to pursue petitioner with the

lawnmower, telling petitioner "If you don't stop it, things will get worse for you," and telling petitioner's wife "I'm going to tell you what I told your husband. You leave us alone, and we'll leave you alone." The second incident occurred at a public meeting.

The court held that under *Delgado v. Souders*, 334 Or. 122 (2002), no culpable mental state was required to maintain an SPO, and thus it was not relevant whether respondent knew that petitioner was afraid when respondent was following him on a lawnmower.

Johnson v. McNamara, 240 Or. App. 347 (2011)

Reversed lower court's grant of a stalking protective order, holding that respondent's conduct did not meet the statutory requirements for an SPO under ORS 30.866(1).

The court found that where the letters that respondent sent to petitioner did not contain any communications that could have "instill[ed] in the addressee a fear of imminent and serious personal violence from the speaker," the letters were not qualifying "contacts" under ORS 30.866(1). *Rangel,* 328 Or. at 303. The only qualifying contact was held to be an incident in which the respondent briefly blocked the door of a classroom with his arm, preventing the petitioner from leaving. Without the letters, only one qualifying contact had occurred. Therefore, the court the requirements of ORS 30.866(1) had not been satisfied.

Gunther v. Robinson, 240 Or. App. 525 (2011)

Reversed trial court's grant of stalking protective order. The court held that the record did not support a finding of two or more threats of imminent and serious and personal violence from neighbor within two years prior to petition as required by ORS 30.866.

The record indicated that respondent neighbor had thrown garbage onto petitioner's driveway, yelled "Heil Hitler" at petitioner, and had thrown rocks at bedroom window of petitioner's daughter. The court found that the rock-throwing incident was the only incident that could support issuance SPO, and thus petitioner had not shown the requisite two contacts within two years. Shouting "Heil Hitler," although offensive, did not constitute a threat, and petitioner did not testify that he felt alarmed or coerced by respondent's throwing garbage on his driveway. Accordingly, the court reversed.

**State v. Nguyen*, 238 Or. App. 715 (2010)

*Decision vacated, 351 Or. 675 (2012); on review, *State v. Nguyen*, 250 Or. App. 225 (2012) (see above)

Overturned trial court's denial of defendant's motion for judgment of acquittal, holding that defendant's text messages to victim did not violate stalking protective order.

Defendant was prohibited by terms of SPO from having any contact with the victim, including sending written or electronic messages. Despite that order, over a four-day period, defendant sent the victim several text messages, including "U want me 2 pay child support? Fuk u! So u can use my muny 2 fuk sum one else! Fuk u! I giv u something bitch!"; and "And u want 2 better myself? But u want to fuk me? Ok! C u soon!" The court found that, while the text messages could be read as veiled threats, under *Rangel*, defendant's statements did not express an unequivocal intent to carry out the threats. The court held that the evidence as a whole did not support a finding that the violations of the SPO constituted an unequivocal threat of imminent and serious personal violence.

*_State v. Ryan_, 237 Or. App. 317 (2010)

*Overturned by *State v. Ryan,* 350 Or. 670 (2011) (see above)

Defendant appealed conviction of the crime of violation of a stalking protective order (SPO). In the hearing resulting in the SPO of unlimited duration the evidence showed that the defendant was a stranger to the victim, that he sent her over two dozen letters expressing a delusional belief they were in romantic relationship, he located the victim's parents' home and went to their home, he went to the victim's workplace and he left numerous messages at her office and home. Within two months of the SPO hearing, the defendant sent two letters to the victim's father, which included delusional statements about his relationship with the victim and expressed a desire to meet with the father. The letters contained nothing that could be construed as a threat.

In reversing the defendant's conviction, the Court of Appeals held that when examining violations of SPOs that involve expressive conduct, the heightened standard enumerated in *Rangel* applies. The court also cited *State v. Maxwell, 165 Or App 467 (2000)* in finding that in prosecutions under ORS 163.750, like in prosecutions for the crime of stalking (and indeed, like in cases concerning the issuance of SPOs), expressive "contacts" must be evaluated in light of the constitutional protections provided by Article I, section 8 of the Oregon Constitution. The court did not find that the defendant made unequivocal threats that instilled a fear of imminent and serious personal violence that were objectively likely to be followed by unlawful acts, and therefore reversed the conviction.

Judge Rosenblum authored a concurring opinion in which she agreed that the court is bound by the decision in *Rangel*. However, she stated that the facts of this case demonstrate that *Rangel* is too restrictive of the protection offered by the stalking statutes and she does not believe Article 1, section 8 of the Oregon Constitution limits the legislature's ability to protect Oregonians from fear of physical violence to the extent that the Oregon Supreme Court has held.

State v. Sierzega, 236 Or. App. 630 (2010)

The Court of Appeals reversed the defendant's convictions for violation of a stalking protective order.

This case was an appeal from two consolidated stalking cases involving one offender with different victims. In the first case, the trial court erred in convicting the defendant of three counts of violating a stalking order based on one incident of telephonic contact and the case was remanded for resentencing. In the second case, the Court of Appeals reversed the trial court's conviction of the defendant for the crime of stalking.

The alleged victim, "A," worked at the Marion County Courthouse and the defendant was a stranger to her. The evidence showed that the defendant was romantically obsessed with A, was mentally unstable, and disregarded the reasonable requests of law enforcement to leave A alone. The state cited six incidents of unwanted contact, including initiating correspondence by mail and fax, approaching A in the courthouse, and making phone calls to the offices where A worked. The Court of Appeals agreed with the state that physically approaching A at work was an unwanted non-expressive contact, but found that the remaining incidents were not actionable contacts because they were expressive contacts subject to the heightened scrutiny required by *Rangel*. While the court found the defendant's behavior disturbing, it did not cross the threshold of constitutionally protected expression and the defendant's conviction was reversed.

Falkenstein v. Falkenstein, 236 Or. App. 445 (2010)

The Court of Appeals reversed the trial court's issuance of a stalking protective order (SPO), finding that the respondent's actions in texting the petitioner (his former wife), running the license plate of the car belonging to the petitioner's boyfriend, or showing up uninvited to the home of the petitioner's mother, were not predicate contacts of the sort necessary to support issuance of a SPO of unlimited duration against the respondent.

Petitioner did not testify as to all of the incidents alleged in her SPO petition, as the court asked her if she had anything to add to her petition and she presented limited testimony. The Court of Appeals noted that the petition was not evidence and found nothing in the record to support the conclusion that it was objectively reasonable for the contacts to cause alarm, coercion, or apprehension, as required by ORS 30.866(1) Without evidence showing how the contacts were explicitly threatening in any way, the contacts did not constitute stalking.

Foster v. Miramontes, 236 Or. App. 381 (2010)

The Court of Appeals affirmed the trial court's issuance of a stalking protective order (SPO) and award of attorney fees without discussion. Rather, the court focused on the respondent's contention that because the petitioner sought an award of damages, the trial court erred in denying him a jury trial. The court reviewed statutory text and context and concluded that the civil stalking statue does not confer a right to trial by jury. Furthermore, the court found that the ORS 30.866 action was not "of like nature" to common-law actions seeking damages for the torts of assault and battery, and therefore the respondent was not constitutionally entitled to a jury trial.

State v. Baker, 235 Or. App. 321 (2010)

The Court of Appeals reversed the trial court's extension of defendant's probation, finding that extending the defendant's probation from one year to five years without stipulation from both parties constituted an abuse of discretion when it functioned as a means of avoiding a SPO hearing.

On April 2, 2009, the defendant pled guilty to telephonic harassment of her former husband's girlfriend and was sentenced to one year of probation. Eighteen days after sentencing, the defendant and her former husband (petitioner) attended a hearing for a stalking protective order of unlimited duration. At that hearing the trial court asked the petitioner if he would agree to extend the defendant's probation from one year to five years in lieu of a SPO hearing. Defendant objected, but the trial court refused to hear evidence and extended her probation.

McGinnis-Aitken v. Bronson, 235 Or. App. 189 (2010)

The Court of Appeals reversed the trial court's issuance of a stalking protective order (SPO), finding the evidence did not meet statutory requirements.

Petitioner and respondent had known each other for some time before the petitioner obtained an SPO which cited several unwanted contacts. The Court of Appeals found that when the petitioner sent a text message stating, "…being away from you is the kind of thing I could do," the respondent was not sufficiently put on notice that there was a substantial risk that future contact was unwanted. There was no evidence that the respondent's subsequent verbal and non-verbal contacts caused the petitioner alarm or concern for her safety or the safety of her family. The court therefore reversed the trial court and vacated the SPO.

Swarringim v. Olson, 234 Or. App. 309 (2010)

The Court of Appeals reversed trial court's grant of a stalking protective order, holding that threats made by respondents did not satisfy the *Rangel* requirement that threats be unequivocal and objectively likely to be followed by unlawful acts.

Petitioners obtained stalking protective orders against two respondents, who are father and son and are the petitioners' neighbors. The evidence presented against Matthew Olson (the son respondent) included an incident of pushing the petitioners' 14-year old son to the ground, parking his car in front of the petitioners' driveway and blocking their car, yelling obscenities, telling the petitioner that he could have the 14-year old son beat up and saying that he knew people at his school who would slit his son's throat, and cursing at the petitioner's 9-year old daughter and telling her he would find someone to beat her up.

The court found that the petitioners could reasonably be fearful for the safety of their children based upon the incidents with the children. However, the threats to beat up the daughter and beat or slit the son's throat were expressive contacts and did not satisfy the *Rangel* test. The court found that the petitioners did not present evidence that they or their children feared imminent violence from Matthew Olsen; therefore, the remaining contact of bullying the 14-year old son was insufficient to impose an SPO. The court found that even if it applied the less-stringent standard for non-expressive contacts, the evidence did not prove that the petitioners or their family members had a reasonable apprehension for their personal safety and the trial court erred in issuing either SPO.

Pike v. Knight, 234 Or. App. 128 (2010)

The Court of Appeals reversed the trial court's issuance of a stalking protective order.

Petitioner and respondent were friends for several years, before the petitioner became annoyed with the respondent's persistence that she was having an affair with another man. Petitioner testified that the respondent began following her and hired a private investigator to follow her. As a result of those contacts, the petitioner told the respondent that she wanted to end their relationship.

There was no evidence that the non-expressive contacts, such as lurking near places she was known to frequent, caused the petitioner apprehension for her personal safety. Also significant to the court was the petitioner's testimony that she was annoyed and irritated by the respondent's behavior, but she did not testify that she was alarmed or coerced by the respondent's actions.

Giri v. Doughty, 232 Or. App. 62 (2009)

The Court of Appeals reversed the trial court's issuance of two stalking protective orders (SPO) prohibiting contact between the respondent and the petitioners.

Petitioners, who were husband and wife, were the respondent's neighbors. The petitioners relied on five incidents to establish the required unwanted contacts: (1) the respondent yelling obscenities at petitioners and telling petitioners' children, "your parents are evil parents"; (2) the "pretty bad messages" that the respondent left on petitioners' voice mail; (3) the respondent's behavior on her front porch when she played loud music and yelled obscenities into the air; (4) hang-up phone calls; and (5) spraying the petitioner's children with a hose.

The court found the first three contacts to involve speech and they were therefore subject to the higher standard imposed by *Rangel*. The petitioners did not present evidence that they felt

threatened by the respondent's conduct; rather, they testified that they were concerned for their children and respondent's behavior affected their quality of life.

The court found that none of the first three contacts were predicate contacts needed for an SPO. The court found there was nothing in the record to establish that the hang-up calls caused the petitioners reasonable apprehension for their own or their children's safety, and therefore contact four was not a predicate contact. The court did not determine if the water-spraying incident sufficed, as one qualifying contact would not have been sufficient for the issuance of an SPO.

Stuart v. Morris, 231 Or. App. 26 (2009)

Upheld trial court's denial of respondent's motion to dismiss a stalking protective order entered in 2001.

Respondent had been in jail since the order was issued and had never violated the order. In June 2007, respondent filed his first motion to terminate the order, arguing that the bases for the issuance of the order no longer existed. At the first hearing petitioner testified that she was afraid of respondent despite his incarceration and that friends of respondent had threatened her. The trial court denied respondent's motion, finding that petitioner was credible and that she suffered "reasonable apprehension" due to the respondent's past acts. Respondent did not appeal.

In April 2008, respondent again moved to terminate the 2001 order. The trial court denied his motion based on issue preclusion. Respondent argued on appeal that the trial court's decision based on issue preclusion was error. Based on *Edward v. Biehler* and *Benaman v. Andrews* (see cites and summaries below), the Court of Appeals reiterated that the primary inquiry is whether the petitioner continues to suffer reasonable apprehension due to the past acts of the respondent and that the respondent has the burden to show that the concerns underlying the issuance of the original order have sufficiently abated. The Court of Appeals side-stepped the issue of whether the label of issue preclusion was appropriate and upheld the trial court's decision because there was no new evidence since the first hearing to support respondent's assertion that petitioner no longer suffers reasonable apprehension as a result of the conduct that was the basis of the order.

Wood v. Trow, 228 Or. App. 600 (2009)

Court of Appeals upheld issuance of stalking protective order.

Petitioner and respondent were neighbors. Respondent made multiple unwanted contacts with petitioner and her fiancé. Those incidents included the respondent being observed wandering in the petitioner's yard late at night carrying a huge knife, stealing mail from the petitioner's mailbox and parking in petitioner's driveway. In addition, the respondent made communicative contacts. These included leaving voice messages late at night, sending a card referring to a romantic relationship that was apparently fantasy, threatening to beat up petitioner's fiancé and later threatening to kill the fiancé or himself. The next day the respondent was observed masturbating in his front yard.

The Court of Appeals found that the communicative contacts, while not overtly threatening (aside from the threats to petitioner's fiancé), provided a context for the non-communicative contacts. Taken together they gave Petitioner cause for alarm. The stalking protective order was upheld.

Osborne v. Fadden, 225 Or. App. 431 (2009)

Court of Appeals reversed trial court's issuance of stalking protective order, holding that none of the contacts between petitioners and respondents would cause petitioners to have a reasonable apprehension about their personal safety.

Petitioners were a married couple as were the respondents. Petitioner wife was formerly married to respondent husband. The petitioners alleged that the respondent wife had sent 2,000 e-mails and e-mail solicitations to them, made harassing telephone calls to petitioners and petitioners' families and friends, opened credit accounts in petitioners' names and signed petitioners up for subscriptions and mail order services. The trial court found that the respondents entered into a civil conspiracy to stalk petitioners and issued stalking protective orders against each respondent.

The Court of Appeals agreed that the respondents acted in concert. The court, however, reversed the SPOs, applying the less stringent standard for non-expressive contacts and finding that while troubling and offensive to the petitioners, none of the contacts would cause petitioners to have a reasonable apprehension about their personal safety.

Goodness v. Beckham, 224 Or. App. 565 (2008)

Court of Appeals reversed stalking protective order as legally insufficient.

Petitioner and respondent were former spouses and had one child. Respondent had been physically abusive to petitioner during the marriage resulting in at least two restraining orders. Petitioner alleged one incident that alarmed her when respondent came to her home rather than to a restaurant as agreed.

The parties' versions of events differed, but the Court of Appeals declined to decide whether that non-expressive contact was qualifying, because it determined that the remaining contacts were legally insufficient and reversed the trial court. The remaining contacts involved multiple emails and allegations that respondent had committed several crimes against petitioner. The opinion provides an extensive evaluation of these remaining contacts.

Ross v. Holt, 224 Or. App. 405 (2008)

Court of Appeals reversed stalking protective order as legally insufficient.

Petitioner and respondent were the estranged parents of two children. Respondent was accused of touching their daughter in a sexually inappropriate way. The allegation was investigated but not prosecuted. The Court of Appeals determined that several expressive communications were insufficient under *Rangel*: calls where respondent demanded to see the children (not a threat); a statement made by respondent in petitioner's front yard that he was going to take the children and get custody (not a threat involving personal violence likely to be followed by unlawful acts) and a statement before the hearing on the stalking protective order where he asked whether the children "had all their fingers and toes" (disconcerting, but not an unequivocal threat objectively likely to be followed by unlawful acts.)

In reversing the trial court, the Court of Appeals determined that the remaining two contacts — coming into petitioner's visual presence in her front yard and at the courthouse — were not contacts that would alarm an objectively reasonable person or cause reasonable apprehension regarding one's own personal safety or the safety of her children. The court noted that there was no evidence that respondent had a history of violence or testimony that petitioner was in fact alarmed by his presence or knew that his presence was unwanted.

Valerio v. Valerio, 224 Or. App. 265 (2008)

The Court of Appeals reversed the trial court's issuance of a stalking protective order.

The parties were involved in a disagreement over money paid by respondent on behalf of petitioner. Four contacts were raised at trial. The trial court determined that two of the contacts did not meet the statutory requirements, and the Court of Appeals agreed. (Respondent walked up to petitioner's car and petitioner backed away; voicemail messages that included a threat by Respondent that she was not going to leave petitioner alone until she left the country.) The Court of Appeals determined that one of the other contacts where respondent came to Petitioner's work and screamed that she wanted to be repaid and that she was not going to leave her alone until she paid or left the country was insufficient under *Rangel.*

The Court did not decide whether the remaining contact (respondent picked petitioner up at the airport, at petitioner's request, and then became angry at petitioner and drove at high speeds) could be considered an "unwanted contact," because two qualifying contacts are required.

Edwards v. Lostrom, 224 Or. App. 253 (2008)

The Court of Appeals reversed the trial court's issuance of a stalking protective order.

Petitioner obtained a stalking protective order on behalf of her daughter against paternal grandfather based on three contacts. Each incident involved petitioner observing respondent in a car — at a stop light, near a transit bus stop and from the window of a friend's house. Respondent was a repair worker and made house calls throughout Eugene. He testified that was not aware that he had driven close to granddaughter.

The Court of Appeals reversed the trial court, finding that petition had not demonstrated the required mental state. While there was some evidence from which one could infer that respondent was aware that granddaughter did not want to have contact with him, the court concluded that there was a lack of evidence that respondent was "aware of, and consciously disregarded a risk that his conduct would result in the unwanted contact."

Farris v. Johnson, 222 Or. App. 377 (2008)

The Court of Appeals reversed the trial court's issuance of a stalking protective order because no more than one of the contacts of which petitioner complained qualified as the basis for an SPO.

On appeal, petitioner conceded that two expressive contacts did not meet the *Rangel* standard ("you're a liar" and "you have a conflict of interest"). The Court of Appeals went on to analyze three other contacts, using the expressive contacts as relevant context.

Based on a single instance where respondent slowed down and looked while driving past petitioner's house, the court could not infer that the respondent was aware that his contact was unwanted. The second was an incident at the courthouse where respondent confronted petitioner's husband. The record did not show that petitioner was even aware of this contact before husband testified about it at the hearing. The final contact involving an altercation between petitioner's son and respondent was discounted, because issuance of a stalking protective cannot be issued based on one contact.

Note that the Court of Appeals considered contacts that occurred after the filing of the stalking petition based on petitioner's argument that the respondent failed to object to this evidence.

Matthews v. Hutchcraft, 221 Or. App. 479 (2008)

The trial court entered a general judgment dismissing Petitioner's stalking protective order and awarding attorney's fees and costs in an amount to be determined after submission of a petition for attorney fees per ORCP 68C. The Petitioner filed a notice of appeal of the general judgment a month before the supplemental judgment containing the amount of attorney fees and costs was entered. Apparently, petitioner was only appealing the issues of fees and costs. Petitioner did not appeal the supplemental judgment. The Court of Appeals dismissed Petitioner's appeal, because Petition appealed the wrong judgment — a non-final judgment as to the issue of attorney fees and costs.

Sparks v. Deveny, 221 Or. App. 283 (2008)

The Court of Appeals reversed the trial court. In this factually complicated case involving numerous phone calls and letters sent to petitioner and at least three non-expressive contacts, the Court of Appeals looked first at the expressive contacts and determined that none of them satisfied "the exacting constitutional standard announced in *Rangel*." In also rejecting the non-expressive contacts (phone hang-ups, attendance at gym class and once following petitioner in car), the court did not question that the contacts caused the petitioner real apprehension and alarm but held that the petitioner did not establish any apprehension relating to her or anyone else's personal safety. The court noted that the contacts were not inherently threatening, comparing the facts in *Delgado v. Souders*, and that there was no testimony that the respondent had a history of violence.

Crop v. Crop, 220 Or. App. 592 (2008)

The Court of Appeals affirmed the issuance of a stalking protective order based on non-expressive contacts.

Petitioner, respondent's estranged wife, complained of multiple incidents in which respondent sent her text messages indicating that he had overheard conversations taking place within petitioner's house. The court held that the evidence demonstrated that respondent spied on petitioner and continued to lurk near her residence while she was inside. The text messages, when considered in context with respondent's actions in lurking and spying on petitioner, comprised conduct that amounted to more than expression protected under Article I, section 8. The court concluded that the trial court did not err in denying respondent's motions for dismissal.

T. Webb v. Lovette and D. Webb v. Lovett, 217 Or. App. 165 (2007)

The Court of Appeals, relying on *Hanzo v. deParrie,* 152 Or. App. 525 (1998), affirmed T. Webb's case against respondent based on respondent's statements that he would terrorize her and a statement that intimated he intended to enter her house to commit robbery. The Court of Appeals reversed D. Webb's case against respondent determining that respondent's statements that he would "take care of things" were not "sufficiently specific, unambiguous, and unequivocal to cause an objectively reasonable person to fear for his personal safety." In these consolidated cases, the petitioners were neighbors of the respondent, who was on parole and considered a high risk to the community. Contacts were a series of threatening statements.

Benaman v. Andrews, 213 Or. App. 467 (2007)

The Court of Appeals affirmed the trial court's supplemental judgment denying the respondent's request to modify or vacate a permanent stalking protective order (SPO).

The facts underlying the original issuance of the issuance of the SPO and respondent's violations of that order are somewhat bizarre. When denying respondent's motion to vacate, the trial court noted that the respondent was "one of the least credible people I have had occasion to see in court." This case is important, however, in that it is the first case to construe *Edwards v. Biehler*, 203 Or App 271 (2005), establishing that a permanent SPO may be terminated when the criteria for issuing the order are no longer present and the petitioner no longer suffers reasonable apprehension due to the past acts of the respondent.

Jennings v. Gifford, 211 Or. App. 192 (2007)

Court of Appeals reversed trial court's issuance of a stalking protective order, holding that the order was not warranted under ORS 163.738(2)(a)(B).

Petitioner applied for and obtained a stalking protective order against her daughter's former high school boyfriend. Subsequent to a break-up, respondent sent daughter many text messages referring to her as a "hypocritical bitch" and telling her to "go to hell," even after being told to stop by her father. Respondent also attended a school play at which daughter was working; however, he did not try to contact her. Later, respondent went to daughter's school and asked daughter's friend if she was there and appeared to follow her after she became frightened and moved to a different part of the building.

The court concluded that none of the text messages met the *Rangel* standard in that the daughter was not alarmed or imminently threatened by them and that daughter was not alarmed by respondent's attendance at the school play. While the court acknowledged that the final contact may have been alarming, at least two qualifying contacts are required.

Middleton v. Tully, 211 Or. App. 198 (2007)

The Court of Appeals held that facts adduced at the hearing were legally insufficient to support the issuance of an SPO, and the trial court's issuance of a stalking protective order was reversed.

The Court of Appeals held that the following verbal communications that occurred after petitioner told respondent that she wanted to break up with him did not meet the standard set out in *State v. Rangel*: respondent called petitioner sixteen times while she was undergoing a medical procedure, respondent called and asked her to go to the coast for the weekend, and respondent left a message apologizing for his previous calls and asked that she call him that weekend.

The court concluded that there was no evidence in the record that respondent communicated a threat to petitioner such that she was objectively put in fear of imminent and serious personal violence as a result. The court held that the trial court erred in entering the permanent SPO.

Maygar v. Weinstein, 211 Or. App. 86 (2007)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, finding that the evidence did not establish that petitioner reasonably feared for his personal safety as a result of two unwanted and alarming contacts.

The parties were co-owners of a townhouse that the petitioner was occupying exclusively. Twice the respondent entered the townhouse when she believed the petitioner was not at home. On one occasion, petitioner's arm was bruised when respondent swung open the door. The court held that the evidence did not establish that petitioner, as a result of the two unwanted and alarming contacts, reasonably feared for his personal safety.

DiCarlo v. McCarthy, 208 Or. App. 184 (2006)

The Court of Appeals held that sufficient evidence supported issuance of SPO.

Respondent was a former co-worker of petitioner's boyfriend who had lent petitioner's boyfriend money to buy new tires and had never been repaid. Respondent confronted petitioner when she was driving her boyfriend's truck, yelling threats, slamming his hand on the windshield, and damaging the truck while she was sitting inside. Petitioner also testified that respondent subsequently drove by her house five times over a two-day period and that she was frightened by this conduct.

The court pointed out that the confrontation over the truck tires was more than a mere verbal communication but found nonetheless that the speech was overtly threatening and reasonably put the petitioner in fear of immediate and serious personal violence. The court also found that respondent's drive-bys caused petitioner fear and that her fear was objectively reasonable, particularly in light of respondent's earlier threat in which he stated, "I'll get you, I'll find you, it's a small town." Issuance of the stalking protective order was affirmed.

Habrat v. Milligan, 208 Or. App. 229 (2006)

The Court of Appeals affirmed the issuance of a stalking protective order.

The respondent was a mail carrier, and petitioner worked in a hair salon on his route. The court found that a series of non-expressive contacts (respondent parking directly in front of the salon and watching petitioner for long periods of time, respondent glaring menacingly at petitioner, respondent attempting to flag down petitioner when she was alone in her car, etc.) that followed a call by petitioner's co-worker to respondent's employer were repeated, unwanted contacts. The court also found that petitioner was subjectively apprehensive for her safety and that her alarm was objectively reasonable.

Smith v. Di Marco, 207 Or. App. 558 (2006)

The Court of Appeals affirmed the trial court's issuance of a stalking protective order.

The respondent was the father of petitioner's former girlfriend. Petitioner testified to numerous contacts. The court determined that one incident was outside the two-year statute of limitation and that two involved speech that did not meet the standard established in *Rangel*. The court found that two other contacts involved physical confrontation of the petitioner by the respondent and that, with respect to each, the petitioner testified that he was afraid for his safety. A final series of contacts that involved respondent following petitioner by car and watching him with binoculars were found to qualify under the statute.

Courtemanche v. Milligan, 205 Or. App. 244 (2006)

The Court of Appeals reversed the trial court's issuance of a stalking protective order where petitioner failed to show that respondent was aware that contacts were unwanted.

Respondent was a mail carrier, and petitioner lived on his mail route. Over an 18-month period, mostly while delivering mail, respondent engaged petitioner in a number of conversations. The court described some of them as "strange, boorish and offensive." Petitioner never told respondent that the contact was unwanted. After a series of unanswered phone calls, including one voicemail message, petitioner's husband told respondent to stop contacting petitioner; respondent immediately complied.

The court, citing *Delgado v. Souders*, 344 Or 122 (2002), acknowledged that a petitioner is not necessarily required to object to an unwanted contact and that other evidence can establish the respondent's awareness that his repeated presence or activities are unwanted. The court found, however, that in this case the petitioner failed to establish respondent's subjective awareness that at least two of the contacts were unwanted and reversed the trial court.

Provost v. Atchley, 205 Or. App. 37 (2006)

The Court of Appeals reversed the issuance of two stalking protective orders due to a complete absence of evidence that either respondent "had engaged in two or more unwanted contacts that actually alarmed petitioner and reasonably put her in fear of her personal safety, much less the sort of fear of imminent and serious personal violence that is required when the unwanted contacts consistent of speech."

Petitioner was a high school student who claimed that one of the respondents had harassed her by calling her names, that both respondents had once blocked her car and vandalized the hood of the car, and that both the respondents had flipped her off and called her vulgar names at school.

The court concluded that that the record was legally insufficient to support the issuance of the stalking protective orders.

Soderholm v. Krueger, 204 Or. App. 409 (2006)

The Court of Appeals reversed the trial court's issuance of a stalking protective order; the court found that the evidence in the record did not meet the statutory requirements regarding the petitioner's subjective state of mind. Under the statute, petitioner must prove the contact causes her to experience "alarm," such that she feels apprehension or fear resulting from the perception of danger.

This case involved a series of contacts between the petitioner and the respondent who were neighbors and shared a driveway. The court determined that petitioner provided sufficient evidence that she was apprehensive about her personal safety with respect to only one incident. This contact was an incident during which respondent followed petitioner to school; petitioner testified that she was frightened during the incident. While opining that some of the other contacts might have caused petitioner to be apprehensive for her safety, the court noted that the statute requires that the petitioner *prove* she felt apprehension or fear resulting from the perception of danger. Citing *Cress v. Cress*, the court noted that being tearful or upset is insufficient proof of this element of stalking claim.

Hollon v. Wood, 204 Or. App. 344 (2006)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, finding that the expressive contacts upon which the petitioner relied were insufficient to meet the standard established in *Rangel*.

Here, the petitioner "did not describe any of the expressive contacts as instilling in her a fear of imminent personal violence." Petitioner's own statements demonstrated that she did not fear for her personal safety as a result of the contacts. Petitioner's lack of specificity as to the contacts themselves and her apparent ambivalent reactions to them presented insufficient grounds to issue a stalking protective order, failing both the subjective and objective prongs of the *Rangel* standard. In addition, the court found that the petitioner only presented evidence of

one instance of non-expressive contact, less than the statutorily required "repeated" contact (defined as two or more).

Edwards v. Biehler, 203 Or. App. 271 (2005)

The Court of Appeals reversed the trial court's denial of a motion to terminate a stalking protective order of unlimited duration.

The trial court found there are "no statutory provisions for modifying or vacating permanent stalking orders." The Court of Appeals disagreed and held that a court may terminate a stalking protective order under ORS 163.741(3). Its decision was based on an analysis of ORS 163.738(2) and ORS 163.741 together with relevant legislative history. The court went on to acknowledge that there are no specific provisions in the stalking statutes dictating the procedures for terminating a stalking protective order and looked to the Family Abuse Prevention Act (FAPA) for guidance in light of its similarity to the statutory stalking scheme. Such orders allow for termination by the court when, "on the respondent's motion, a court finds that the criteria for issuing the order under (the statute) are no longer present." In such situations, courts' inquiries shall focus on "whether petitioner continues to suffer 'reasonable apprehension' due to the past acts of the respondent under ORS 163.738(2)(a)(B)(iii)."

Hulburt v. Delaney, 197 Or. App. 437 (2005)

The Court of Appeals reversed the trial court's entry of judgment for a permanent stalking protective order.

The trial court found "probable cause" to believe that the elements of a stalking action as set forth in ORS 30.866 (1) had been established. The judgment was held to be defective because probable cause is not the correct standard. The trial court was required to find by a preponderance of the evidence that defendant actually engaged in the unwanted contact; accordingly, the trial court's judgment was reversed.

Lomax v. Carr, 194 Or. App. 518 (2004)

The Court of Appeals reversed the trial court's issuance of a permanent stalking protective order and remanded for further proceedings.

This case was an appeal from a permanent stalking protective order initiated by a citation in the form specified in ORS 163.744(2). The trial court denied several motions filed by respondent testing the adequacy of the complaint and found that the ORCP 21 provisions relied on as a basis for those motions do not apply in a proceeding to obtain a SPO. The Court of Appeals agreed, relying on ORCP 1A, which states that the rules of civil procedure do not apply when a different procedure is specified by statute or rule. The court found that the statutory form of citation precluded application of Oregon Rules of Civil Procedure that would require a complaint to contain more or different information or allegations.

At the hearing phase of this case, the trial court ruled without permitting the parties to present their evidence. The Court of Appeals inferred that the trial court's basis for doing so was a belief that the complaint was an adequate basis on which a permanent order could be issued and that an evidentiary proceeding was not required. The Court of Appeals found that the trial court was in error on both counts. The averments of the statutory citation do not allege all the elements required for issuance of a permanent stalking protective order nor do they conclusively prove those elements. Also, the statutory scheme provides for an evidentiary hearing, which the trial court did not hold. The case was reversed and remanded.

Castro v. Heinzman, 194 Or. App. 7 (2004)

The Court of Appeals affirmed the trial court's issuance of a stalking protective order pursuant to ORS 30.866.

The facts involved a series of unwanted emails and in person contacts by the respondent. On appeal, the respondent asserted that the trial court had based the stalking protective order primarily on the emails that he asserted were not overtly or implicitly threatening. The Court of Appeals acknowledged that potential constitutional problems can arise when the contact relied on by the petitioner involves expression and cited *Rangel* and *Hanzo* for the proposition that expressive contact must meet a more stringent standard than set out in the statute.

The court agreed with respondent's argument that his statements did not constitute an overt threat of physical violence. However, the court determined that the statements in some of the emails (expressing some coercive fantasies and a desire to resume a sexual relationship with the petitioner) together with his in person contacts would alarm a reasonable person.

Most important, the court found that respondent's expressive contacts provided a context for his nonexpressive contacts (repeated unwanted contact at work and a gym). The court did not reach the question of whether the expressive contact alone satisfied the *Rangel* test. Instead the court evaluated the nonexpressive contacts and found them to be overt and intrusive, especially in a light of an admission by the respondent that he had abused a prior spouse. In evaluating the nonexpressive contacts, the court found that respondent's acts were more overt and intrusive than the respondent's acts in *Delgado v. Souders*.

Jones v. Lindsey, 193 Or. App. 674 (2004)

The Court of Appeals reversed the lower court judgment granting a permanent stalking protective order, finding that the evidence was insufficient to support the issuance of the order.

First, the court addressed petitioner's argument that the allegations of the petition were part of the evidentiary record. The court rejected petitioner's argument and held that the facts alleged in a SPO petition do not constitute evidence. The court went on to consider eight contacts on which the petitioner produced evidence at the hearing. The court reviewed the alleged incidents and determined that the most serious occurred outside the two years preceding the petition and could not be considered. In reversing the trial courts decision, the court found a lack of evidence of unwanted contact that reasonably alarmed or coerced the petitioner. Finally, as to the purely expressive contacts, the court held that there was no evidence of an "unequivocal threat that instilled an objectively reasonable fear of imminent and serious personal violence."

Lopus v. Glover, 193 Or. App. 481 (2004)

The Court of Appeals reversed the trial court's issuance of a permanent stalking protective order pursuant to ORS 30.866.

The petitioner's evidence was based on one incident involving the return of children during a parenting time exchange. During the exchange, the respondent refused to give the child to the petitioner and walked towards her car with the child. The court found that the petitioner did not establish more than one unwanted contact or that any contact had caused her a reasonable apprehension of physical harm.

Sabados v. Kempa, 193 Or. App. 290 (2004)

The Court of Appeals, *per curiam*, affirmed the trial court's entry of a permanent stalking protective order under ORS 30.866. The court chose not to include a detailed description of the facts and deferred to the trial court's findings in light of its opportunity to view the witnesses firsthand. The court assumed that the trial court believed petitioner's testimony that the respondent pointed or waved a gun at her.

Putzier v. Moos, 193 Or. App. 80 (2004)

The Court of Appeals reversed the trial court's issuance of a permanent stalking protective order, holding that two of the three incidents cited at trial were insufficient to serve as the basis for the order.

Expressive contacts must satisfy the test set out in *Rangel* in order to qualify as stalking contacts. The *Rangel* test requires that in order for communicative contact protected by the first amendment to qualify as a stalking contact, the communication must be (1) a threat that "instills in the addressee a fear of imminent and serious personal violence," (2) "unequivocal," and (3) "objectively likely to be followed by unlawful acts."

In this case, there were three incidents of stalking alleged, two of which were expressive contacts. The first expressive contact was a letter from the respondent to petitioners, which did not threaten them with any kind of physical harm. The second was contact between the individual and petitioner's employer reporting alleged employment-related misconduct. Neither of the expressive contacts satisfied the *Rangel* test. Because more than one incident is required, the court reversed.

Michieli v. Morgan, 192 Or. App. 550 (2004)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that respondent's repeated emails and letters to petitioner did not satisfy the *Rangel* test for expressive contacts.

Written communications must satisfy the test outlined in *Rangel* in order to qualify as stalking 'contacts.' Repeated notes attempting to convince the petitioner to agree to date the respondent did not satisfy the *Rangel* test when the communications did not threaten or allude to violence, and when the Respondent had no history of violence. Though clearly unwanted and reasonably alarming, the communications did not satisfy the *Rangel* test.

Bryant v. Walker, 190 Or. App. 253 (2003), *rev granted* May 2004

Stalking order upheld even though respondent's contacts all occurred in a public place where petitioner was not alone, and no overt threats occurred.

Petitioner's fear was objectively reasonable for a person in her situation. The court cited Caroline A. Forell and Donna M. Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man* 133 (2000): "[B]ased on the realities of men's and women's lives, reasonable women are likely to experience fear in situations where reasonable men would not. * * * [I]n our culture, men and women are not similarly situated when it comes to being able to defend and protect themselves from others."

The court found that respondent was aware of a substantial risk that further contact was unwanted after Petitioner told Respondent "You don't need to stare." Respondent argued that he had not received an adequate hearing. The court found that he had received an adequate hearing as required by *Miller v. Leighty*, and had not preserved his error if he had not received an

adequate hearing. Respondent argued that he had been cut off and prevented from questioning. The court found it permissible to infer from the record that when the court asked "anything further?" that question was directed at both parties. Because respondent did not respond, he chose not to take advantage of the opportunity offered him.

Dissent: The dissent felt strongly that fundamental fairness had not been met because a more thorough examination of the record revealed that the respondent was not specifically given the opportunity to respond to petitioner's evidence. The dissent felt that this was such a basic problem that no preservation was required under the circumstance or, alternatively, that this case should have been reviewed as error apparent on the record. Review was granted (May 18, 2004) but subsequently dismissed as improvidently granted (November 12, 2004).

Tumbleson v. Rodriguez, 189 Or. App. 393 (2003)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that the trial court erred in issuing an SPO in absence of evidence of two or more contacts that were unwanted.

When respondent arrived uninvited at petitioner's home, was told to leave, and then granted permission to stay for the night, the contact was not unwanted. The Court specifically noted that there was no evidence that petitioner was afraid of respondent during this incident, or that petitioner was coerced into allowing respondent to stay.

State v. Shields, 184 Or. App. 505 (2002)

Conviction for stalking upheld.

Phone calls made by the defendant during which he did not speak were not expressive acts and therefore did not have to satisfy the 'actual threat' standard set out in *Rangel* (*see above)*. The list of "contacts" set out in ORS 163.730(3)(a)-(k) is illustrative and not exhaustive, and can include making telephone calls without speaking. The court referred to its decision in *Boyd*, 170 Or App 509 (2000) and reiterated that it is sufficient for conduct to be a "contact" for purposes of ORS 163.730 if the act gives rise to an unwanted relationship or association between the victim and the defendant.

Pinkham v. Brubaker, 178 Or. App. 360 (2001)

The Court of Appeals upheld the trial court's issuance of a stalking protective order.

The following behavior of respondent constituted unwanted contact within the meaning of ORS 163.730(3): taking petitioner's child from school to respondent's home without permission; shredding petitioner's dresses; waiting outside petitioner's home; and picking petitioner's child up on the way home from school without permission.

The court held that it was immaterial that petitioner's fear resulting from the shredding of the dresses arose when she learned of that contact, even though it had taken place months before. While petitioner did not explicitly describe herself as subjectively "alarmed," the court inferred from her testimony that she was so alarmed. The court looked at the totality of the circumstances, including the context of the parties' entire history, to determine whether petitioner's subjective alarm was reasonable. Contacts that might appear innocuous when viewed in isolation often take on a different character when viewed in context.

O'Neil v. Goldsmith, 177 Or. App. 164 (2001), *rev den* 333 Or 595 (2002)

The Court of Appeals affirmed without discussion the trial court's issuance of a stalking protective order. The court did modify the scope of the order.

Where petitioner and respondent live in very small town, it was overly burdensome to prohibit respondent from "intentionally, knowingly, or recklessly" coming into petitioner's physical or visual presence. The court modified the stalking order to prohibit only "intentionally" coming into the petitioner's presence. All other terms of the order were upheld.

Schiffner v. Banks, 177 Or. App. 86 (2001)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that while respondent's actions constituted unwanted contact, petitioners were not entitled to SPO, as they did not experience "alarm" from that contact.

Respondent repeatedly waited outside petitioners' home and took photographs of petitioners. This contact was repeated and unwanted contact within the meaning of ORS 163.730. However, petitioners' alarm did not arise as a result of this contact. Petitioners knew of this contact and there was no evidence that they were alarmed by it. Instead of being alarmed by respondent's contacts, petitioners were alarmed as a result of conversations between respondent and third parties, as relayed to petitioners by the third parties. Respondent's conversations with third parties were not 'contacts' within the meaning of ORS 163.730. While instances may arise where the other person initially believes a contact to be innocuous and later understands the contact in a new light and only then becomes alarmed, this case did not present those facts.

Cress v. Cress, 175 Or. App. 599 (2001)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that while the requisite number of contacts existed for issuance of an SPO, the contacts did not cause daughter the requisite apprehension regarding her personal safety.

Petitioner testified that she was "unnerved" and "extremely upset" by her father's repeated contacts, which he knew were unwanted. The court held that this did not satisfy her burden of proving by a preponderance of the evidence that she was subjectively afraid for her physical safety. In this case, the petition contained an allegation that the respondent had sexually molested the petitioner as a child. There was no further evidence presented to the court on this issue. The allegation in the petition, without more, was not a basis from which to infer a subjective fear of current physical harm.

K.H. v. Mitchell, 174 Or. App. 262 (2001)

The Court of Appeals upheld the issuance of a stalking protective order, modifying its scope to prohibit only intentional contact.

The filing of a law enforcement citation to initiate a court proceeding to determine whether a stalking order should be entered is procedurally correct. ORCP 3 does not apply to stalking protective order proceedings. ORCP 1A identifies that the Oregon Rules of Civil Procedure do not apply when a different procedure is authorized by statute.

Respondent was an adult male who lived next door to petitioner, who was a high school student. Respondent's anonymous phone calls to petitioner when she was alone in the house, identifying his desire to perform certain sex acts and indicating that he would be right over were not benign requests for consent. Rather, these phone calls conveyed a threat of serious personal assault and reasonably instilled in petitioner a fear of serious personal violence.

However, because respondent lived next door to petitioner, a stalking order prohibiting respondent from all contact defined in ORS 163.738 was overly broad. A court should weigh the need to protect the victim against the restrictions placed on the respondent when exercising its discretion in choosing what sorts of contact to prohibit in a stalking order.

The Court of Appeals modified the order to prohibit the respondent from contacting petitioner by *intentionally* communicating by any means with Petitioner, either directly or through a third person, *intentionally* initiating visual contact with Petitioner, *intentionally* following petitioner, going onto petitioner's property, her place of work, or her school, and waiting outside of her place of work or school.

Boyd v. Essin, 170 Or. App. 509 (2000)

The Court of Appeals upheld issuance of permanent stalking protective order.

Petitioner had FAPA temporary restraining order against respondent. Petitioner also alleged that respondent had made numerous phone calls to her home, some at odd hours; that he had followed her out of church and blocked her way; called her names; and that he had driven by and observed her home. After the temporary restraining order was entered, respondent was seen 1000 feet from the home looking at it with binoculars. Some contacts occurred before the parties separated. The court analogized the facts in this case to *Delgado v. Souders* and found that driving by the family home and watching it with binoculars were reasonably alarming contacts in this context.

Dissent: Judge Armstrong dissented and did not accept driving past the house as reasonably alarming. He points out that there was no testimony supporting petitioner's subjective level of alarm. He points out that it is not clear from the record if some of the incidents occurred before or after separation.

Weatherly v. Wilkie, 169 Or. App. 257 (2000)

The Court of Appeals reversed the issuance of a stalking protective order (SPO) under ORS 30.866, finding that contacts may have been subjectively alarming but were not of a nature that would have caused a reasonable person to be alarmed. However, the court specifically states that "our conclusion should not be understood as a holding that ostensibly innocuous contacts of the kind we have in this case can never give rise to objectively reasonable alarm and apprehension regarding personal safety."

There was no evidence of domestic violence presented; however, petitioner did suffer from post-traumatic stress disorder due to military experiences. This was the second petition for a SPO filed by petitioner. Petitioner alleged that over a one-and-one-half year period respondent drove by her store with his new girlfriend and waved; drove by petitioner's home twice; sent her a postcard and letters; called her one time; and left real-estate flyers for her. The court found that the contacts were neither implicitly nor explicitly threatening. Petitioner further alleged that respondent had made numerous hang-up phone calls to her, flattened her tires, set her dog loose, started a fire at her house, and left a bottle bomb in the neighbor's mailbox. The trial court sustained respondent's objection to these allegations on relevancy grounds due to a lack of evidence tying respondent to the events.

State v. Maxwell, 165 Or. App. 467 (2000)

The Court of Appeals upheld felony convictions for violation of stalking protective order and held that the term "presence" is not unconstitutionally vague.

The court found that "a person is within another's 'visual or physical presence' when the person is capable of being seen – whether or not the person is in fact seen – or when the person is within physical calling distance." The court found that even though expressive contact had occurred on two occasions, the prohibited contact was coming into the presence of the victim, not the note or statements made. Therefore, there was no problem with *Rangel*.

Miller v. Leighty, 158 Or. App. 218 (1999)

The Court of Appeals reversed trial court's issuance of a stalking protective order, and remanded for further proceedings. The court held that the trial court erred in entering the permanent SPO without affording respondent an opportunity to cross-examine adverse witnesses, including petitioner, and to present his own evidence. Respondent has the right to present his own witnesses and cross-examine adverse witnesses in hearing on stalking protective order. However, there is no authority for the proposition that Court must advise a respondent of these rights.

Wayt v. Goff, 153 Or. App. 347 (1998)

The court reversed the permanent stalking protective order issued by the trial court, holding that there was insufficient evidence to find that the contacts were "unwanted and repeated" as required by the statute.

Petitioner, a police officer, cited three contacts with respondent. In 1985, petitioner and respondent had a confrontation in a mall parking lot, in which respondent told petitioner that if he "put his hand on me again, it would be a mistake," and said that "If you take that [petitioner's gun] out, I'll stick it up your ass." The second incident took place on January 15, 1992, when respondent confronted petitioner at a courthouse and said, "Well, Gary, that's perjury number three. I guess it's time for a 12-34 and possibly the pill or a big pill." The final incident took place on August 26, 1995; petitioner confronted respondent, who told petitioner that he knew where he lived and knew the names of petitioner's wife and daughters.

ORS 163.738 requires that, before a stalking protective order may be issued, the court must find that alleged stalker "intentionally, knowingly or recklessly engaged in repeated and unwanted contact with the other person or a member of that person's immediate family or household thereby alarming or coercing the other person." To avoid a conflict with the guarantee of free expression in Or. Const. art. I, § 8, ORS 163.738 had to be construed to require that the alleged stalker not only intended his expressive conduct to threaten another person, but also had the means to carry out the threat.

The court concluded that, of the three incidents in the record, only one incident fit the statutory requirements. Accordingly, the order was reversed.

Hanzo v. deParrie, 152 Or. App. 525 (1998)

The Court of Appeals reversed the issuance of a stalking protective order against an anti-abortion protestor. Where the predicate contacts for a civil stalking protective order issued pursuant to ORS 30.866 involve expression, the expression or other associated conduct must "unambiguously, unequivocally, and specifically communicate the respondent's determination to cause harm." In *Hanzo*, the Court of Appeals concluded that the evidence was not sufficient to support issuance of a stalking protective order because the predicate contacts were not "unambiguously" or "unequivocally" threatening.

The respondent in *Hanzo* was the leader of a local anti-abortion group who publicly

supported anti-abortion activists who killed abortion providers. The petitioner was the executive director of a Portland health center that provides gynecological health care and counseling, including abortions. Respondent and his supporters initiated a campaign to stigmatize, harangue, agitate, mortify, and expose ("S.H.A.M.E.") petitioner; that campaign centered on petitioner's home. On two occasions, respondent led a group of anti-abortion protesters who picketed on the sidewalk and street in front of petitioner's home and paraded around petitioner's neighborhood with signs stating "your neighbor is an abortionist" and other slogans. Respondent and supporters also distributed handbills listing petitioner's work and (unpublished) home telephone numbers and addresses, and encouraged people to call or write petitioner to express their anti-abortion views. There was evidence that unidentified person(s) mailed an anti-abortion flyer and postcard to petitioner, and left an anti-abortion magazine at her front door. The picketers were peaceful and did not trespass on petitioner's property. On one occasion, respondent telephoned petitioner at home but was requested to never call back again. Respondent complied with that request.

The court of appeals held that, under both the civil (ORS 30.866) and criminal (ORS 163.732) stalking statutes, respondent must "knowingly" engage in "unwanted contact," and the complainant's alarm must be objectively reasonable. The contacts that petitioner pleaded and proved were not actionable contact because the contacts were not "unambiguously" or "unequivocally" threatening. The court rejected petitioner's "contextual overlay" argument, that the court should consider respondent's acts in the context of escalating violence towards abortion providers and respondent's prior statements in support of such violence. The court reasoned that (1) even if such advocacy is reasonably read as advocating violence, "that advocacy is abstract advocacy;" and (2) if petitioner's argument were correct "then *any* contact between petitioner and respondent would, necessarily [,] be an actionable "unwanted contact." (The concurring opinion did not join in the argument that respondent's earlier declarations of support for violent acts against abortion providers may have bearing on whether or not the contacts were "objectively reasonable" or a "threat.")

Shook v. Ackert, 152 Or. App. 224 (1998)

The Court of Appeals reversed the trial court's denial of a stalking protective order, holding that the ORS 163.730 *et. seq* is not, on its face, unconstitutionally overbroad. *If* a SPO proscribes arguably protected expression, that order is subject to an "as applied" constitutional challenge. The trial court erred when it dismissed the police citation and vacated the SPO on the grounds that the definition of "contact" in ORS 163.730(3) is an unconstitutionally overbroad restraint upon speech.

Criminal stalking statutes that describe the potential content of a SPO [ORS 163.730(3) and ORS 163.738(2)(b)] are not unconstitutionally overbroad simply because the statutes *may* authorize a SPO that restrains SPO that encompasses all forms of conduct specified in ORS 163.738(3). Because the trial court has the discretion to require the respondent to refrain from less than all of the forms of contact specified, and the court must specify the conduct covered by the SPO, the stalking law is not overbroad and does not violate the free speech provisions of the Oregon and United States Constitutions. The case was remanded to the trial court for reinstatement of the SPO.

Delgado v. Souders, 146 Or. App. 580, 934 P2d 1132, *rev allowed*, 326 Or. 43 (1997)

The Court of Appeals upheld the trial court's issuance of a stalking protective order. holding that ORS 30.866 was not unconstitutionally vague or overbroad, and that he terms

"contact," alarm," "danger" and "personal safety" were not unconstitutionally vague. The court further held that it was not an unconstitutional restriction on the right to freedom of movement to prohibit a person from frequenting a public place, where the circumstances are appropriate. (The court noted that this was an issue of scope of the protective order rather than constitutionality of the statute and that the former argument was not preserved.)

Defendant's conduct of repeatedly sitting next to and following petitioner in the university library, and appearing next to her on campus pathways, streets, and sidewalks, and in front of her personal residence, was not trivial conduct and was reasonably alarming to petitioner. (The court referred to ORS 163.732 as the "criminal analog" of ORS 30.866.) The trial court's issuance of the SPO was affirmed.

State v. Rangel, 146 Or. App. 571, *rev allowed*, 325 Or 367 (1997)

The Court of Appeals reversed the trial court's denial of a stalking protective order, holding that ORS 163.732, which defines the crime of stalking, is not overbroad and does not violate Article I, section 8, of the Oregon Constitution. For purposes of constitutional analysis, the court examined the focus of ORS 163.732 on "the forbidden effects of knowingly alarming and coercing."

Relying on its earlier analysis of Oregon's harassment statute in *State v. Moyle*, 299 Or. 691 (1985), the court held that, where the alleged stalking activity is carried out, in whole or in part, by communicative means, proof of the crime of stalking requires a "threat" or its equivalent to have been made. The defendant must intend to cause alarm or to coerce. The victim's alarm must be subjectively experienced and objectively reasonable.

The trial court erred when it granted defendant's demurrer. The case was remanded for trial on the criminal charge of violating the stalking protective order.

(NOTE: The following Court of Appeals cases were decided *before* the 1997 revisions to the stalking statute)

State v. Orton, 137 Or. App. 339 (1995)

Collateral bar doctrine did not bar criminal defendant, charged with the crime of violating a court-issued stalking protective order (SPO), from demurring on grounds that the term "without legitimate purpose" was impermissibly vague and overbroad. The court vacated defendant's conviction, agreeing that the term "without legitimate purpose" was unconstitutionally vague. [Note: This element has since been deleted.]

Johnson v. McGrew, 137 Or. App. 55, *rev den*, 322 Or. 361 (1995)

Respondent is not entitled to a court-appointed attorney to appeal a court-issued stalking protective order (SPO). The proceedings that lead to the issuance of a court's SPO do not meet the statutory definition of a "criminal action" ("an action at law by means of which a person is accused and tried for the commission of a crime." ORS 138.500 (since amended by Or Laws 1995, ch. 117, sec. 2, and ch. 194, sec. 1).

The court relied on the Oregon Supreme Court's ruling in *Brown v. Multnomah County,* 280 Or. 95 (1977), which identified five indicia that are to be evaluated to determine whether a proceeding is a "criminal prosecution" under Article I, section 11 of the Oregon Constitution: (1) The type of offense: Although violating a court's SPO is a crime, the conduct on which the underlying SPO is based need not be criminal. Moreover, the stalking statute imposes a burden

of proof associated with civil, not criminal, actions; (2) The prescribed penalty: This is generally regarded as the single most important criterion. The SPO proceeding results only in injunctive relief; the court cannot impose any other penalty at the SPO hearing. The fact that there is a criminal penalty for violating a SPO is irrelevant (and there was no such charge in this case); (3) Collateral consequences: The possibility that the issuance of a SPO could result in criminal prosecution is not a relevant "collateral consequence" and does not convert the civil process into a criminal proceeding; (4) Punitive significance: The test is whether the court's order "carries a stigmatizing or condemnatory significance." The overriding purpose of the SPO is injunctive; any stigmatizing or condemnation is incidental; and (5) Pretrial procedures: Arrest for failing to appear in court on an officer's SPO is a regulatory function. The fact that a failure to appear results in a subpoena or order for arrest does not mean that the proceeding in which the subpoena was issued was criminal. Other than as a consequence for failing to appear, the stalking statute does not provide for physical restraints, booking, detention in jail, or other procedures normally associated with criminal proceedings.

Starr v. Eccles, 136 Or. App. 30 (1995)

The phrase "legitimate purpose" is unconstitutionally vague. Because, under ORS 163.735 and ORS 163.738, the police officer and the court, respectively, must find that respondent intentionally, knowingly, or recklessly contacted petitioner or a member of petitioner's family or household "without legitimate purpose" as a prerequisite for the entry of the officer's and the court's stalking protective order, and the term "without legitimate purpose" is impermissibly vague, both the officer and the court were without authority to enter the SPO.

Foster v. Souders, 135 Or. App. 542 (1995)

Defendant's criminal stalking conviction was reversed, pursuant to the court's ruling in *State v. Norris-Romine*, 134 Or App 204, rev den, 321 Or. 512 (1995) (see below). The statutory term "without legitimate purpose" in ORS 163.735 and 163.738 is unconstitutionally vague; that vagueness is grounds for dismissing criminal charges against defendants accused of violating stalking protective orders issued pursuant to ORS 163.735 and ORS 163.738.

Under the Oregon Constitution, a criminal statute must be sufficiently explicit "to inform persons of common intelligence of the conduct that they must avoid." The term "legitimate purpose" does not, on its face, tell a person of ordinary intelligence what is encompassed within that term. It is insufficient that the meaning of the term may become clear upon reference to legislative history.

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Under the Oregon Constitution, a criminal statute must be sufficiently explicit "to inform persons of common intelligence of the conduct that they must avoid." The term "legitimate purpose" does not, on its face, tell a person of ordinary intelligence what is encompassed within that term. It is insufficient that the meaning of the term may become clear upon reference to legislative history.

	SEXUAL ABUSE PROTECTIVE ORDER (SAPO) Effective 1/1/2014
ELIGIBILITY	• Available to minor* as well as adult petitioners (12 yo and older can file on own petition; parent or lawful guardian can petition for person under 18, but must file petition for person under 12) • Not available against minor respondent • Petitioner and respondent must NOT be "family or household members" (defined by ORS 107.705) • Respondent must NOT be subject to another protective order (ie, EPPDAPA, FAPA**, Release Agreement (in criminal case), No Contact Order, Stalking Order, Protective Order from Juvenile Dependency Court, including foreign restraining orders)

ABUSE	• One incident of abuse required
	• Subjected petitioner to sexual abuse. Sexual abuse = sexual contact with:
	  ○ a person who does not consent to the sexual contact; or
	  ○ a person who is considered incapable of consenting to a sexual act under ORS 163.315
	• Petitioner must reasonably fear for their safety with respect to respondent
	• Abuse must have taken place within last 180 days (unless respondent is in jail or more than 100 miles away or was subject to a restraining, protective or no contact order)

RELIEF	• One year (renewable upon finding that it is objectively reasonable for a person in the petitioner's situation to fear for the person's physical safety if the restraining order is not renewed)
	• <u>Order shall restrain respondent from</u>:
	  ○ contacting petitioner and from intimidating, molesting, interfering with or menacing the petitioner, or
	  ○ attempting to intimidate, molest, interfere with or menace the petitioner.
	• <u>Upon petitioner request, Court may order</u>:
	  ○ Respondent be restrained from contacting the petitioner's children or family or household members;
	  ○ Respondent be restrained from entering, or attempting to enter, a reasonable area surrounding petitioner's residence;
	  ○ Respondent be restrained from intimidating, molesting, interfering with or menacing any children or family or household members of petitioner (or attempting to do this);
	  ○ Respondent be restrained from entering, or attempting to enter, any premises and a reasonable area surrounding the premises when necessary to prevent the respondent from intimidating, molesting, interfering with or menacing the petitioner or the petitioner's children or family or household members; and
	  ○ Other relief necessary to provide for the safety and welfare of the petitioner or the petitioner's children or family or household members.

MODIFICATION	• Terms of order may be modified
	  ○ Petitioner may remove or make terms less restrictive by ex parte motion
	  ○ For other modifications by either party, notice and hearing required

PROCEDURE	• SATF to develop forms and make available an instructional brochure regarding SAPO rights • One procedure – all petitions filed through Court • No filing, service, or hearing fees • Hearing only if requested by respondent • Prohibits use of certain evidence in hearing (Rape Shield law applies) • Preponderance-of-the-evidence standard (51%) • Ex parte hearing may be held by telephone • A party may request that the party or a witness appear by telephone if hearing scheduled
ENFORCEMENT	• Petitioner cannot violate • Mandatory arrest laws apply • Sheriffs to enter into LEDS and NCIC databases • Violation of order can be prosecuted by issuing county or the county in which violation occurred • Violation is a civil matter but remedial sanctions may be sought pursuant to ORS 33.055 (Contempt proceeding)
FULL FAITH AND CREDIT	Yes, enforceable in all states
FEDERAL GUN LIABILITY	No, except certain minor petitioners

*<u>Minor petitioners</u> seeking an order should be advised that Judges and Law Enforcement Officers are mandatory child abuse reporters who will likely make a report to law enforcement or Department of Human Services upon receipt of a SAPO petition from, or on behalf of, a minor petitioner.
**<u>Minor petitioners</u> could be eligible for FAPA and SAPO <u>at same time</u>.

BRIEF SUMMARY OF EMERGENCY PROTECTIVE ORDER STATUTE

HB 2776

I. A Peace Officer **MAY** inform a person in danger of abuse of the officer's ability to apply for an ex parte emergency protective order.

II. Peace Officer must have:

A. Consent or permission of the person **AND**

B. Probable cause to believe, 1) after responding to a domestic disturbance, circumstances for mandatory arrest exist (ORS 133.055(2)(a)), **OR** 2) the person is in immediate danger of further abuse by a "family or household member" (ORS & 107.705(3) **AND** an emergency protective order is necessary to prevent further abuse.

III. Application will consist of the proposed order and the Officer's declaration setting forth facts and circumstances.

VI. Electronic Transmission is allowed.

[THIS WILL BE THE METHOD EMPLOYED AFTER WORK HOURS IN MULTNOMAH COUNTY]

V. Court **MAY** enter order **IF** the court finds:

A. In response to a domestic disturbance the officer believes circumstances for mandatory arrest exist **OR**

B. The person is in immediate danger of abuse from family/household member **AND** an emergency protective order is necessary to prevent further abuse.

VII. Unlike Family Abuse Protection Act restraining orders, the Emergency Protective Order restrains the respondent from contacting, intimidating, molesting, interfering with or menacing the person, or attempting to do any of those things **ONLY**.

VII. Order must include probable cause findings, the date the order expires and a security amount for violation.

VIII. The rest of the statute and after-hours protocol documents provide further detail regarding the process for law enforcement and for the after-hours warrant duty judge.

RELATED STATUTES:

MANDATORY ARREST – ORS 133.055 (2)(a):

(2)(a) Notwithstanding the provisions of subsection (1) of this section, when a peace officer responds to an incident of domestic disturbance and has probable cause to believe that an assault has occurred between family or household members, as defined in ORS 107.705, or to believe that one such person has placed the other in fear of imminent serious physical injury, the officer shall arrest and take into custody the alleged assailant or potential assailant.

FAMILY OR HOUSEHOLD MEMBER – ORS 107.705(3)

(3) "Family or household members" means any of the following:

(a) Spouses.

(b) Former spouses.

(c) Adult persons related by blood, marriage or adoption.

(d) Persons who are cohabiting or who have cohabited with each other. *[Note: This has been interpreted to apply to people cohabiting or who have cohabited in a sexually intimate relationship, not to platonic roommates).*

(e) Persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing by one of them of a petition under ORS 107.710.

(f) Unmarried parents of a child.

Oregon Judicial Department (OJD) Website Links

Forms for Family Abuse Prevention Act (FAPA) - Restraining Orders; Elderly Persons & Persons with Disabilities Abuse Prevention Act (EPPDAPA) – Restraining Orders; Sexual Abuse Protective Orders (SAPO); and Stalking Orders: http://www.courts.oregon.gov/ojd/forms/pages/index.aspx

OJD's website with DV information and resources:
http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Domestic-Violence-Resources.aspx

OJD's website with information about Firearms Restrictions in Domestic Violence cases:
http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

The Future of the Legal Profession: Dealing with Change

Presenter:

William J. Howe, III, Attorney at Law, Gevurtz Menashe Larson & Howe PC

Bill has practiced law for 40 years, the last 20 years devoted exclusively to family law with Gevurtz Menashe, P.C. Bill has devoted enormous amounts of time and energy to family court reform. He has served as the Vice-chair of the SFLAC since 1997; currently serves on the Advisory Committee of the Honoring Families Initiative of IAALS; currently serves as President of the Oregon Family Institute and formerly of the Oregon Academy of Family Law Practitioners; served on the Board of Directors of AFCC; and was Chair of the Oregon Task Force on Family Law from 1993 to 1997. He also served as Pro Tem Judge and a mediator. He was awarded the 2003 Pro Bono Challenge Award for donating the Highest Number of Pro Bono Public Service Hours by the Oregon State Bar. In addition, Bill has made over 120 presentations at family law conferences and at other venues in the United States, Canada, Australia, Europe and South Africa, and has authored several articles on family law-related matters.

FUTURE OF THE LEGAL PROFESSION

William J. Howe, III

Vice Chair: Statewide Family Law Advisory Committee
Of Counsel: Gevurtz, Menashe, Larson & Howe, P.C.,
Portland, Oregon USA
Email: whowe@gevurtzmenashe.com

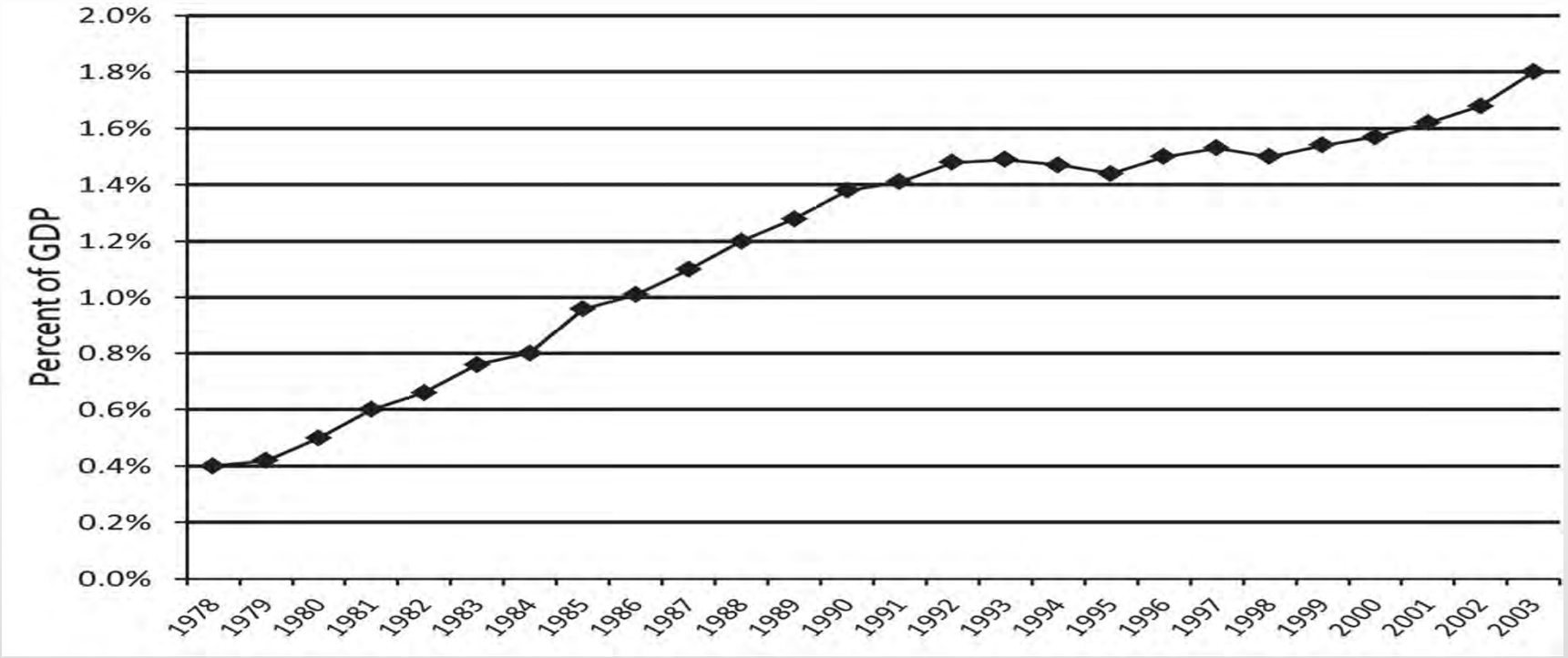
SFLAC Family Law Conference
Salem, OR - March 16, 2017

PRACTICE OF LAW – RECENT HISTORY

- 1975
  - Minimum fee schedules were very recent memory
  - Lawyers out earned doctors – but fought legal insurance
  - No Computers, no internet
  - Fax machines new, slow and expensive
  - Photocopying slow and expensive
  - Six button black phones, no cell phones
  - Male dominated, much more formal legal culture
  - “Full service” was the only service
- Earlier: Training by apprenticeship, “counsellor at law”

LEGAL SERVICES HAVE BECOME TOO EXPENSIVE

Expenditures on Legal Services as Percent of Gross Domestic Product, 1978 to 2003

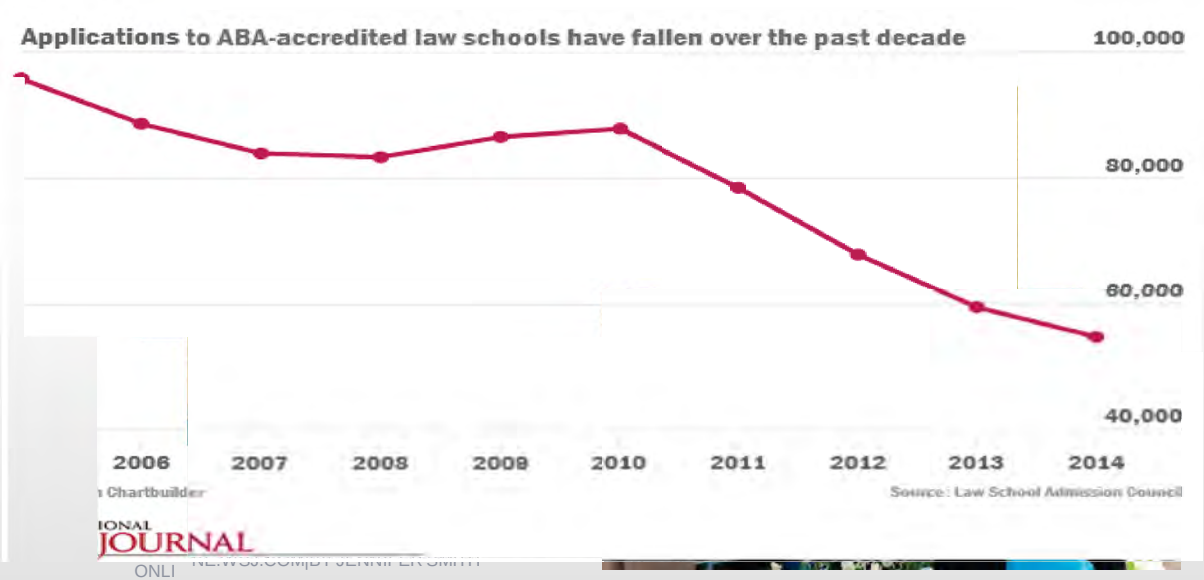


Source: Marc Galanter, Planet of the APs, 53 Buff. L. Rev. (2006)

LAW SCHOOL CRISIS

- Law schools bloated by research-oriented faculty with little practical experience
- Class action suit against 13 law schools for misleading employment statistics
- Many graduates leave with crushing student debt
- Applications declined 32 % 2004 to 2013. In 2014-15 fewer *applied* than were *admitted* three years before!
- Some law schools will close, are others lowering standards, admitting smaller classes, cutting faculty or merging

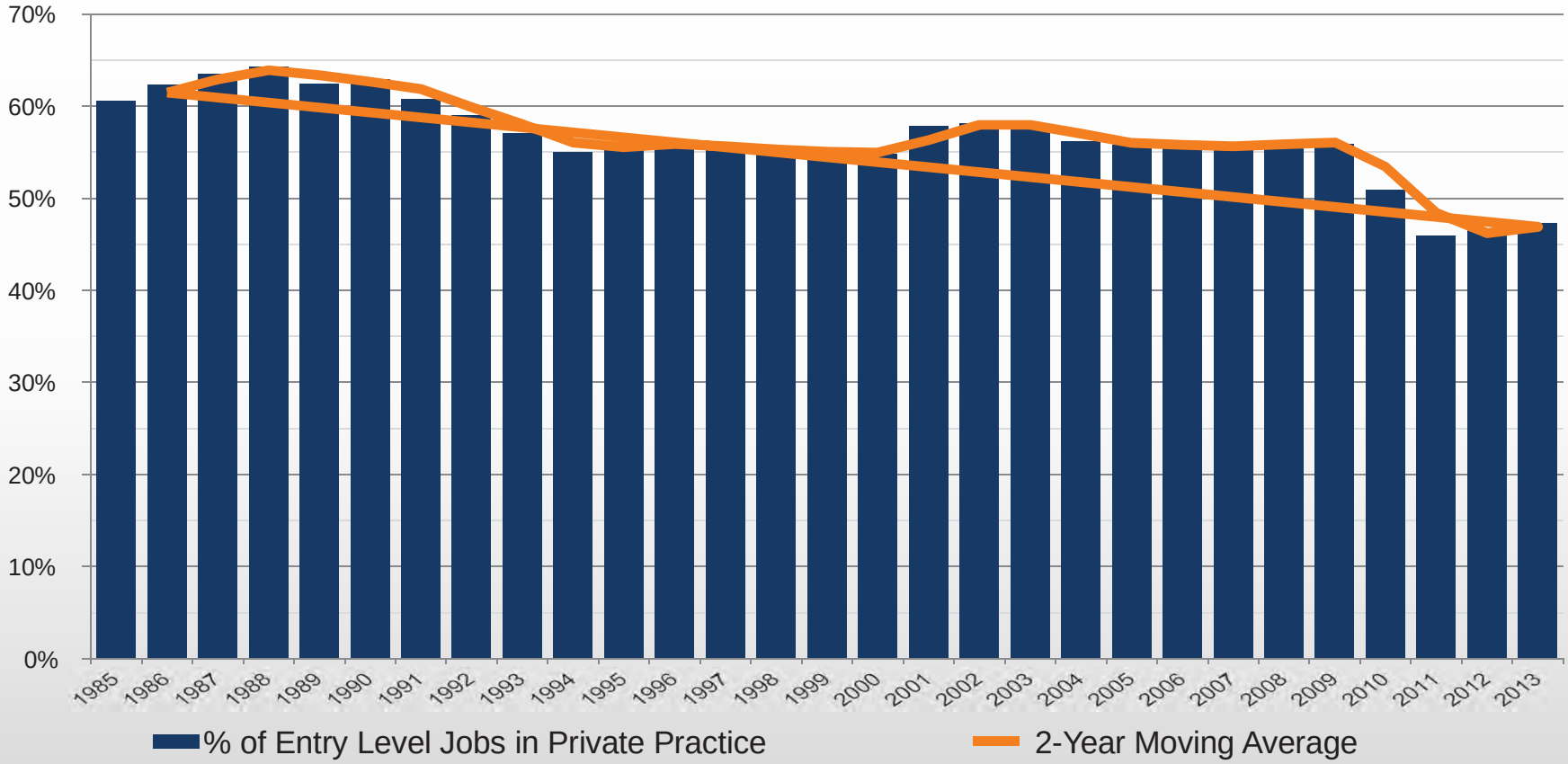
CURRENT TRENDS ARE NOT PROMISING



CRISIS FOR LAW STUDENTS

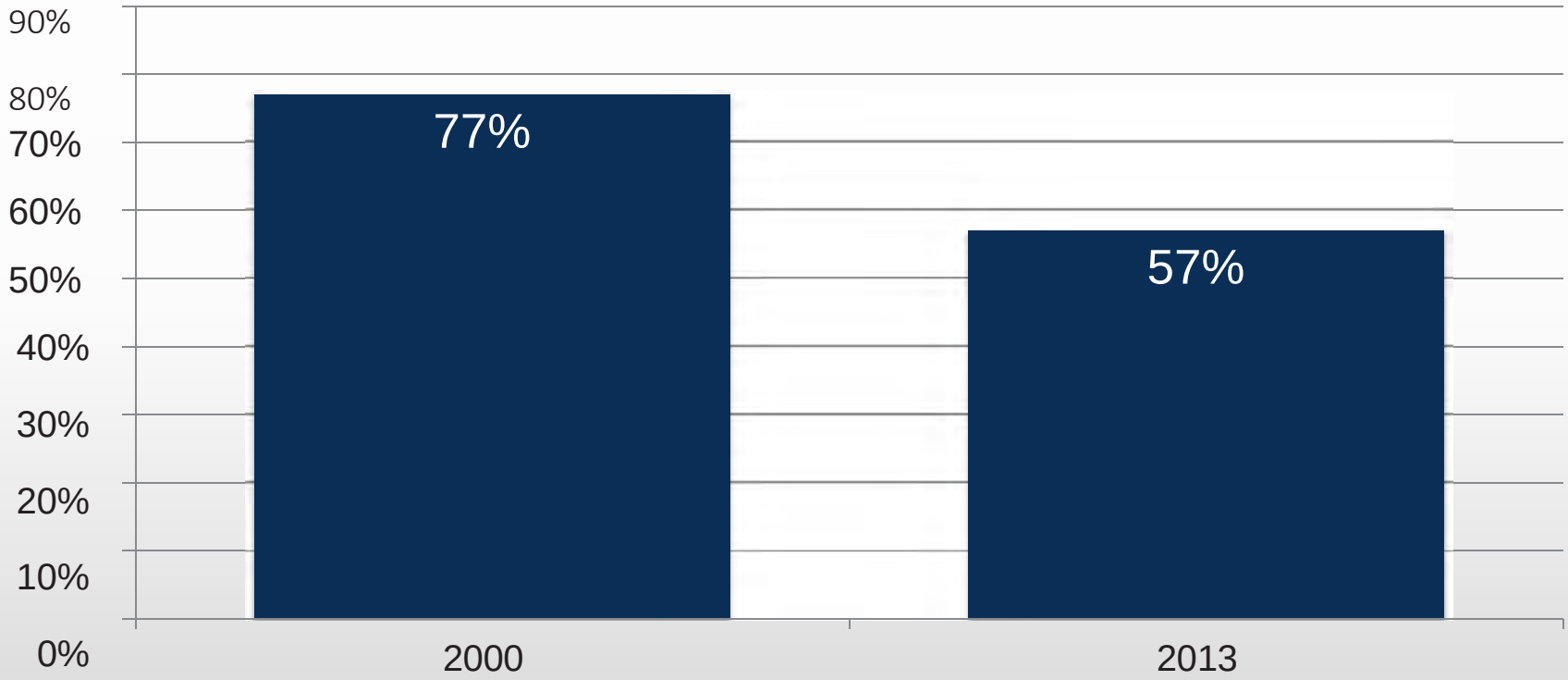
- Law school tuition increased 820% in public and 375% in private schools between 1985 and 2009
- From 2002 to 2013 student debt has risen from $46,499 to $85,600 at public schools and from $70,147 to $122,158 at private schools
- Dismal job market = these debt load figures are unconscionable. 55.1% of 2012 graduates were employed in full-time, long-term jobs one year after graduation
- Student loan debt is now the most common type of debt, surpassing both auto loans and mortgages!

PERCENTAGE OF ENTRY LEVEL JOBS IN PRIVATE PRACTICE

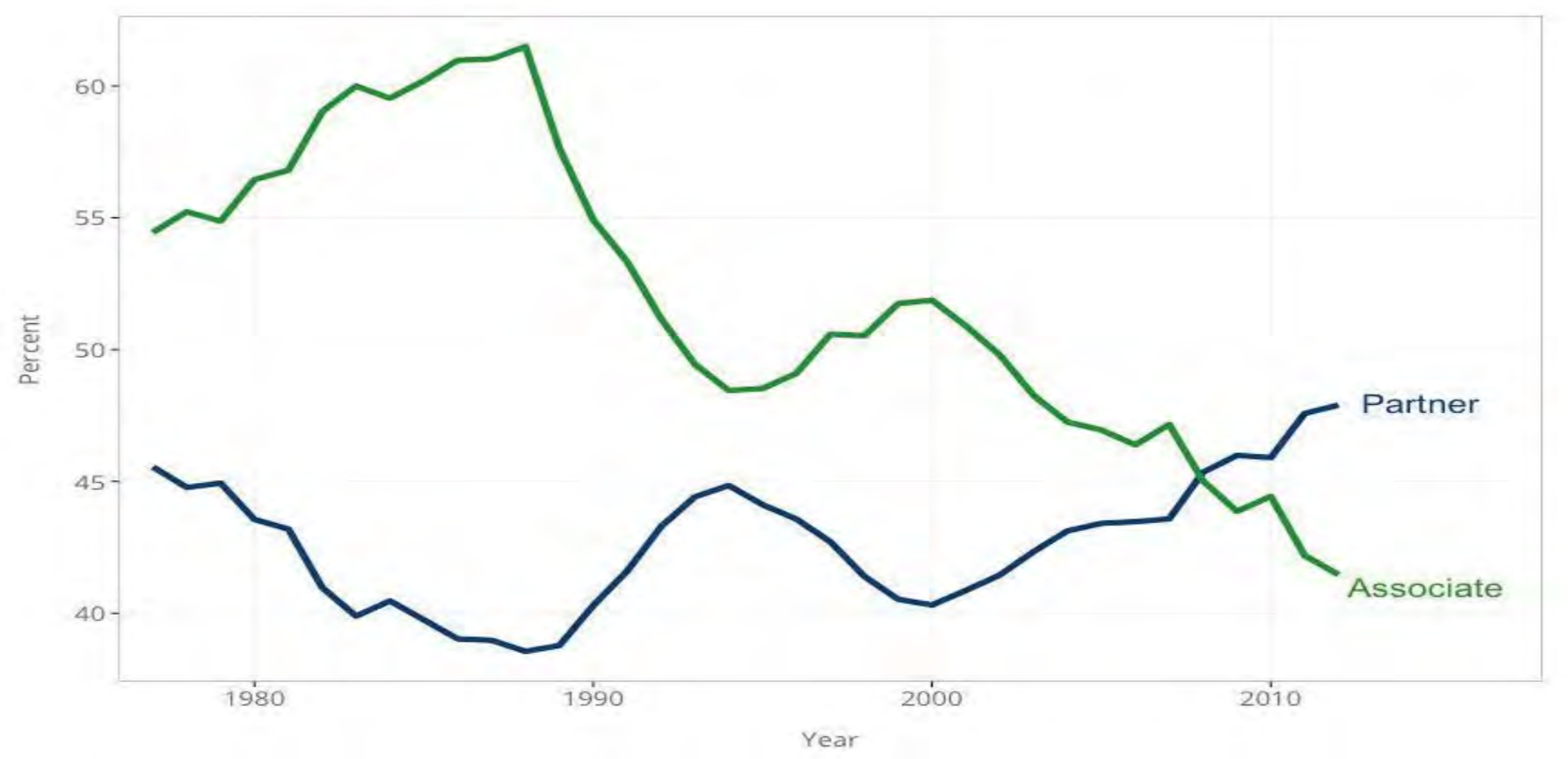


Source: NALP, charts generated by William Henderson

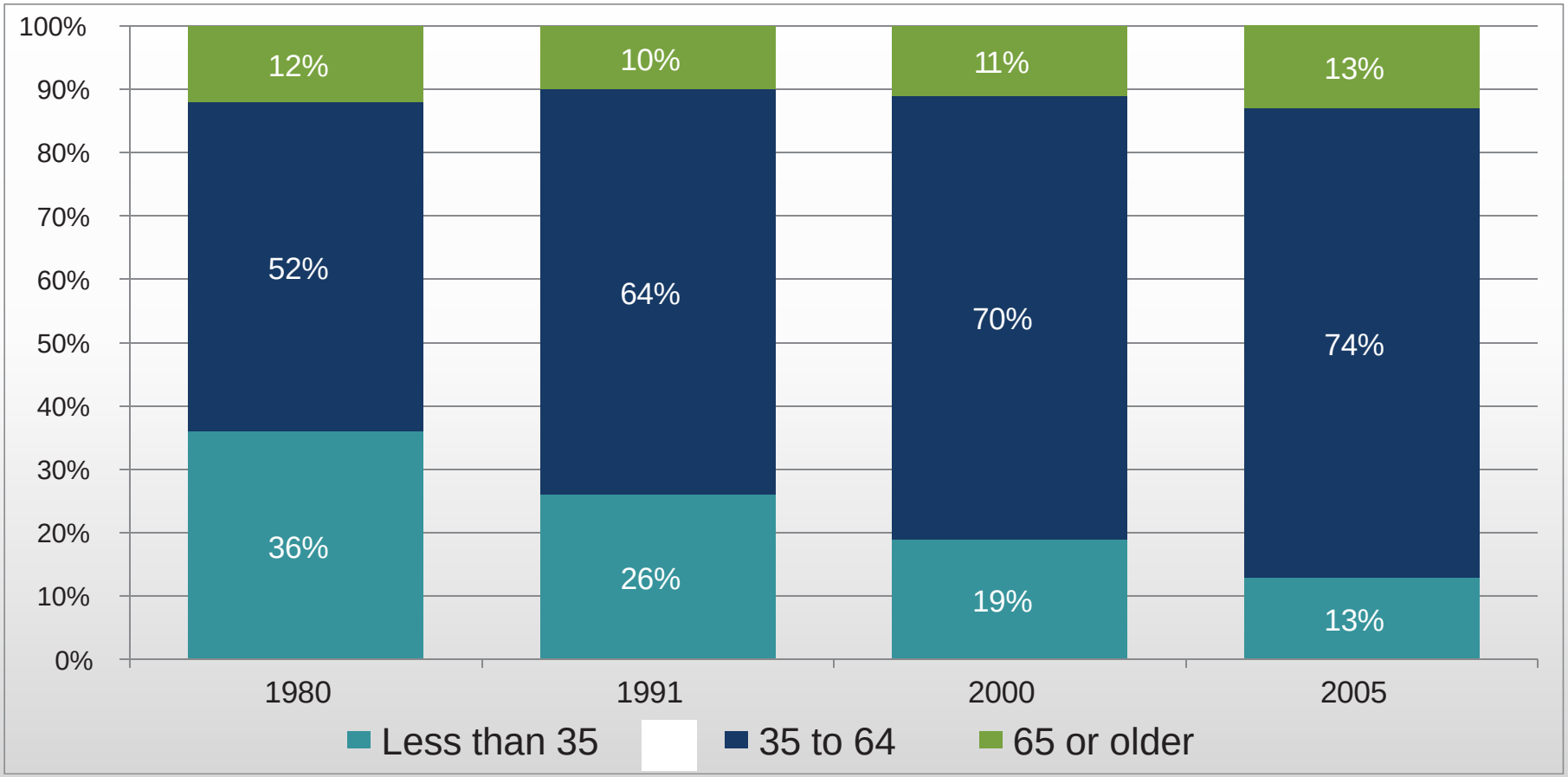
BAR PASSAGE REQUIRED JOBS



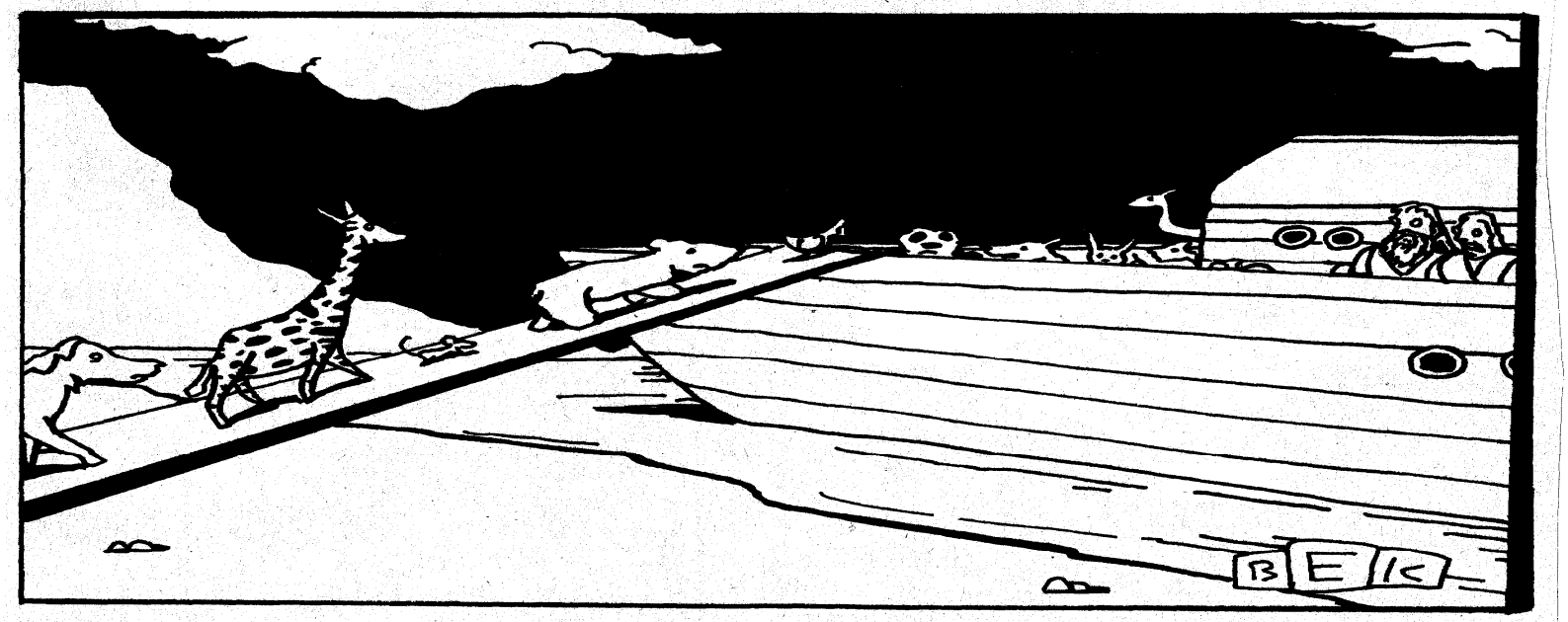
% PARTNERS AND ASSOCIATES IN THE NAT. LAW J 250, 1977-2012



DEMOGRAPHICS OF LICENSED BAR



JUDICIAL BRANCH BUDGET WOES



"I know we have to cut costs, but is bringing only one of each a good idea?"

SO WHAT'S THE PROBLEM?

- Legal services are too expensive – creating unacceptable transaction costs. ABA – 80% of U.S. population lacks adequate access to legal services. U.S. 67th or 97 (tied with Uganda) in access to affordable legal services.
- Customers are rejecting the fee-for-service, full-service model
- Growing army of unemployed and under-employed lawyers – many with crushing student debt while compensation falling
- Judicial branch is underfunded and overwhelmed with self-representeds
- Technology and non-lawyer providers are increasingly penetrating the legal service delivery market
- Lawyer practice regulations limit new technologies, multi-state practice, and service delivery by non-lawyers
- Organized Bar resists change to traditional practice model

FAMILY LAWYERS DISSATISFIED WITH SYSTEM

- 73% of divorce attorneys surveyed agreed that the current court system of divorce, legal separation, and parenting rights and responsibilities in their jurisdiction does not adequately meet the needs of most litigants
- 88% felt that a less adversarial system would better serve families
- 83% agreed that comprehensive changes in the current court-centric system of divorce, separation, and parenting responsibility are necessary
- 95% supported comprehensive change to the existing system— even if doing so would require significant adjustments to their current practice

- *All from :* http://iaals.du.edu/sites/default/files/documents/publications/on_current_issues_in_family_law_an_informal_survey_of_attorneys.pdf8 The survey asked respondents to react to the following statement: "I think that the current

TRENDS IN THE LEGAL MARKET

- Increasing “self help”
  - Self-help culture
  - Anti-lawyer bias - lawyers perceived to increase rather than diminish controversy. Marsha Kline Pruett – Clients in 71% of divorces with children felt that the lawyers increased the conflict
  - Weak economy
- Many more “self-representeds”
  - 70%+ in Family Law in Oregon, 40%+ in Canada – trend is international
  - Creates huge challenges for the Courts (confusion over evidence, delays and complicates hearings, raises troublesome judicial ethics issues)
  - Presents opportunities for lawyers
- Clients and law firms adapting – Outsourcing, house counsel,

CHANGING LAWYER BUSINESS MODEL

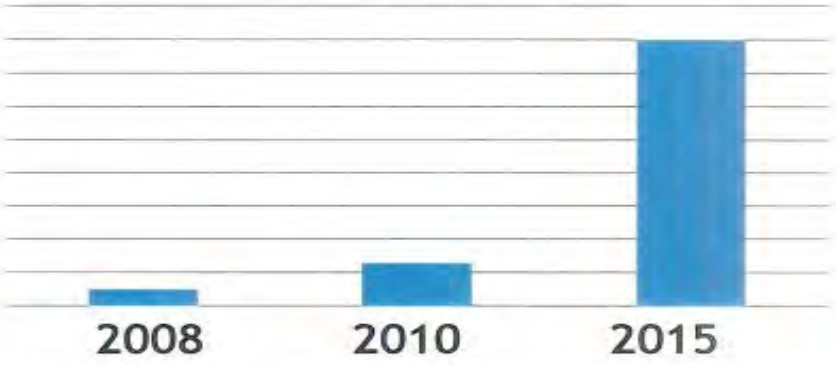
- Law firms consolidating, solos increasing
- Use of hourly billing decreasing. Increased use of Alternative Fee Arrangements
- Newer lawyers demanding a work-life balance and facing staggering debt
- The consuming public is resorting to a “Home Depot,” “self-help” approach
- Lawyers are fungible, clients are fungible – relationship reduced to a transaction
- MULTI-DICIPLINARY PRACTICE IS COMING! Has arrived in England.
- Market and demographic changes are driving change.
- AVVO, Legal Zoom, Counsel on Call, http://www.paralegalalternatives.com/ - $155 Oregon divorce.

OUTSOURCING

- Billing rates – India $30/hour, experienced lawyers often trained in U.S. - $75 to $100/hour
- Avoids infrastructure costs of associates
- Counsel on Call (http://counseloncall.com/) could easily be adapted to family law

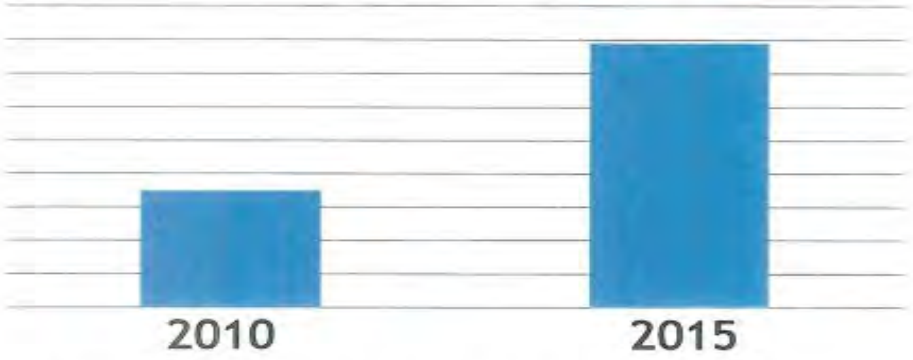
Effect of Outsourcing

Revenues



Estimated increase from 250 million to 640 million to over 4 billion

Outsourced Jobs



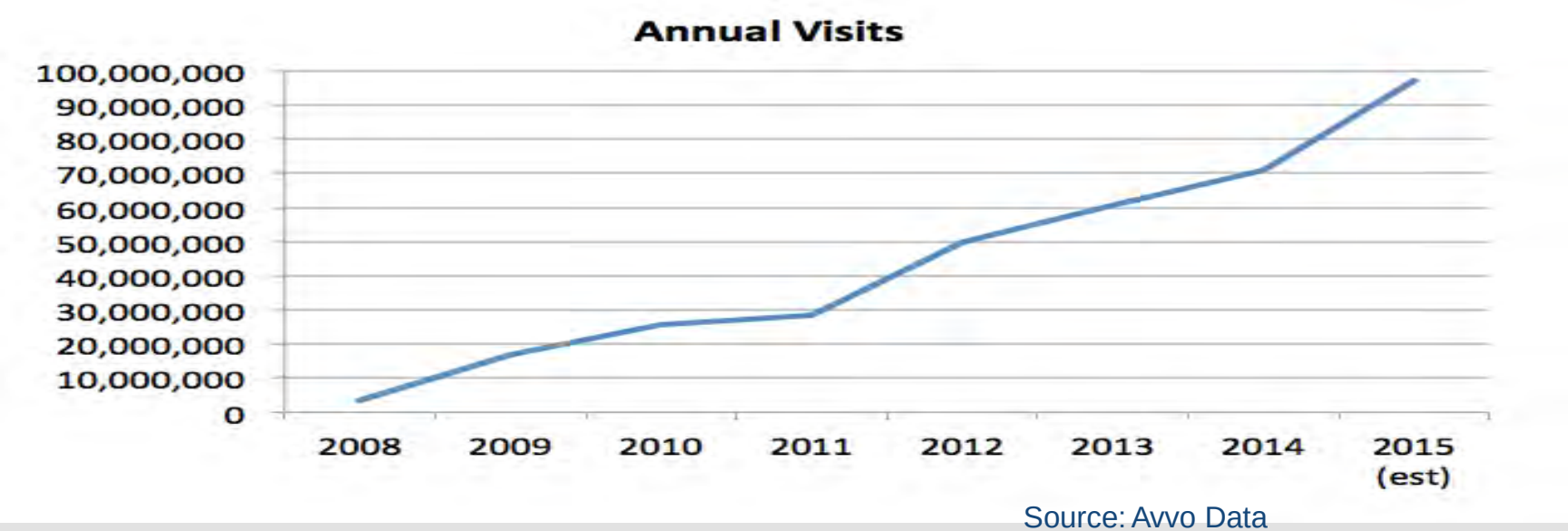
Estimated increase from 35,000 to 79,000

Work Being Outsourced

Just about anything


Avvo
Legal. Easier.

AVVO – CONSUMERS NATIONWIDE



Source: Avvo Data

AVVO MARKET PENETRATION

- Comprehensive lawyer directory – 97% coverage in U.S. (2016)
- Every 5 seconds someone receives free legal guidance on AVVO
- Competition is not from lawyers but from:
  - Legalzoom.com - $69 Will, $795 Premarital Agreement – 2 million customers (as of 2014)
  - Rocketlawyer.com – driven by Google and Lexis-Nexis
  - Cybersettle - $1.8 billion in settlements
- Value of legal market was 400 Billion in 2013 – increasingly this market is flowing from lawyers to other providers
- Private venture capital is flooding into legal marketplace
- Change is RAPID: Uber, Airbnb


Avvo

BOTTOM LINE

Courts and lawyers must become more creative and efficient in delivering legal services to our customers

- If we do not, legislation and regulatory changes are sure to follow. Tasks currently reserved to lawyers will disappear (Remember title insurance, workers comp, railroad claims, current efforts to license legal technicians, electronic delivery of legal services, etc.)
- Technology and non-lawyer providers will fill the need
- Increasing public's access to competent legal services is both profitable and the right to do

OLD PARADIGM

- Rights-based orientation
- Confidence that courts will produce best justice
- Mindset that lawyers are needed and in charge

NEW PARADIGM

- Client-centered Decisions
- Power Sharing
- Interdisciplinary
- Lawyer as problem solver, counselor at law, helper and healer
- Negotiation, not court, is assumed to be the last stop on the dispute resolution highway

EMERGING FAMILY LAW REFORMS

- Informal Domestic Relations Trial
- Unbundled legal services
- Innovative practice models, such as Justice Café
- Collaborative law
- Limited Licensed Legal Technicians
- Multi-disciplinary practice models – IAALS Center for Out-of-Court Divorce
- Divorce by registration
- Robust interactive forms available on OJD website
- Triage and differentiated case management

SELF REPRESENTEDS NEED HELP
A Self-Represented on Evidence

INFORMAL DOMESTIC RELATIONS TRIAL

(Deschutes SLR 8.015)

- "Opt In" – exceptions for inappropriate cases
- Most rules of evidence waived
- Informal procedures - Court retains jurisdiction to modify if justice requires
- Resolves all issues, usually faster – same day as hearing
- Standard of review unchanged
- Opportunity for lawyers to unbundle
- See *Family Court Review* Article, 1/17, *Oregon's Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials*, by: William J. Howe III and Jeffrey E. Hall

INFORMAL DOMESTIC RELATIONS TRIAL LOGISTICS

- SLR 8.015 – Resolves all issues as follows:
  - Parties sign waiver and consent
  - Parties summarize issues to be decided
  - Moving party then the other party speaks. Parties are not questioned except perhaps by the Court
  - Expert testimony usually by report
  - Rules of evidence waived, hearsay received
  - Each party allowed brief testimonial response
  - Each party may make a brief legal argument
  - Court rules, usually same day
- Court retains jurisdiction to amend procedures as justice requires

WHAT IS UNBUNDLING?

Full service

vs.

Mini-service

UNBUNDLED LEGAL SERVICES

- It's what lawyers have always done – define the scope of representation!
- For Example:
  - Advising/coaching
  - Gathering facts about client's situation
  - Discovering facts about opposing party
  - Researching particular issue of law
  - Drafting documents
  - Reviewing documents
  - Negotiating with opposing parties or their lawyers
  - Representation in court

WHAT UNBUNDLING IS NOT

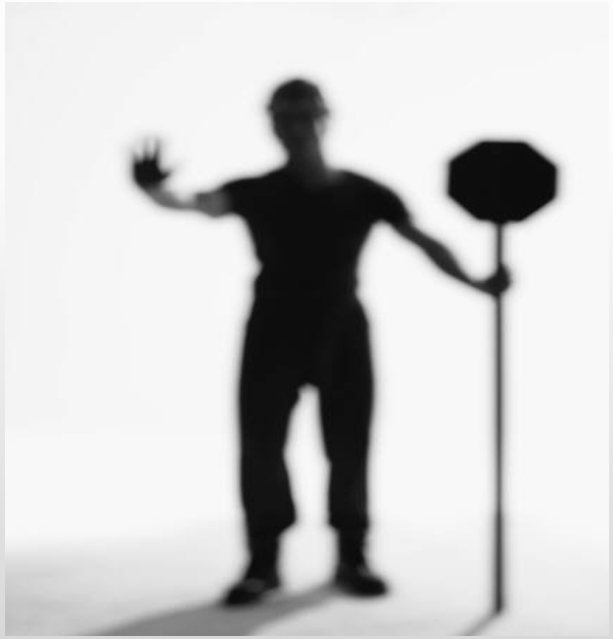
- Second-class practice
- Inherently unethical
- Inherently malpractice
- Good for every case, every client
- A chance to learn a new area of law

BENEFITS OF UNBUNDLING

- More affordable
- Greater access to justice
- Empower clients
- Expand practice
- Improve perception of lawyers and legal system
- Preserve diminishing court resources – Chief Balmer has ordered training for staff

BARRIERS TO UNBUNDLING

- Discomfort with lack of control
- Concern for client
- Fear of malpractice/ethics risks
- More work than it's worth
- Concern that court will require full service



ETHICAL FRAMEWORK

- Lawyer may limit the scope of representation of a client if:
  - the limitation is reasonable under the circumstances, and
  - the client gives informed consent. RPC 1.2(b)
- Representation is competent
  - Requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation RPC 1.1
- Representation is diligent
  - Lawyer must not neglect a legal matter entrusted to the lawyer. RPC 1.3
- Be careful about communicating with represented party. RPC 4.2

CHOOSE CLIENTS CAREFULLY

- Does the client have the mental, emotional, physical capacity to carry out his or her portion of the work?
- What experience does the client have with the legal system?
- What is the distribution of power between the parties?
- Do you communicate well with the client and does the client seem to understand?
- Are the client's expectations reasonable?

PRACTICAL TIPS

- Define and document limited scope in WRITTEN agreement – do not include “and such other matters” language
- Detail factual basis of your advice/services
- Explain and document risks of unbundled representation
- Outline client responsibilities
- Repeatedly remind client of limited scope
- Send disengagement letter when your representation is over
- Document any changes in scope of representation in writing
- PLF covers limited scope representation

JUSTICE CAFÉ

- www.justicecafe.com
- Unbundling model – The Manely Firm, P.C., Georgia – Michael and Sheila Manely
  - Intake initially by law students, now single intake person
  - $75/hour, maximum $750, court extra
  - Detailed contract with very specific tasks
  - Lawyers who take referrals trained by firm
  - Has produced large benefits for firm

COLLABORATIVE LAW

- Objective: Parties not professionals are in charge
- 15 states have adopted part or all of Uniform Collaborative Law Act - http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act
- Written participation informed consent agreement required
- Non-litigation agreement and lawyers are disqualified from any litigation, with few exceptions
- Supportive and transparent teamwork – open communication
- Terminable by any party at any time

LICENSED LEGAL TECHNICIANS

- Non-lawyers preforming some lawyer tasks – Firms increasingly use paralegals
- LLLT's Authorized in 7 U.S. states, Washington D.C. and Canada
  - June 15, 2012, Washington Supreme Court order adopting LLLT Rule stating: "[w]e have a duty to ensure the public can access affordable legal and law related services, and that they are not left to fall prey to the perils of the unregulated market place." Order at 5-6.
- OSB has created Limited Legal Technicians Task Force which has issued a report that is now being reviewed by the OSB Futures Task Force Regulatory Committee
- Bottom line – LLLT's are coming!

SFLAC COLLABERATION WITH IAALS

- IAALS: Institute for the Advancement of the American Legal System http://iaals.du.edu/about
- Executive Director: Former Colorado Supreme Court Justice Rebecca Kourlis
- IAALS assistance to Oregon's Statewide Family Law Advisory Committee
- IAALS also has an ongoing role:
  - monitoring innovative processes and programs around the country
  - providing assistance to state court and community efforts to better serve divorcing and separating families
  - http://iaals.du.edu/honoring-families/projects/innovation-around-country

IAALS INITIATIVES

Quality Judges – Identifies and recommends empirically based models for choosing, evaluating, and retaining judges that preserve impartiality and promote accountability.

Educating Tomorrow's Lawyers – Identifies innovative models of legal education that align with the needs of an evolving profession.

Rule One – Identifies and recommends court processes and procedures that provide greater access, efficiency, and accountability.

Honoring Families – Identifies and recommends dignified and fair processes for the resolution of divorce, separation, and custody in a manner that is more accessible and more responsive to children, parents, and families.

CENTER FOR OUT-OF COURT DIVORCE

Modeled in part after the Australian Family Relationship Centres and initially implemented in the Resource Center for Separating and Divorcing Families at the University of Denver – the Center is now active in the Denver community

http://iaals.du.edu/honoring-families/projects/different-pathways-separation-and-divorce/center-out-court-divorce

An innovative process leverages interdisciplinary services and an environment that empowers parents to work together towards positive outcomes for their children:

- Legal education
- Mediation
- Mental health
- Parenting support
- Financial planning

CENTER FOR OUT-OF-COURT DIVORCE (2)

An IAALS evaluation found that parents who participated in the demonstration project at the University of Denver showed significant improvements in the following areas (among others) during a time when a negative trajectory would be expected (http://iaals.du.edu/honoring-families/projects/different-pathways-separation-and-divorce/center-out-court-divorce)

- Lower levels of stress, anxiety, and depression
- Increased shared decision-making skills
- Increased confidence in ability to co-parent
- Decreased acrimony between parents

DIVORCE BY REGISTRATION

- Australian model the Family Relationship Centres
- France initiative to allow court clerks to approve divorces when spouses agree
- Principal Judge Peter Boshier (ret.), New Zealand – Proposes allowing filing of dissolution by registration to be filed not as a litigation filing but enforced as a judgment
- Analogy to dissolving registered Domestic Partnerships in U.S.
- These processes will be easier for non-lawyers and self-representeds to navigate

ADDITIONAL DEVELOPMENTS

- Robust interactive forms soon to be available on OJD website
- Triage and differentiated case management
- Return of courthouse facilitators
- Courthouse navigators in New York and California
- Law library conversions to self-help centers

THANKS TO CONTRIBUTORS

- WOODY MOSTEN, the “Father of Unbundling” for sharing his slides on unbundling and for his tireless efforts to promote consumer-oriented delivery of legal services
- HELEN HIERSCHBIEL, Ex. Dir. OSB, for sharing slides on the ethical issues surrounding unbundling
- PAULA LITTLEWOOD, Ex. Dir. Washington State Bar, for information about the state of Washington’s LLLT program
- WILLIAM HENDERSON, University of Indiana Maurer School of Law, for sharing data on lawyer metrics and demographics
- BECKY KOURLIS, Ex. Dir., IAALS and all of her staff whose devotion to improving our judicial system is generating significant positive reform
- AVVO for the use of its slides

RESOURCES - GENERAL

- *Glass Half Full: The Decline and Rebirth of the Legal Profession*. Benjamin H. Barton, 2015
- *The Lawyer Bubble: A Profession in Crisis,* Stephen Harper, 2013
- *South Carolina Law Review,* Winter 2016, Vol. 67, No. 2, an excellent selection of articles
- *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016
- *IAALS* publications:
  - *Rebuilding Justice,* Rebecca Love Kourlis and Dirk Olin, IAALS, 2011
  - *Cases Without Counsel: Experiences of Self-Representation in U.S. Family Court* – study exploring self-representation from the litigants' perspective and IAALS recommendations based on these narratives. http://iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/cases-without-counsel
  - *Unbundling Legal Services: Options for Clients, Courts & Counsel* – multiple guides and toolkits on unbundled legal services developed in partnership with the Association of Family and Conciliation Courts. (http://iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/unbundling-legal-services)
  - *2015 Family Bar Summit: Shaping the System for the Families We Serve* – convening of thought leaders from a cross-section of the family law bar. http://iaals.du.edu/honoring-families/projects/future-family-bar
  - *The Modern Family Court Judge: Knowledge, Qualities & Skills for Success* http://iaals.du.edu/honoring-families/projects/empowering-courts-best-serve-families-and-children/modern-family-court
  - http://iaals.du.edu/honoring-families/projects/innovation-around-country
  - *2016 A Court Compass for Litigants Convening* – focused on the development of an online tool designed to help families divorcing and separating families. http://iaals.du.edu/honoring-families/publications/court-compass-litigants

RESOURCES - UNBUNDLING

- OSB Fee Agreement Compendium
- PLF Practice Aids and Forms
- ABA Standing Committee on the Delivery of Legal Services www.abanet.org/legalservices/delivery/delunbund.html
- IAALS guides cited above and additional materials on website
- Wealth of materials published by Forrest “Woody” Mosten, all excellent and to numerous to list. http://www.mostenmediation.com/books/index.html

FINALLY – OUR CHALLENGE

- "Where there is no vision, the people perish." President Franklin D. Roosevelt, 1st Inaugural Address – SFLAC Futures Report
- Ours is a noble profession
- Striving to obtain "liberty and justice for all" is our culture's most noble ideal
- Lawyers and all in the Judicial Branch share the obligation to deliver on this promise
- We can, and we must, do better

I’M GRATEFUL TO PARTICIPATE

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

"What's the Problem Here?": How to Serve the Best Interest of the Child in "High Conflict" Custody Cases

Presenters:

Judith A. Swinney, J.D., Parenting Consultant & Family Mediator

Judith Swinney is a parenting consultant and family mediator in Portland. She earned her Doctor of Jurisprudence from the South Texas College of Law (1987), and a B.A. in Journalism from the University of Houston (1983). Her experience includes: *Cooperative Adoption Mediation Services*, DHS, facilitating agreements between birth and adoptive resources on behalf of children; *Parent Educator*, Multnomah, Clackamas Counties, facilitating mandatory parent education classes for separated/divorcing parents, to a diverse population; *Facilitator*, *Parenting Beyond Conflict class*, a six-week skill-building seminar for divorced, separated parents; *Supervised Parenting Time Reunification Services*, facilitating parenting time where safety concerns exist, or reunification of parents and children; *Parenting Consultant***,** providing individual parent training/coaching related to children's safety and supervision, child development, positive discipline, etc.; *ESL Instructor*, Houston Community College Refugee Program. Judith is a member of the Oregon State Bar, State Bar of Texas, Oregon Mediation Association, Oregon AFCC. In her spare time, Judith enjoys gardening and baseball.

Dr. Vicky Curry, Licensed Psychologist

Dr. Vicky Curry earned her Ph.D. in clinical psychology and Masters of Science in Psychology from the University of Oregon, a Masters in Student/Educational Psychology and her BS with Distinction in Psychology from the University of Washington. In her private practice, Vicky provides family therapy (issues with blended/foster/adopted/divorce), adolescents and children (problems with legal system, depression, anxiety, trauma, school difficulties, parent-child relations), adults (depression, anxiety, trauma, adjustments, parent-child relations), and evaluations/assessments for a variety of school districts, county and state agencies.

Lorena Reynolds, Attorney at Law, The Reynolds Law Firm, P.C.

Lorena is the managing attorney of The Reynolds Law Firm, PC, in Corvallis, Oregon, where she focuses her practice on family law. For almost 20 years, she has been litigating high conflict cases with an emphasis on representing survivors of domestic and sexual violence. She also teaches classes about intimate violence at Oregon State University and is a frequent public speak on a variety of topics. Under the past 12 years, Lorena and her firm have provided over $750,000.00 worth of pro bono legal services to survivors of domestic and sexual violence, stalking, and child abuse and to help children who are being negatively impacted by the drug or alcohol abuse of a parent.

The Honorable Karrie K. McIntyre, Lane County Circuit Court Judge

Judge Karrie McIntyre was appointed to the bench in May 2015. Prior to her appointment, she practiced for 15 years in both criminal and domestic relations law. Judge McIntyre attended Oregon State University earning a Bachelor of Science in Forestry and graduated from University of Oregon Law School in 1998. She has been actively involved in the community through service with a variety of organizations. She currently serves the Lane County Bar as President, chairs the Family Law Advisory Committee to the Court, and also serves on the State Family Law Advisory Committee work group on Unbundled Legal Services and the Mediation Subcommittee. Judge McIntyre hears all matters assigned to her out of the general trial call and also handles her current assignment which is the Civil Ex Parte team.

2017 Family Law Conference

Oregon Judicial Department, Family Law Program
Salem, Oregon

"What's the Problem Here?"
How to Serve the Best Interests of the Child
in High Conflict Custody Cases

Judith Swinney, J.D.

Panel Presentation Points:

- Impact of Domestic Violence on Children
- The Impact of Exposure to Parental Conflict on Children
- How I Get Through to Parents in High Conflict

Exposure to Domestic Violence

Impacts on children in different ways and to different extents.

Behavioral, social and emotional problems

Higher levels of aggression, anger, hostility, fear, anxiety

Cognitive and attitudinal problems

poor school performance, lower cognitive functioning, limited problem-solving skills, pro-violence attitudes

Long-Term Effects of Exposure to DV

As teenagers: Behavior problems, substance abuse

As adults: Physical health problems

Higher levels of adult depression and trauma symptoms; anxiety, PTSD

Increased tolerance for and use of violence in adult relationships

Does this sound like any of your clients?

Young Children and Intimate Partner Violence (IPV)

- Children under the age of 6 are at a higher risk than older children for exposure to IPV
- IPV often occurs during pregnancy
- Perception exists that younger children are not as affected by witnessing IPV. However developmental models suggest that there may be devastating effects on neurological, emotional and other realms of development as well as threats to an infant's and a young child's sense of security and wellbeing.

Young Children and IPV

Children who live in an environment of IPV are at increased risk for:

- becoming direct victims of child abuse
- poor school performance
- structural and physiological changes in the brain
- higher rates of mental health problems than children who are directly abused
- long-term effects including physical health problems, behavioral problems in adolescence and emotional difficulties in adulthood

Young Children and IPV

Reactions to DV for children birth to 5:

- Sleep and/or eating disruptions
- Withdrawal/lack of responsiveness
- Intense/pronounced separation anxiety
- Inconsolable crying
- Developmental regression, loss of acquired skills
- Intense anxiety, worries and/or new fears
- Increased aggression and/or impulsive behavior.
- Disruptions in attachment and bonding occur as children focus on survival

Young Children and IPV

Children can be exposed and impacted on many levels:

- visually or audibly witnessing violence
- seeing the physical aftermath (bruises, wounds, holes in walls, etc.)
- interaction with social and medical services
- impact to a parent's mental health may negatively affect their ability to parent the child in a warm and sensitive way

"Children may learn that it is acceptable to exert control or relieve stress by using violence, or that violence is linked to expressions of intimacy and affection."

-National Child Traumatic Stress Network

Young Children and IPV

- References

- 1. California Attorney General's Office (2008) First Impressions: Exposure to Violence and a Child's Developing Brain.
- 2. Carpenter, G. & Stacks, A. (2009). Development Effects of Exposure to Intimate Partner Violence in Early Childhood: A Review of the Literature. *Children and Youth Services Review, 31 831-839.*
- 3. Children and Domestic Violence. National Child Traumatic Stress Network. Retrieved 8/6/2015 from http://www.nctsnet.org/content/children-and-domestic-violence
- 4. Child Welfare Information Gateway; US Department of Health and Human Services
- Administration on Children, Youth and Families, Children's Bureau

Impact of Children's Exposure to Parental Conflict

"High conflict between parents not only causes children immense suffering, it causes serious problems in their development."

Judith S. Wallerstein and Sandra Blakeslee, *What About the Kids?* 2003

Children Blame themselves, as the conflicts they see, hear, and hear about, are *about them .*

"Conflicts between parents are likely to cause self-destructive behaviors in children." –Philip M. Stahl, *Parenting After Divorce: A Guide to Resolving Conflicts and Meeting Your Children's Needs*. 2000

What Kids Say

- "If I weren't here, this wouldn't be happening."
- "This is MY mom and dad. I must have the faults they see in each other."
- "I need to tell people what they want to hear."
- "I can't do anything right; I deserve what happens to me."
- "I'm scared to death. I don't know what will happen next."
- "I will make one parent angry (or hurt) if I need or love my other parent."

What to Do?

Skills
Images/Stories
Resources

Communication

- What's your 30-year plan for a relationship with your child?
- Make sure one's social media is not *anti-social!*
- What is said, and how it's said, matters.
- Will what you send (parent OR professional) further this parenting relationship, or destroy it? Is it brief? Business-like? Kid-focused?
- Are you OK with a judge reading this six months (or six years) from now?
- Electronic evidence prevalent court- Nothing Is Private!

Images

- Using both words and pictures to remember information engages both halves of our brains, promoting better learning.
- Einstein said, “My elements of thought are…images.”

Two Images

- Simple
- Easy to remember

Stories

Two examples

In the form of Poetry

Resources

- Mediation (now mandatory in Clackamas County as of 2/1/2017!)
- Parenting Time Coordinators-keep things on track
- Parenting Time Supervisors-keeps things safe
- Classes- skills, practice, support
- Some cases set for court review in three months-holds parents accountable.
- Coaches
- OurFamilyWizard.com- helps parents communicate, and professionals can look in for free. Also in Spanish, and now there's an app.

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SFLAC – 3/2017

Vicky Curry, PhD; Psychologist

DV, ABUSE, HIGH CONFLICT

COMPLEX AND ILL-DEFINED

PARALLEL PARENTING

A PARENTING PLAN TEMPLATE

Informed by:

- AFCC Research, findings, trainings
- Family Court Enhancement Project
- 2014 Battered Women's Justice Project, 2014
- 10+ years working with 'High Conflict' families
- Collaborative Family Therapy - intervention
- 100+ CE, Expert Testimony – Court experience

Domestic Violence
Abuse
High Conflict

ALL NEGATIVE BEHAVIORS WITH NEGATIVE IMPACTS

Ill Defined?

ANALOGOUS
OVERLAP
CONSENSUS
WEIGHTING

Direct Impacts

Children are the victims or understand or perceive the behaviors as threatening to themselves or those they love

Indirect Impacts

Children impacted because their caregiver is compromised in some way

Short Term

confusion, distraction, loss of focus, disrupted sleep and mood, blame, anger, resentfulness, withdrawal, hopeless, helpless, lost opportunity to focus on normal developmental tasks (social, emotional, cognitive)

Long Term

triangulation with parents, becoming split, chronic depression/anxiety, loss of sense of self, loss of emotional security, increased psychopathology, less empathy, decrease in cognitive, social, academic, and psychological functioning

MY GOALS TODAY:

1)Highlight the complexity of these issues

2) Convey the likelihood that these abuses may occur covertly and be uncorroborated.

3)Professionals (attorneys, Judges, MH professionals) need to look for the innocuous 'faces' of ABUSE, DV, HIGH CONFLICT even if they ARE ill-defined because there ARE negative impacts for the families and especially the children.

Physical Abuse

Sexual Abuse

Emotional/Psychological Abuse

Coercion and/or Control

COERCION / CONTROL
1) Economic Abuse
2) Using Child as a Tool
3) Denying Impact of Abuse on Child
4) Ignoring Child's Separate Needs
5) Undermining the Other's Parenting or Relationship with the child
6) Relentless Harassment

Coercive / Controlling Behaviors are:
1) Difficult to corroborate (he said/she said)

2) Even more difficult to quantify

3) The victims (sometimes) ultimately respond aggressively and the abuser will capitalize on their outburst

4) 95% of these abusers are male (per reports by the Battered Women's Justice Project, funded by US Department of Justice)

What To Do?

ONE way is to utilize a Parallel Parenting Plan

Reduce conflict between parents by reducing ambiguous language, reduce transitions, reduce need to communicate, and keep children out of the middle of dysfunctional behaviors of parent(s)

Key Components

1) Sole custody
2) NEITHER parent can make unilateral decisions about household rules at other house
3) EACH parent makes routine decisions at own house
4) No Flexibility
5) No First Right
6) DAP adjustments anticipated
7) Schedule changes minimized and formalized
8) Minimize number of transitions (DAP)
9) Clearly defined transitions (school when able or at NEUTRAL public location)

10) Family Wizard: Calendar, finances, emails
11) Sick Children, childcare spelled out
12) Transportation clearly articulated: Drivers, etc.
13) Transitions described in detail: clothing, good byes, assisting toddlers, remain in the vehicle, no communication, not using children to deliver adult documents/messages, tardiness consequences, auto insurance and licensure documentation
14) Clear definitions of all "academic breaks" and details of when "routine schedule" resumes after summer break

15) Who can sign children up for extra-curricular activities, who is mandated – or not – to take the children to said activities, who will pay for fees/uniforms, who will attend and when, who has veto power, how will children be involved – or not – in the decision making, etc. Same with summer camps.
16) School activities: Field trips, class events, volunteering - Who attends and when, who is responsible – or not - for sharing the information (including 'Tuesday' folders)
17) Information sharing and parental rights

18) Medical appointments: Who can take child to non-emergency appointments (urgent vs routine), who can attend, scheduling of routine appointments
19) Medical and uncovered expenses: How will they be shared, how notified, how documented, timing for all of it including payment
20) Travel: What information must be shared (itinerary?), timing of supplying this info, security to ensure return?, planning and timing
21) Designation for legal purposes: taxes, deductions, government assistance

22) Name identifiers: How shall S.O. be identified, will they be emergency contacts on school/activity forms
23) Communication between parents
24) Communication between parent and child, frequency/method, (allow children to settle in!)
25) Communication between child and steps/SO
26) How to respond when children make allegations about the other parent, what to consider-demand characteristics, have a plan
27) Phones, internet, media exposure (costs, rules, autonomy at each home – or not)
28) Medications-compliance, decision making

29) Punishment (physical? NO), consequences from house to house (NO)
30) Disputes or conflict resolution: Spell it out.
31) Order 'high conflict' therapeutic intervention and/or parent coordination-oversight, involvement, monitoring, and potential neutral reporter to the Courts
32) ANYTHING this family cannot agree to during the process should be spelled out in the parenting plan-at least consciously considered.
33) Put the parenting plan ON A CALENDAR for two years; review/**fix** ambiguities, problems!!!

PARENTING PLAN XXXXX-TEMPLATE

This TEMPLATE is intended to be a relatively comprehensive parallel parenting plan. While it will not resolve all potential conflict it will decrease the degree of conflict significantly; especially if the Family Wizard is utilized and the calendars are input for two years in advance. It should be reviewed line by line and edited to fit the specific family. It is suggested that this be the starting point for mediations and/or negotiations between the parties; that is, each party be encouraged to give input about the particulars of the plan, add things that are of specific concern to them, and that third parties assist them to come up with a workable plan for the future. Wherever there are "XXX" it implies that an obvious decision or option or detail needs to be determined; the "XXX" are not at all comprehensive of all variables in this plan.

This parenting plan is:
____ A Parenting Plan submitted to the court with the agreement of the parties.
_____A Parenting Plan established by the court.

The parent's names are:
XXXXX XXXXX and XXXXX XXXXX

This Parenting Plan applies to the following children:
XXXXX, aged X; XXXXX and XXXXX, aged X

This Parenting Plan contemplates the parties' residences in the XXX area.

The provisions of this Parenting Plan shall override any earlier existing temporary parenting plan.
Joint Custody: XXX
It is in the best interests of the child(ren) that the parents confer and **jointly** make all major decisions affecting the welfare of the child(ren). Major decisions include, but are not limited to, decisions about the child(ren)'s education, healthcare, religion and other responsibilities unique to this family.

OR

Sole Custody: XXX
It is in the best interests of the child(ren) that the XXXX shall have sole authority to make major decisions regarding Education, Medical, and Religious decisions for the child(ren.) It is detrimental to the child(ren) to have the expectation that parents share decision making responsibility.

Parallel Parenting Time Plan:
Due to the antagonism, prior aggression, allegations of coercion and control, total lack of trust or respect between the parents and the sometimes intrusive and likewise problematic relations between the parents and the extended family members (including significant others, in-laws, and others) it is clearly in the children's best interests to create a plan that is clear, inflexible, and decreases need for contact between the parties during transitions or during each parents own designated parenting time with the children.

Family Wizard:
This on-line program provides email, calendar, bill paying, and other conflict reducing services specifically designed for families who have difficulty co-parenting. The parents can elect to have a third party neutral

monitor their communications and Family Wizard can also teach neutral communication strategies. XXX This is a necessity for this family. XXX In 2016 the cost was $99/year per parent but is subject to change.

PARENTING TIME SCHEDULES

***Routine Parenting Time Schedule:**
-The following schedule shall apply beginning on _____; the day this document is signed by the Court.
-The 2/2/5/5 Parenting Plan is recommended until the youngest child enters the 1st grade at which time a change to a week on/week off schedule will be instituted. XXX

***50/50 PARENTING TIME IN A XXX 2/2/5/5 XXX PARENTING PLAN** (More suitable for younger children)
-The children will transition between homes after school on Monday, Wednesday, Friday one week and then after school on Wednesday the next week.
-During a 14 day rotation the XXX Mother's XXX parenting time will be from Monday after school until Wednesday after school that week, XXX Father's XXX parenting time will then be from Wednesday after school until Friday after school that week, then XXX Mother XXX will resume parenting time from Friday after school until the following Wednesday after school, then XXX Father XXX shall resume his parenting time Wednesday after school until the following Monday after school. Repeat.
-Specifically:

- This parenting time allows maximal time for all the siblings to be together while allowing for the developmental stages of the younger children.
- This parenting time has the benefit of nearly all transitions taking place after school (no contact between parents necessary during routine parenting times.)
- Alternating weekends that include Friday, Saturday, and Sunday nights (to allow for weekend get a ways).
- XXX Mother XXX will have all Monday and Tuesday nights and XXX Father XXX will have all Wednesday and Thursday nights.
- This schedule will ONLY be set aside when specific holidays or breaks detailed in this plan contradicts it.
- This plan will be calendared for the year and no other deviations will take place unless agreed to by both parties, in writing.
- No snow days, furlough days, grading days, sick days, or other unspecified deviations in the school or parenting work schedules, etc. will supersede this plan.
- If it is a school day, the transition time is considered to be at the time school is out; hence, during school hours the child has NOT transitioned to the other parent yet.
- On no school days the transition occurs at the time school typically lets out, in the specified neutral setting.

-When the youngest children begin 1st grade then the schedule to change to a week on and week off schedule. This change will occur during the first full week of school at the school in which the youngest child attends. So, the change will occur to coincide with the transition of the youngest child, XXX, such that the children will spend the maximum amount of time together.

***50/50 PARENTING TIME in an ALTERNATING WEEK PARETING TIME PLAN:**
-Mother and Father shall have equal parenting time for Child/children on a rotating weekly schedule (7 days).
-During the school year the transitions will be on XXX Thursday XXX when school is typically let out.
-Hence, during school hours the child has NOT transitioned to the other parent yet.
-On non-school days the transitions will also occur at the time that school would routinely be out.

***Holiday Schedule Vacations, Holidays (These Plans Supersede Routine Parenting Time)**
Holiday time-sharing shall be in accordance with the following schedule. The Holiday schedule will take priority over the regular weekday, weekend, and summer schedules.

-In-service days, Furlough days: The parenting time plan will continue without interruption. That is, the routine parenting plan applies.

-Mother's Day and Father's Day: Mother and Father shall have parenting time with Child/children on Mother's Day and Father's Day respectively from the Sunday of Mother's or Father's Day beginning at 9:00 a.m. until the following Monday morning when Child/children will be dropped off at school. The child(ren) will be picked up at the designated public transition point.

-President's Day: No provisions for this holiday, routine parenting time plan applies.

-M.L. King Day:

- During the 2/2/5/5 schedule this means that if father has his parenting time the previous weekend, then he will be expected/allowed to fully utilize the Monday Holiday until the time that school is normally let out. The transition will be at the designated public transition point. (Mother does not lose her routine Monday afternoon/evening with the children)
- During the week on/off parenting time, then who ever has parenting time during the previous weekend will extend their parenting time until child(ren) resume school the following Tuesday at which time they will take the children to school, if in session. The alternative parent will begin their parenting time at the time that school is routinely let out.

-Valentines Day: No provisions for this holiday, routine parenting time plan applies.

-Easter: Parents will alternate with **mother having odd years and father having even years** beginning at 9:00 a.m. until the following Monday morning when Child/Children will be dropped off at school. The child(ren) will be picked up at the designated public transition point.

- During the 2/2/5/5 schedule this means that if father has his parenting time for Easter, then he will be expected/allowed to fully utilize his Monday parenting time until the time that school is normally let out. The transition will be at the designated public transition point. (Mother does not lose her routine Monday afternoon/evening with the children). If mother has her parenting time for Easter, then there will be no deviation from the routine schedule.
- During the week on/off parenting time, then who ever has parenting time during Easter will be expected to take the children to school Monday morning and whoever is having parenting time with the children resumes their parenting time at the time that school is scheduled to begin.

-Memorial Day weekend:

- During the 2/2/5/5 schedule this means that if father has his parenting time the previous weekend, then he will be expected/allowed to fully utilize the Monday Holiday until the time that school is normally let out. The transition will be at the designated public transition point. (Mother does not lose her routine Monday afternoon/evening with the children)

- During the week on/off parenting time, then who ever has parenting time during the previous weekend will extend their parenting time until child(ren) resume school the following Tuesday at which time they will take the children to school, if in session. The alternative parent will begin their parenting time at the time that school is routinely let out.

-4th of July: Parents will alternate with **father** having odd years and **mother** having even years beginning at 9:00 a.m. on July 4th and ending at 9:00 a.m. the following morning when Child/Children will be transitioned to the parent exercising "routine parenting" at that time. The child(ren) will be picked up/dropped off at the designated public transition point.

-Labor Day Weekend:

- During the 2/2/5/5 schedule this means that if father has his parenting time the previous weekend, then he will be expected/allowed to fully utilize the Monday Holiday until the time that school is normally let out. The transition will be at the designated public transition point. (Mother does not lose her routine Monday afternoon/evening with the children)
- During the week on/off parenting time, then who ever has parenting time during the previous weekend will extend their parenting time until child(ren) resume school the following Tuesday at which time they will take the children to school, if in session. The alternative parent will begin their parenting time at the time that school is routinely let out.

-Columbus Day Weekend: No provisions for this holiday, routine parenting time plan applies.

-Halloween: Parents will alternate with XXX mother XXX having odd years and XXX father XXX having even years beginning at the time school is out until school resumes the next day. If Halloween is a non-school day then the transition will occur at 9:00 a.m. on October 31st and end at either 9:00 a.m. the following day or the children will be taken to school and the transition in parenting time will be when school is out that day. If the day after Halloween is a non-school day then the transition will occur at the time that school would routinely let out that day. The child(ren) will be transitioned at the designated public transition point if school is not in session.

-Thanksgiving. Mother and Father shall alternate the Thanksgiving holiday with child/children with Mother having child/children from the Wednesday before Thanksgiving in XXX 2017 XXX and each odd-numbered year thereafter beginning after school and continuing until the following Monday, when child/children will be dropped off at school. Father shall have parenting time on Thanksgiving of XXX 2018 XXX and each even-numbered year thereafter.

-Veteran's Day: No provisions for this holiday, routine parenting time plan applies.

-Christmas Eve, Christmas Day, and New Years Day. The parties shall alternate having parenting time for Christmas Eve, Christmas Day, and New Year's Day. Father shall have parenting time on Christmas Eve from 9:00 a.m. until 9:00 p.m. on December 25, XXX 2017 XXX and each odd-numbered year thereafter. Mother shall have parenting time from 9:00 a.m. on December 31, XXX 2017 XXX until 6:00 p.m. on January 1, and on each December 31 on each odd-numbered year thereafter. Mother shall have parenting time on Christmas Eve from 9:00 a.m. until 9:00 p.m. on December 25 and each even-numbered year thereafter. Father shall have parenting time from 9:00 a.m. on December 31 until 6:00 p.m. on January 1 and on each December 31 on each even-numbered year thereafter.
The child(ren) will be transitioned at the designated public transition point.

-Veteran's Day

-Hanukkah

-Yom Kippur

-Rosh Hashanah

-Other

-Child(ren)'s Birthday(s). Mother and Father shall alternate having Child/children on his/her birthday with Father having all children on their birthdays beginning in XXX 2017 XXX and each odd numbered year thereafter beginning when school is routinely let out or at 9:00 a.m. until the following morning when Child/children will be dropped off at school, or otherwise 9:00 a.m. Mother shall have the same schedule with Child/children having all children on their birthdays beginning in XXX 2016 XXX and each even-numbered year thereafter. Specifically, all three children will celebrate each other's birthdays together, with the parent designated above. The child(ren) will be transitioned at the designated public transition point if school is not in session.

-Parent's Birthday: No provisions for this event, routine parenting time plan applies. Parents are encouraged to celebrate their birthdays with their children during their routine parenting time. This is to reduce the likelihood of unnecessary contact with potential antagonists on their birthdays.

***Winter Break:**
-The XXX Father XXX shall have the child(ren) from the day and time school is dismissed until December 25th at 9:00p. m in odd-numbered years and the XXX Mother XXX will have this first part of the winter break as their parenting time in even-numbered years. The parent who does not have the first part of the winter break will have their parenting time from December 25th at 9:00 p.m. until they take the children to school the first school day of the year. The transition of parenting time actually occurs at the time that school lets out on that first day of school. The parties shall alternate the arrangement each year.

***Spring Break:** Spring Break is defined as the time school lets out the Friday before the break until school resumes the Monday after the break. If the school calendar has any other days of 'no school' on either side of this time; then the parent that is exercising their time on that/those days, under the routine schedule, will still have that parenting time.

-The Spring Break will be evenly divided. XXX The first half of the Spring Break will go to the parent whose routine regularly scheduled weekend falls on the first half and the second half going to the other parent (whose weekend falls during the second half). The half way mark will be considered to be XXX Wednesday at 9:00 a.m. XXX

OR

-The Spring Break will alternate. XXX The parents shall alternate he entire Spring Break with the XXX Mother/Father XXX having the child(ren) during the odd numbered years and the XXX Mother/Father XXX having the children during the even numbered years.

OR

-The XXX Mother/Father XXX shall have the children for he entire Spring Break every year.

OR

-The Parents shall follow the regular schedule.

-It is known that this sometimes this will result in a very long stretch of time with one parent or the other. Attempting to alleviate this long span of time by anticipating any flexibility or making changes routine parenting is discouraged due to the inevitability of conflict around attempts to coordinate with extended family members and their preferred plans. It is recommended that this plan be maintained even if there is a long stretch away from one parent or the other. However, provisions for mediating schedule changes for just this sort of difficulty is described below.

***Summer Break**
-The parents shall follow the routine regular schedule, without break, through the summer.

- For a 2/2/5/5 schedule the parents shall alternate on all transition days at XXX 9:00 a.m. XXX at the alternative transition location.

-During a week on/week schedule parenting plan the parents shall alternate week on/week off during the Summer break with the transitions taking place on XXX Friday XXX, at XXX 9:00 a.m. XXX at the alternative transition location.

OR

-The XXX Mother/Father XXX shall have the entire Summer Break from XXX the day XXX after school is out until XXX the day XXX before school starts.

OR

-The parents shall equally divide the Summer Break as follows: During odd-numbered years XXX Mother shall have the children from XXX day XXX after school is out until XXX *day* XXX. The other parent shall have the child(ren) for the second one-half of the Summer Break. The parents shall alternate the first and second one-halves each year unless otherwise agreed. During the extended periods of time-sharing, the other parent shall have the child(ren) XXX_____XXX.

OR

-The parents shall alternate week on/week off during the Summer break with the transitions taking place on XXX *day* XXX, at XXX _____ a.m./p.m. XXX at the alternative transition location.

OR

-The parents shall alternate two week on/two week off during the Summer break with the transitions taking place on XXX *day* XXX, at XXX_____ a.m./p.m. XXX at the alternative transition location.

-Summer Break commences on the first regularly scheduled exchange XXX *day* XXX following the conclusion of the academic year, such that the parent that would ordinarily commence parenting time on the XXX *day* XXX following the conclusion of the academic year, would then commence Summer Break parenting time. Parenting

time would then continue in XXX *one/two/other? As per above* XXX blocks rather than the Routine Parenting Time.
-Summer Break ends on the XXX *day* XXX prior to the commencement of the academic year, such that the parent that would ordinarily commence parenting tome on the XXX day XXX following the conclusion of the Summer schedule would commence parenting time on XXX *day* XXX, and the Routine Parenting Time would resume.

OR

-Other: _____

***Extended time away from parent due to Holiday schedule:** The holiday schedule may affect the regular routine parenting time. Parents may wish to specify either or both of the following options:
-When the holiday schedule results in one parent having the child(ren) for extended periods of time, different arrangements may be mediated only XXX during the 30 days XXX from when the school calendar, and the parenting time calendar, are input into the shared parenting plan calendar. There is no presumption that any arrangements will be accommodated if the long parenting time stretch is only noticed after that XXX 30 day XXX period has passed. Changes will only be enacted if both parents agree.

PARALLEL PARENTING TIME PROVISIONS

The following parenting time provisions shall apply to both parents

***Each parent shall work independently for child/children's best interests.**

***This is a parallel parenting situation; neither parent has the authority to mandate what occurs at the other house.**
-The custodial XXX mother/father XXX is able to unilaterally make decisions about religion, medical care, and education; this does not translate into having the authority to determine household rules at the other house.
-Therefore, neither parent is in a position to have expectations about how life is lived at the other house; it is expected that each household will have different rules and expectations.

***Maintaining Household Rules.** Neither party is required to follow the rules established for Child/children in the other party's household, other than the requirement that doctor-prescribed medications shall be administered according to the physician's directions. However, in order to allow the parties to understand the other party's household rules, on January 1 of each year, each party shall provide a written overview to the other party of that party's household rules, so the other parent shall have the best information possible about the household rules, including discipline rules of the other party.

***Routine Parenting Decisions.** Each parent is responsible for making decisions about the child during the time that the child is in that parent's household. Neither parent is entitled to tell the other parent how to parent on his/her or her parenting time.

***Significant changes to child(ren)'s appearance.** Neither parent is allowed to significantly change a child's appearance, or give permission for a child to significantly change their own appearance without the other parent's notification and opportunity for the other parent to discuss the requested change with the child (at

minimum) and/or permission after consultation with the child (preferred). This includes such things as major changes in haircuts, hair coloring, piercings, tattoos, or other significant and relatively permanent or enduring changes. This rule does not apply to temporary changes in appearance (examples include: styles of dress and/or makeup).

***Parenting Time Flexibility**. In order to minimize conflict, there is no assumption of flexibility in scheduling. Unless otherwise specified in this plan, each parent shall make decisions regarding day-to-day care and control of each child while the child is with that parent. Regardless of the allocation of decision making in the parenting plan, either parent may make **emergency** decisions affecting the health or safety of the child(ren) when the child is residing with that parent. A parent who makes an emergency decision shall share the decision with the other parent as soon as reasonably possible. Emergency decisions include emergency medical care such as broken bones, bleeding, catastrophic accidents. Such things as fevers, stomach aches, headaches, earaches, vomiting, are not considered emergency unless the other parent is not available within XXX 4 XXX hours of onset.

***Education: School designation**
-For purposes of school boundary determination and registration, the XXX Mother's XXX address shall be designated; unless they mutually agree to using XXX Father's XXX address, via communication in the Family Wizard.
-The Custodial Parent is able to make unilateral decisions regarding education; with the following provisions. The following provisions are made regarding educational choices, public/private/or home schooling: XXX ____ XXX

***School Calendar:**
-On or before XXX June 1st XXX of each year, both parents should obtain a copy of the school calendar for the next school year and XXX Father/Mother XXX shall input the school calendar onto a shared calendaring system (ex. Family Wizard).
-The parents shall follow the school calendar of the oldest child; in this case, XXX.

***Joint Scheduling Calendar:**
-Both parents will input all school events or critical deadlines, appointments, non-routine parenting time events (ex. best friend's birthday party), etc. on a joint calendar within XXX 48 hours XXX of making such appointments, arrangements, or becoming aware of such events.
-Any disagreements or ambiguity regarding the annual calendar will be addressed within XXX 30 days XXX after it is input. If no disagreements are brought forward in this XXX 30 day window XXX (from the time the school calendar is input into the annual parenting plan calendar) then the calendar will be considered rigid and static unless both parties agree to make a change.

- If the parents cannot reach an agreement regarding this calendar at the time it is being input then a third party mediator or other professional will be enlisted to assist.
- Neither parent has unilateral decision making regarding the calendar.

-Appointments will be calendared within XXX 48 XXX hours of making the appointment.
-School events will be calendared within XXX 48 XXX hours of becoming aware of said event (ex. If a child brings home a Tuesday folder that specifies pictures are to be taken the following Monday then this event must be calendared within XXX 48 XXX hours.)

***Schedule changes to the parenting time plan:**
-The parties may decide by mutual agreement to change the Parenting Time Schedule, however, one parent cannot decide to change the schedule without the other parent's approval.
-The request may be made ONCE, and if refused then the existing Court Order is adhered to without further consideration-no arguing.

-A parent making a request for a schedule change will make the request as soon as possible, but in any event, except in cases of emergency, no less than 7 days before the change is to occur.
-A parent requesting a change of schedule shall be responsible for any additional child care, or transportation costs caused by the change.
-Any agreed upon changes to the parenting plan must be made in writing, signed or electronically affirmed by both parties.
-Any changes to the parenting time will be agreed to in writing via the Family Wizard prior to the children being informed of the change. That is, if one parent requests the change and the other parent says "yes" then the children are informed. If one parent requests the change and the other parent says "no" then the children are not even told. There will be no "your father/mother won't let you go". The parents will simply refer to the parenting time plan and state that it is "not on my time with you" so I cannot make that decision.
-Temporary changes to this Parenting Plan may be made informally without a written document; however, if the parties dispute the change, the Parenting Plan shall remain in effect until further order of the court. Any substantial changes to the Parenting Plan must be sought through mediation prior to the filing of a supplemental petition for modification.

***First Right of Refusal:** There is no first right of refusal in this plan unless specifically noted in any specific section of this parenting time plan.

***When not all of the children are available:**
If either parent exercises parenting time for just one or two of multiple children due to other child(ren) being otherwise engaged (e.g. slumber party, sports travel, etc.) there will be no make-up time for that parent.

***Sick Children:**
-If a child(ren) is too sick to participate in transition for one parent's parenting time that parenting time will not be made-up; however, a doctor's recommendation that the child not be transported must be provided. Otherwise, BOTH parents are assumed to be capable and willing to care for a sick child.
-If children are kept out of school they will be cared for by, or have care arranged by, the parent exercising their parenting time that day.

***Child Care**
-Each parent may select appropriate child care providers

OR

-All child care providers must be agreed upon by both parents.

-There will be NO 'first right of refusal' unless otherwise, specifically, noted in this document.

-Childcare will be paid as follows: Each parent is responsible for their own childcare costs. If a childcare provider is shared then an equitable amount will be determined to be each party's responsibility and those costs will be kept current.

***Transportation**

The parent beginning their time-sharing shall provide transportation from the school(s) for the child(ren) but both parents provide transportation when they meet at the alternative designated public transition location.

OR

-Other _____

***Driving**

-Neither party will drive without a valid driver's license and insurance; and parents will supply each other with copies of their current and valid proof of insurance and license.

-Neither party will drive ANY vehicle under the influence of intoxicants (anything that impairs driving).

-The above conditions regarding "under the influence" apply to this section.

***Transportation Costs**

-Each parent shall pay their own transportation costs.

OR

-Transportation costs are included in the Child Support Worksheets and/or the Order for Child Support and are not included here.

OR

-The Mother shall pay XXX ? % of transportation costs and the Father shall pay XXX ? of transportation costs.

OR

-Other _____

***Exchange/Transition**

-Transitions will be at the school whenever school is in session

-Transitions will be at the time school is out, unless specified in a specific section above, even when school is not in session.

-The transitions that do not occur at the school will be at the XXX alternative designated public location

OR

-The transitions that do not occur at the school will be at curbside XXX.

-The adults will remain in their XXX home or in their vehicle XXX unless it is necessary to assist with a baby or toddler. In this case, the parent ending their parenting time will walk out with the chld(ren), hand them off quickly and return to XXX the house or to their vehicle XXX.

-The parent ending their parenting time will have had their good bye hugs, etc. prior to XXX the arrival of the other parent OR in the house prior to sending the children out XXX.

-The adults will remain in their XXX home/vehicle XXX unless it is necessary to assist with a baby or toddler. In this case, the parent ending their parenting time will walk to the other vehicle with the child(ren), hand them off quickly and return to their XXX vehicle/home XXX.

-The parent ending their parenting time will have had their good bye hugs, etc. prior to the arrival of the other parent.
-Absolutely no verbal or non-verbal communication is expected during this transition and any negative or confrontational communication is absolutely forbidden.
-Businesslike conduct is most appropriate. Friendly greetings (ex. hand wave, grin) are acceptable.
-Exchanges shall occur at the locations designated above unless both parties agree in advance, via Family Wizard so as to document, to a different meeting place. Without documented (text or email) agreement prior to the transition it is assumed that the transition time will be as stated in this plan.
-Parents XXX may/may not XXX assign another designated caregiver to complete the transition. XXX If so, then the parent who designates another driver or caregiver is responsible for informing that person of ALL expectations of the transition process and is further responsible for their designee's behaviors during said transitions. No excuses. XXX
-If there is another caregiver who will be transitioning the children the other parent XXX is/is not XXX entitled to see their driver's license and proof of insurance.
-Both parents shall have the child(ren) ready on time at the designated transition time. If a parent is more than 15 minutes late then the parent with the children may proceed with other plans or activities. XXX The parenting time will be considered to have been forfeited. XXX There will be no makeup parenting time.
-The children will not be allowed to make these arrangements themselves. Unless the children will be allowed to make these arrangements themselves then the children will not be involved in the potential change at all. No commitment or promise will be made about the other parent accommodating or not accommodating the change is to be shared with the child(ren) until after the agreement is made between parents; in particular, no one says anything like, "your father/mother refused to do that". Specifically, transitions are to take place at the designated location, at the designated time, per Court Order, without exception. Messages through the children, regarding small adjustments to the transition times and places, will not occur. Children may seem to be the 'least conflict' approach but this is a burden for the children and this rule is being implemented in order to keep them out of the middle.
-Sufficient clothing will not be expected to be sent with the children. It will be assumed that each parent has sufficient clothing for each child.
-When transitioning children without excess baggage the transitions taking place at school will include the following routines for the child(ren)'s belongings (ex. clothing, sports/music/activity items, coats, boots, school projects, pets): The children will wear "transition" outfits to school that day. When the child(ren) is picked up after school those "transition" outfits are to be washed-if appropriate-and placed in a ziplock bag and placed in their school backpack on the day they transition back to the other parent.
-Coats and shoes/boots are not included in the "transition" outfits and these typically more expensive 'on off' items SHALL be returned with the child(ren) EACH AND EVERY WEEK. Failure to do so will require a special trip to the school, or a special meeting arranged the following day, to deliver said articles of clothing. It will be viewed as an act of passive aggression towards the other parent or, minimally, as failure to prioritize the procedures outlined here to reduce conflict between parents-for the children's benefits.
-Seat Belts. Both parents shall ensure that if Child/children is riding in a vehicle with him or her, that Child/children wears his/her seatbelt.
-Auto Insurance and Properly Licensed Drivers. Each parent shall ensure that any driver of a motor vehicle in which Child/children is a passenger is properly licensed and insured.

***Academic Break Definition:**
When defining academic break periods, the period shall begin at the end of the last scheduled day of classes before the holiday or break and shall end on the morning of the first day of regularly scheduled classes after the holiday or break.

***Extra-curricular Activities:**
-This section applies to team sports or other activities that typically require participation on a daily or weekly basis.
-This section does not apply to extra-curricular activities that could be chosen and implemented during only one parent's time. (ex. music lessons, some athletics, art classes, etc. – these activities could sometimes reasonably be provided for by one parent without participation of the other.)

Choose one or the other; Option A or Option B
- **Option A XXX (most restrictive-has consequences for children)**: Neither parent shall be required to have Child/children participate in any extra-curricular activities on that party's parenting time.
-Neither party may schedule any activity on the other party's parenting time except by specific written agreement, or electronic affirmation of a consent to schedule said activity on that parent's parenting time. Neither parent shall discuss the other parent's willingness or unwillingness to schedule extra-curricular activities with Child/children.

-**Option B XXX (Custodial parent has final say and both parents must facilitate)**: The parents will communicate regarding the choice of extra-curricular activities that take place on the other parent's time but the custodial parent will make the final decision. The Custodial parent, may register the child(ren) and allow them to participate in the activity of the child(ren)'s choice.

- Once an activity is chosen, the child(ren) are enrolled, and the season or sequence has begun, both parents are required to facilitate the child(ren)'s participation.
    - If a child is significantly ill and cannot attend then the absence will be documented by doctor's note (if questioned by the other parent).
- The parent who has physical custody of the child during said activity will have the option to attend said activity (ex. practice, game, concert, performance) during their parenting time.
- If the parent who has physical custody of the child during the activity is unable to attend the other parent will be welcome to attend.
    - If the parent without physical custody will be allowed to attend - these arrangements must be made by communication on Family Wizard 7 days prior to said event.
- The non-physical custodial parent will not be routinely welcomed to these events.
    - If the parent who has physical custody at the time agrees in writing prior to the event then the other parent may attend and these arrangements will be made by communication on Family Wizard 7 days prior to said event.

-The parent with physical custody of the minor child(ren) shall transport the minor child(ren) to and/or from the extra-curricular activities, providing all necessary uniforms and equipment within the parent's possession.
-The costs (fees for participation) of the extra-curricular activities shall be paid by:
XXX Mother 50% / Father 50% XXX
-The uniforms and equipment required for the extra-curricular activities shall be paid by:
XXX Mother 50% / Father 50% XXX
-These fees and costs shall be reconciled the same way that uninsured medical bills are reconciled. Refer to that section for details.

***School Field Trips/Events/Activities/Extracurricular.**
-The parties will ONLY attend field trips/school activities during the time when they are exercising parenting time.
-Each parent is responsible to secure all information and permission slips necessary to allow such attendance.

-If one parent is unable to attend, that parent shall give notice to the other parent 7 days prior so that the other parent (the one who is not exercising their parenting time at that time) is able, potentially, to make arrangements to attend. No make-up time is warranted.

- **XXX "Tuesday" XXX folders:**

The parent who receives the weekly packet has 24 hours to send the other parent notice of any time sensitive information (Ex. Field trips, parent participation days, picture day, etc.)

***Volunteering/visiting at school**

Each parent will volunteer/visit ONLY during their parenting time. The exception to this would be a scheduled parent/teacher conference but parents are highly encouraged to attempt to schedule even these school visits during their OWN parenting time when able. Under no circumstances will both parents be expected to be present at the same place and the same time to talk to any school personnel.

***Summer camps:** Mother will choose camps on her time and anticipate paying for them and father will choose camps on his time and anticipate paying for them. Both mother and father are allowed to place children in the camps of their choosing, as long as the camps do not interfere with the other parent's time.

***Contact with schools/coaches/providers:** Each parent is responsible for contacting child/children's schools, doctors, health care providers or other such service providers for information and shall not rely on the other parent, except as specifically set forth herein.

***Information sharing:**

-In general, unless otherwise prohibited by law, each parent shall have access to medical and school records and information pertaining to the child(ren) and shall be permitted to independently consult with any and all professionals involved with the child(ren).

-The parents shall cooperate with each other in sharing information related to the health, education, and welfare of the child(ren) and they shall sign any necessary documentation ensuring that both parents have access to said records.

-However, each parent shall be responsible for obtaining the records and reports directly from the school and health care providers.

-Both parents shall be listed as "emergency contacts" for the child(ren).

- It is Custodial Parent's responsibility to put the Non-Custodial Parent's name on all forms they complete for the child(ren)'s medical and school records as well as any forms that request an emergency contact number.
- The parents shall always be correctly identified as "mother" or "father" even if there is a "stepmother" or "stepfather" or "significant other" or "grandparent" etc. that will also be listed.
- The order of who is called in an emergency will be 1) Custodial Parent, 2) non-custodial parent, 3) other parties depending on the situation. If a significant other or other caregiver is to be notified instead of the other parent - then the details of these arrangements will be made known to all parties.

***Parental Rights**: Each parent shall continue to have the following authority, to the same extent as the other parent has, equal and independent:

-To inspect and receive school records/day care, and to consult with school staff concerning Child/children's welfare and education.

-To inspect and receive governmental agency and law enforcement records concerning Child/children.

-To consult with any person who may provide care or treatment for Child/children and to inspect and receive Child/children's medical, dental and psychological records.
-To authorize emergency medical, dental, psychological, psychiatric or other health care for Child/children if the custodial parent is, for practical purposes, unavailable.
-To apply to be Child/children's guardian ad litem, conservator, or both.

***Notice Requirements.** Each parent shall have a continuing responsibility to:
-Each parent has a continuing responsibility to provide a residential, mailing, and contact address and contact telephone number to the other parent. Each parent shall notify the other parent in writing within 24 hours of any changes. Each parent shall notify the court in writing within seven (7) days of any changes.
-Emergencies. Notify the other parent of any emergency circumstances or substantial changes in Child/children's health immediately.
-Notice Before Moving. Neither parent shall move to a residence that is more than 60 miles further distant from his/her current address without first providing the other parent 90 days written notice of the change of residence and providing a copy of such notice to the Court. Any relocation of the child(ren) is subject to and must be sought in compliance with the ORS. In brief, the 60 day notice to the other parent is to allow them time to consider and approve or contest such a move. In order for a relocation to occur, without the other parent's permission, it is generally necessary to show why it would be "in the best interest of the child" to make the move.

***Medical, Therapy, Dental, or Other Health Care Providers ("Health Care Appointments").**
- All appointments will be logged onto the common calendar within XXX 24 XXX hours of being scheduled.

-The parties shall cooperate in the scheduling of all health care appointments using a common calendar where the appointments are scheduled.
-ONLY the custodial parent shall schedule non-emergency appointments and the other parent must be given a 7 day notice, if they are to be given special permission to attend said appointments (ex. dental evaluation for braces, etc.).
-ONLY the custodial parent shall schedule urgent care appointments (ex. temperatures that are rising over a period of hours, earaches that seem to be getting worse, headaches)
-Either parent may take child(ren) in for emergency care (ex. broken bones or blood, but not fevers that have risen over a period of hours.)

- XXX ONLY the custodial parent may attend the urgent or non-emergency medical appointments, unless special permission is granted to the non-custodial parent, in writing XXX
OR
- XXX The custodial parent will attend urgent or non-emergency appointments if the child is in their physical custody at the time. The non-custodial parent will attend the urgent or non-emergency medical appointments; IF the non-emergency appointment is on the non-custodial parent's parenting time.

-The Custodial parent will make routine medical appointments ONLY on their OWN parenting time.
-Each parent shall have full access to the health care provider and records of the provider free and clear of any interference from the other parent. Neither parent shall discuss the other parent with the provider and shall make no derogatory comments about the other parent to the provider.

***Health Insurance.**
-XXX Father/Mother XXX shall continue to insure Child(ren) for health, dental and optical coverage provided such coverage is available through his employment at a reasonable rate.

***Uninsured Health/Dental Expenses. (Also to be utilized for extra-curricular fees and expenses)**
-The parties each shall pay XXX half XXX of Child/children's reasonably incurred, ordinary uninsured medical expenses, including, but not limited to, medical, optical, hospital, dental, prescriptions, counseling/psychiatric and orthodontic expenses, and co-payments made to providers, that are not covered by insurance.
-Time Period to Request Payment. It is the responsibility of the parent who incurs an uninsured expense to promptly request payment (in writing and providing proof of the expense) from the other parent of any such expense. A delay of more than sixty (60) days in making a request for reimbursement shall not be considered timely, and the other parent shall not be required to pay any portion of the claimed expense.
-The parents will utilize the Family Wizard (or other joint electronic communication tool) to request payments.
-Reimbursement. The obligated parent shall make reimbursement to the other parent within 60 days of receipt of the payment request, or explanation of benefits, and proof that the claim has been submitted to insurance, and the insurance company has paid or rejected the claim.

***Travel: Local, Foreign and Out-Of-State:**
-Either parent may travel within the United States with the child(ren) during his/her time-sharing. The parent traveling with the child(ren) shall give the other parent at least 30 days written notice before traveling out of state unless there is an emergency, and shall provide the other parent with a detailed itinerary (destination and accommodation details), including locations and telephone numbers where the child(ren) and parent can be reached at least 10 days before traveling.
-Either parent may travel out of the country with the child(ren) during his/her time-sharing. At least 60 days prior to traveling, the parent shall provide a detailed itinerary, including locations, and telephone numbers where the child(ren) and parent may be reached during the trip at least 15 days prior to traveling. Both parents shall cooperate in allowing Child/children to travel internationally on that parent's parenting time, and shall comply with the provisions of this paragraph. XXX Mother XXX shall provide Child/children's passport to XXX Father XXX on a timely basis to secure visas as necessary, or otherwise within two weeks of travel. XXX Father XXX shall return the passport to XXX Mother XXX within seven days of returning from said travel. Each parent agrees to provide whatever documentation is necessary for the other parent to take the child(ren) out of the country.
-If a parent wishes to travel out of the cournty with the child(ren), he/she shall provide the following security for the return of the child(ren): XXX _____ XXX

***Designation for other legal purposes**
The tax credit for the children will be as follows:
-Mother shall claim XXXXX each year and Father shall claim XXXXX and XXXXX each year. When XXXXX is independent or no longer eligible to be claimed for this tax credit then the younger child(ren) XXX ___ XX, or XXXXX and XXXXX, shall be split.

OR

-XXX _____ XXX shall be entitled to claim "Head of Household" for tax filing purposes. XXX _____XXX shall be entitled to claim child(ren) as a dependent for tax purposes in XXX and each even-numbered year thereafter and XXX _____XXX shall be entitled to claim child(ren) as a dependent for tax purposes in XXX and each odd-numbered year thereafter.

OR

-Whoever pays for the child care shall be eligible to claim that on their taxes.

OR

-Whoever pays for the medical insurance shall be eligible to claim that on their taxes.

OR

-Whoever pays for college and related expenses shall be eligible to claim that on their taxes.

OR

XXX Mother/Father XXX will be allowed to claim the child(ren) for the purposes of food stamp or other aid, if they qualify.

-Both parties shall execute any documents required by any taxing agency to acknowledge this entitlement.

***Communication Between Parents**

-All communications regarding the child(ren) shall be between the parents. The parents shall not use the child(ren) as messengers to convey information, ask questions, or set up schedule changes.

-Strategy to keep communications neutral (without side bar judgments or criticisms):

- The subject Line to contain the TOPIC of the email
- Write neutral email, re-read email to be certain it ONLY addresses the TOPIC
- If in doubt, have a neutral party proof read it

-The parents shall communicate with each other only via Family Wizard emails unless there is an emergency or a last minute unavoidable transition problem.

-The parents will discourage extended family members from communicating with the other party as well.

-No one in the family is to post anything on social media about the other parent. No exception.

***Inter-Parent respect/Facilitating affection and respect between children and BOTH parents**

-The parties shall make best efforts to foster love and harmony in the other party's relationship with Child/children and shall not attempt to undermine the authority of the other with Child/children.

-Specifically, each parent is prohibited, under any circumstances, from making or willfully allowing others to make derogatory comments in the presence of Child/children about the other parent, or his/her/her new partner or family, or in any way diminishing the love, respect and affection that Child/children has for the other parent.

-This also includes the requirement that the parties use best efforts to ensure that the same conduct and efforts take place with either party's future partners, family and friends.

-Additionally, the parties shall not use Child/children as a messenger to pass messages to or communicate with the other parent.

-Insidious or subtle attempts to diminish Child/children's love and respect for the other parent is equally damaging to Child/children, and is prohibited by this/her parenting plan.

***Name Identifiers**

-Neither parent shall at any time for any reason cause Child(ren) to be known, identified, or designated by any surname other than XXXXX.

-Neither parent shall initiate or cause the designation of "Mother " or "Father" or their equivalents to be used by Child(ren) with reference to any person other than his/her natural parents.

***Communication Between Parent and Child(ren)**

-Both parents shall keep contact information current.

-"Electronic communication" includes telephones, electronic mail or e-mail, webcams, video-conferencing equipment and software or other wired or wireless technologies or other means of communication to supplement face to face contact.

-Telephone or other electronic communication between the child(ren) and the other parent shall XXX be/ shall not be XXX monitored by or interrupted by the other parent.

-The child(ren) may have telephone, e-mail, other electronic communication in the form of text, video, facetime, skype, with the other parent ONLY:

- XXX on the third day of the five day sequence, between 5:00 and 7:00 p.m. of that day XXX

OR

- XXX During the two day stretches there is no need to contact the children; they need to settle into their context with the other parent.

OR

-During any longer periods of absence, week on/week off schedules, the parent away from the children may contact the children every XXX three days; between 5:00 and 7:00 p.m.XXX

- If the children are not available at the designated time then the parent with physical custody of the children will make sure they return the communication XXX within 24 hours XXX.

-If the parent does not place the call during the designated time then they forfeit that particular communication and need to wait until the next regularly scheduled communication; XXX no exceptions. XXX

***Allegations regarding parental behaviors and/or extended family members and/or significant others at the other house:**

-If the children report concerning behaviors/incidents in the other parents household do NOT assume the child(ren) is an accurate reporter (longer explanation follows in next section):

- ASK the other parent
- Do not act to 'correct' the other parent's behaviors
- If concerned bring it to 3rd party professional (therapist) versus DHS, police, etc.
- Refuse to keep secrets, even if the child(ren) request.

***Parents will not take the children's statements for fact, just because they said it.**

-Children are little thinking machines and will likely notice the differences between houses and will report the differences… for many different reasons (and even the kids probably don't know for sure why they say what they say).

- To get one parent or the other to change the rules to their benefit.
- To get a rise out of one parent or the other.
- Because they honestly don't understand the WHY of the differences and are curious.
- Because there are 'demand characteristics' to say or do certain things-that is, telling mom that dad doesn't do xyz for them because they know that their mom will sympathize and give them extra attention for that…. Or tell dad that mom lets them do xyz because they are confused about the different reasons for things and want an explanation. Clearly, kids are not always great reporters, for many reasons.
- Therefore, each parent is to respond to reports of differences between homes with this comment: "Mom has her rules and does things at her house her way. Dad has his rules and does the things at

his house his way. They are different-just like rules at school are different than rules at home or rules at school change depending on the teacher. It is just the way it is. Now that you are at THIS house, you know the rules. End of story."

- Don't allow them to get in the habit of 'playing the parents'.

***Communication between child(ren) and step-parents and/or significant others:**
-The same provisions shall apply as have been stated above for the parents.
-Parent(s) are XXX not XXX allowed to delete said communications from the child(ren)'s devices.
-Parent(s) are XXX not XXX allowed to monitor said communications with the significant others.

*** Children's ownership of electronic devices/Costs of Electronic Communication:**
-The child(ren) will not be allowed to have their own smart phone/tablets with internet capacity/etc. prior to XXX age 12 XXX unless both parents agree that it is appropriate.
-Rules regarding electronic use will be set independently at each home.
-If one parent provides/pays for a phone/device the other parent still has the authority to prohibit or make their own guidelines over the use of said phone/device-regardless who paid for it.
-Each parent is responsible for the costs of their own devices; not necessarily the costs of their children's devices.
-When the children receive their own equipment then it is up to the parent who purchased that equipment to determine the appropriate use of that equipment during their own parenting time. That is, there is no expectation that the other parent will comply with THEIR rules, that the equipment will be made available at any specific time, for any specific purpose, nor that it will or will not be used as a consequence or reward at any particular location or time.

***Non-Age Appropriate Content/Media**
-The parties agree that non-age appropriate adult-content material is harmful for Child/children.
-Television, movies, video games, music, performances, Internet usage, or contact that either party may have with a current or future partner in the presence of Child/children must be scrutinized to ensure age appropriateness.
-Child(ren)'s specific viewing shall be allowed at the discretion of the parent who is exercising their parenting time.
-However, child(ren) shall not be exposed to any inappropriate images or content as set forth in this paragraph. Both parties shall comply with all parental movie and television advisories as set forth by CARA (G, PG, PG-13) and all ESRB Video Game ratings (C,E,E10+,T).

***Medications**
Both parents are required to provide the other with all medications that are required for Child(ren) to take as per his/her physician's instructions. Should Mother/Father fail to provide said medications with Child(ren), Mother/Father is not required to administer the medications, but she/he shall use best efforts to communicate with Mother/Father to secure Child/children's necessary medications.

***Physical Punishment of Child(ren)**
The parties agree that neither parent will use, and shall not allow other persons to use, physical or corporal punishment to discipline Child/children. XXX There have been too many allegations of abuse to allow any discretionary corporal punishment in this family. XXX

***Not "under the influence"**

The existing Court Order states “not under the influence” of intoxicants… and that is interpreted to mean XXX not “over the legal limit” for this purpose at this time. XXX

-IF either party feels the other is “over the legal limit” they have the right to request that the other parent submit to a urine analysis within 12 hours or otherwise submit to a test for intoxicants.

- If the test is positive, the person being tested accepts financial responsibility for the test.
- If the test is negative, the person reporting the concern accepts financial responsibility for the test as well as having to pay the other party XXX $50 XXX for the inconvenience.
- If the other party refuses the test then future parenting time will be considered to be XXX cancelled XXX XXX supervised XXX XXX limited to… XXX pending a drug and alcohol assessment and completion of whatever that assessment recommends.

***Situations of Parental Conflict.**

Should conflict or disagreements arise between the parents, neither parent shall involve Child/children in such conflict. If in-person conflicts occur, the parties shall immediately disengage and refuse additional interaction until the problem has been resolved. In other situations of conflict, such as email or text messages, the parties shall not communicate in offensive or disrespectful language but shall deal with the issue and the problems directly, and not as personal attacks.

***Disputes or conflict resolution**

Parents shall attempt to cooperatively resolve any disputes which may arise over the terms of the Parenting Plan. The parents may wish to use mediation or other dispute resolution methods and assistance, such as Parenting Coordinators and Parenting Counselors, before filing a court action.

***High Conflict Collaborative Therapy-specialized Family Therapy**

-The parties shall immediately jointly enroll in a program of collaborative therapy specifically designed for high conflict families. The parties shall equally share the cost of such therapy in advance. The stated goal of such therapy is to ensure the parties embrace parallel parenting, allow for future collaboration, and teach appropriate communication skills to the parties.

-Specifically, this therapist meets the mother separately, meets the father separately, meets all the children, reads the custody evaluation(s) XXX if one exists XXX to provide background for this family and then the therapist works with the adults (not jointly, though) to decrease conflict.

-When the parties and the therapist agree that the parties can move beyond parallel parenting, the parties agree to revisit the issues of the existing parenting plan and work with the therapist to revise the parenting plan.

-Each party is XXX required to attend TEN sessions XXX with the therapist following entry of judgment, or as otherwise agreed by the parties.

Other: _____

_____

_____.

SIGNATURES OF PARENTS

I certify that I have been open and honest in entering into this Parenting Plan. I am satisfied with this Plan and intend to be bound by it.

Dated: _____ Dated: _____

Signature of Mother: _____ Signature of Father: _____

Printed Name: _____	Printed Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____
Telephone Number: _____	Telephone Number: _____
E-mail: _____	Email: _____

Disclaimer: This document is merely a GENERIC PARALLEL PARENTING PLAN TEMPLATE created by Dr. Vicky Curry, PhD intended to be used by families who have difficulty co-parenting. The hope is that the level of detail in this plan, that encourages the thoughtful consideration of each of these categories and appropriate decisions made by parties at the time of dissolution or modification will decrease potential conflicts for the future.

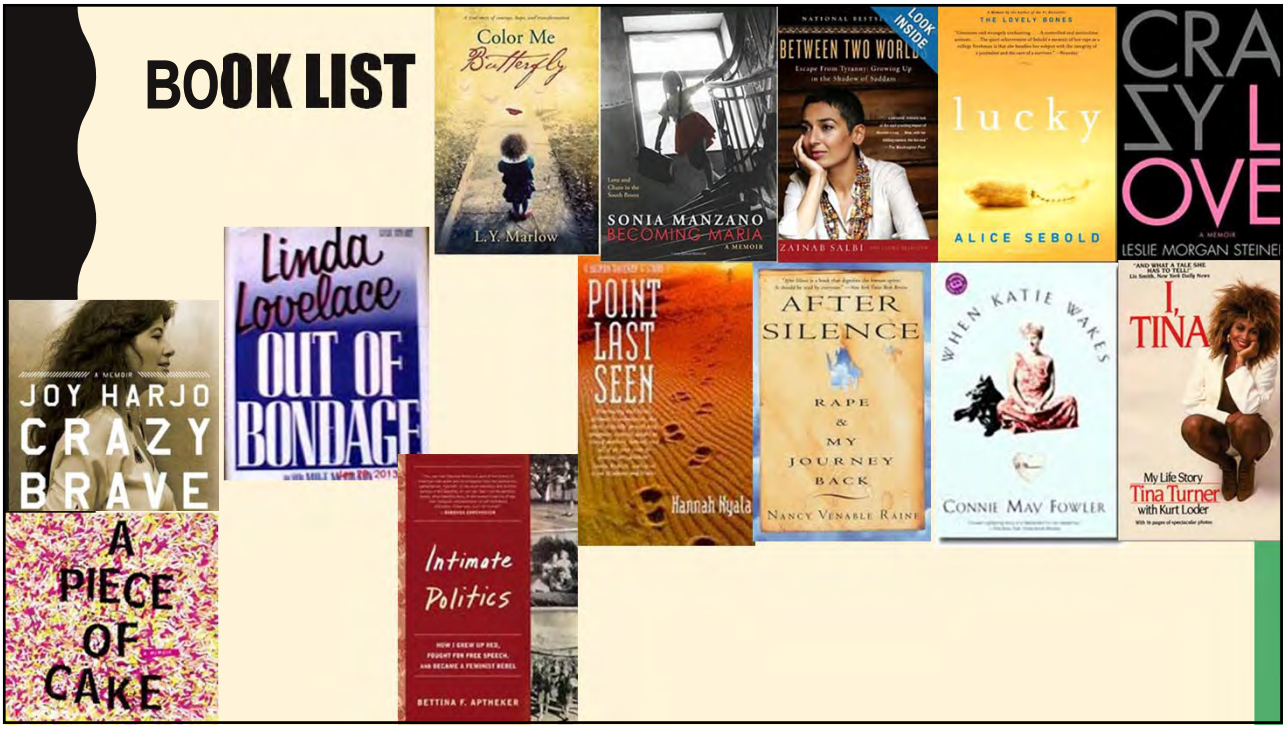
REPRESENTING LITIGANTS IN HIGH CONFLICT FAMILY LAW CASES

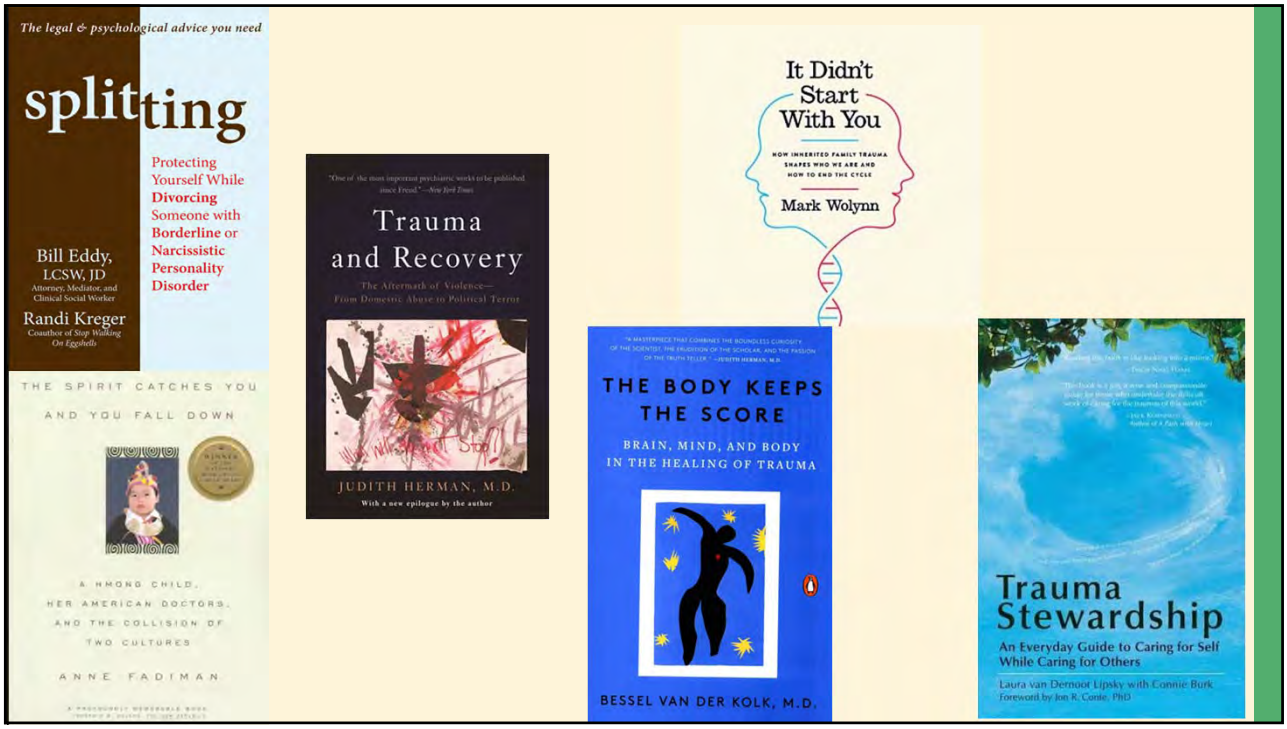
LORENA REYNOLDS, AAL
THE REYNOLDS LAW FIRM, PC

WORKING WITH CLIENTS IN CRISIS

BUILDING TRUST

BOOK LIST




The legal & psychological advice you need
splitting
Protecting Yourself While Divorcing Someone with Borderline or Narcissistic Personality Disorder
Bill Eddy, LCSW, JD
Attorney, Mediator, and Clinical Social Worker
Randi Kreger
Coauthor of Stop Walking On Eggshells
THE SPIRIT CATCHES YOU AND YOU FALL DOWN
A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES
ANNE FADIMAN
Trauma and Recovery
The Aftermath of Violence—From Domestic Abuse to Political Terror
JUDITH HERMAN, M.D.
With a new epilogue by the author
It Didn't Start With You
HOW INHERITED FAMILY TRAUMA SHAPES WHO WE ARE AND HOW TO END THE CYCLE
Mark Wolynn
THE BODY KEEPS THE SCORE
BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA
BESSEL VAN DER KOLK, M.D.
Trauma Stewardship
An Everyday Guide to Caring for Self While Caring for Others
Laura van Dernoot Lipsky with Connie Burk
Foreword by Jon R. Conte, PhD


what's comin' will come and we'll meet it when it does.
- HAGRID
WWW.THEBIGLAKE.ETSY.COM
PANIC!
Don't PANIC!

WIN-WIN SCENARIOS FOR CHILDREN

B.A.S.E.R. MODEL

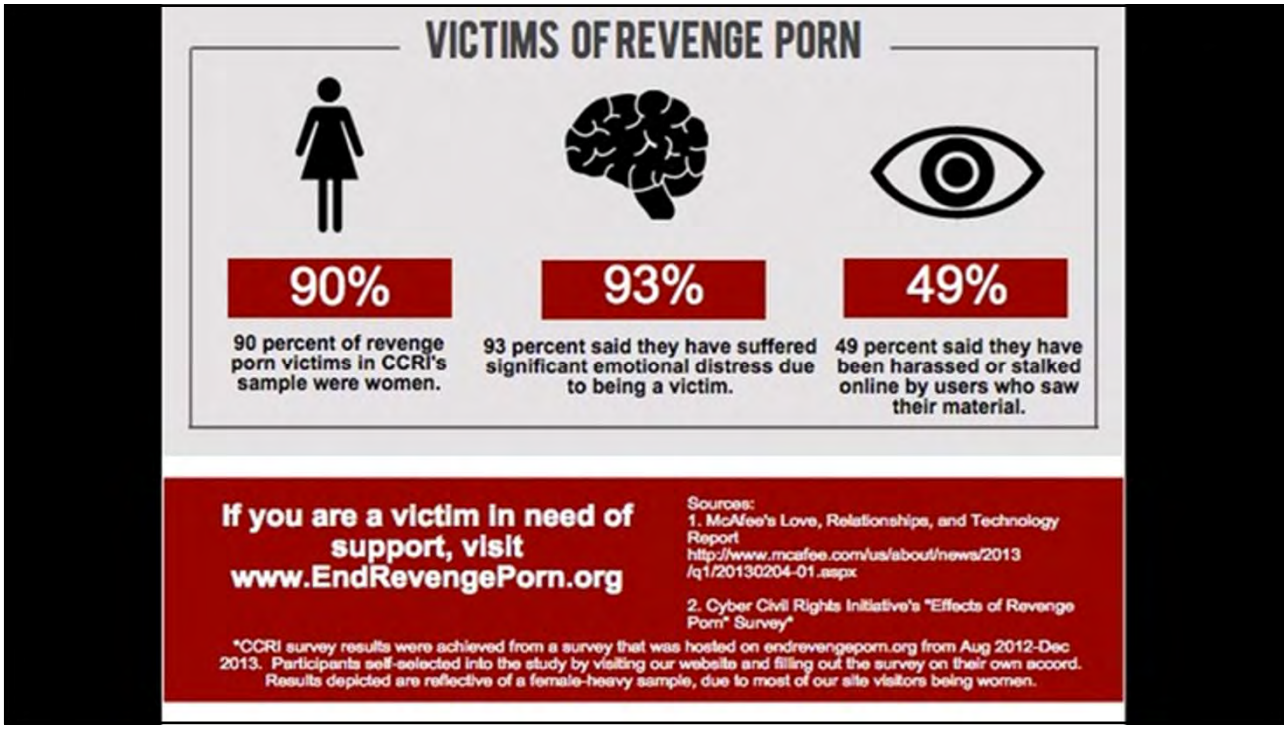
BELIEVE
AFFIRM
SUPPORT
EMPOWER
REFER

- Adapted from T.A. Henderson (1992)

BELIEVE

- "I believe what you are telling me.“
- “I am here for you.”

TECHNOLOGY


VICTIMS OF REVENGE PORN
90%
90 percent of revenge porn victims in CCRI's sample were women.
93%
93 percent said they have suffered significant emotional distress due to being a victim.
49%
49 percent said they have been harassed or stalked online by users who saw their material.
If you are a victim in need of support, visit www.EndRevengePorn.org
Sources:
1. McAfee's Love, Relationships, and Technology Report http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx
2. Cyber Civil Rights Initiative's "Effects of Revenge Porn" Survey*
*CCRI survey results were achieved from a survey that was hosted on endrevengeporn.org from Aug 2012-Dec 2013. Participants self-selected into the study by visiting our website and filling out the survey on their own accord. Results depicted are reflective of a female-heavy sample, due to most of our site visitors being women.

B.A.S.E.R. MODEL
BELIEVE
AFFIRM

- Adapted from T.A. Henderson (1992)

AFFIRM

- "I am glad you told me about this."
- "It is not your fault."
- "No one deserves to be hurt."

B.A.S.E.R. MODEL
BELIEVE
AFFIRM
SUPPORT

- Adapted from T.A. Henderson (1992)

SUPPORT

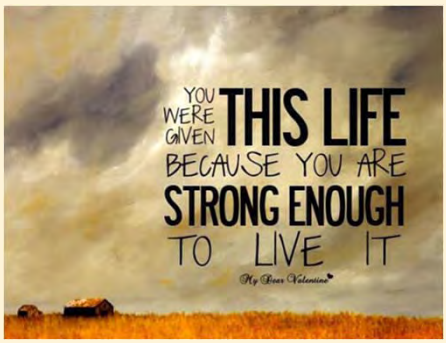
- "You are not alone."
- "I am here for you."
- "How can I support you best?"
- "What can I do?"
- "Do you want me to go with you?"
- "I can help by…"
- "Would it be helpful if I…"

B.A.S.E.R. MODEL

BELIEVE
AFFIRM
SUPPORT
EMPOWER

- Adapted from T.A. Henderson (1992)

EMPOWER



- "It took a lot of strength to speak up about this."
- "You are strong enough to get through this."
- "You did what you had to do to survive."
- "It took courage to tell me."

B.A.S.E.R. MODEL

BELIEVE
AFFIRM
SUPPORT
EMPOWER
REFER

- Adapted from T.A. Henderson (1992)

REFER

B.A.S.E.R. MODEL

BELIEVE
AFFIRM
SUPPORT
EMPOWER
REFER

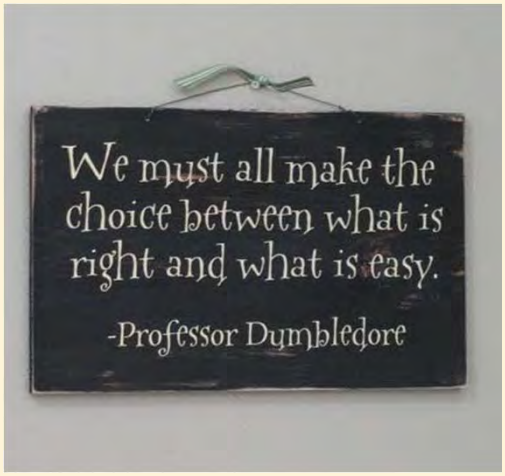
- Adapted from T.A. Henderson (1992)

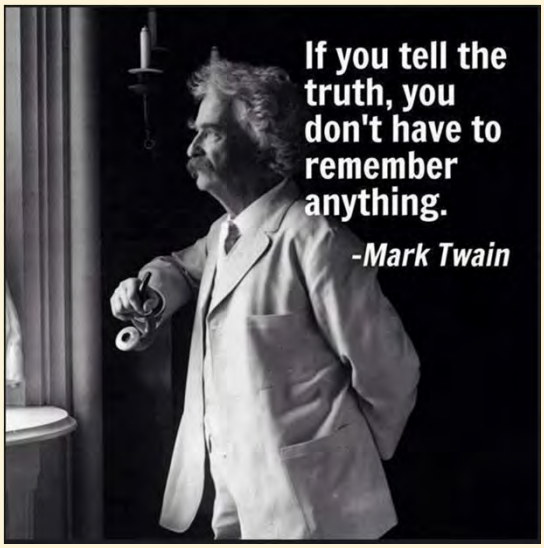
TIPS FOR INTAKE

MAKING PREDICTIONS, NOT PROMISES

TIPS FOR COURTROOMS


I am a delicate
feminine
flower


We must all make the choice between what is right and what is easy.
-Professor Dumbledore


If you tell the truth, you don't have to remember anything.
-Mark Twain

PARENTING PLANS

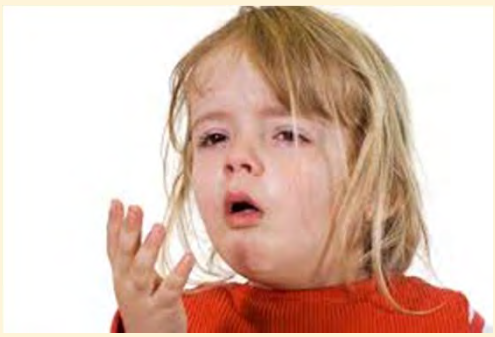
- Drafting
- Implementing
- Changing

CALENDARING LANGUAGE

UNPLANNED NO SCHOOL DAY

WE LOVE SNOW!!!

WHAT ARE WE GOING TO DO WITH THE KIDS?



SPECIAL FAMILY EVENTS


Happy
April Fool's Day!

HELMETS, CAR SEATS, LIFE JACKETS

Bad parent!

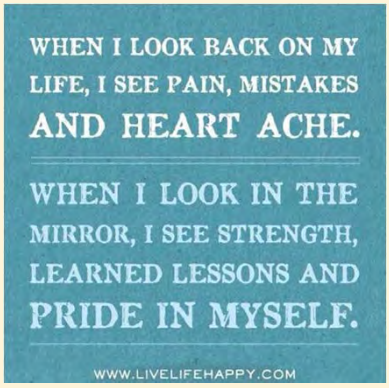
Good parent!

PETTY OR NOT PETTY?

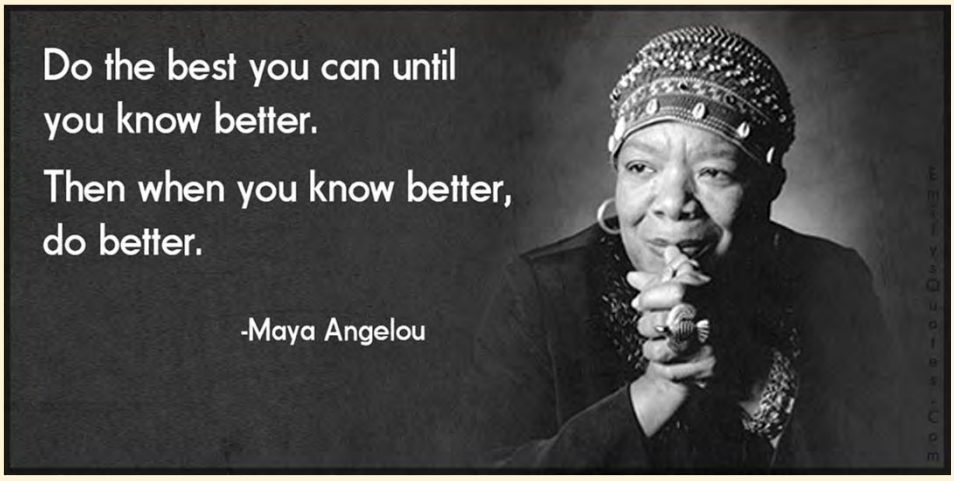
THROUGH KIDS' EYES

YOUR EXPERIENCE COLORS YOUR JUDGMENT OF CASES

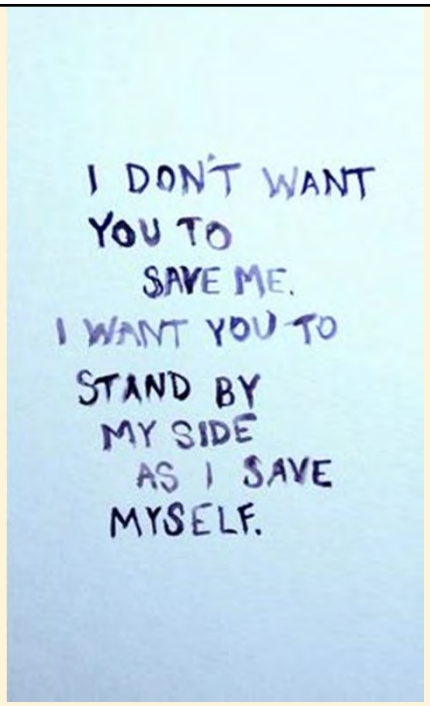
SHIFTING CLIENT BEHAVIOR AND ATTITUDE




Tomorrow
is always
fresh,
with no
mistakes
in it.


Do the best you can until
you know better.
Then when you know better,
do better.
-Maya Angelou

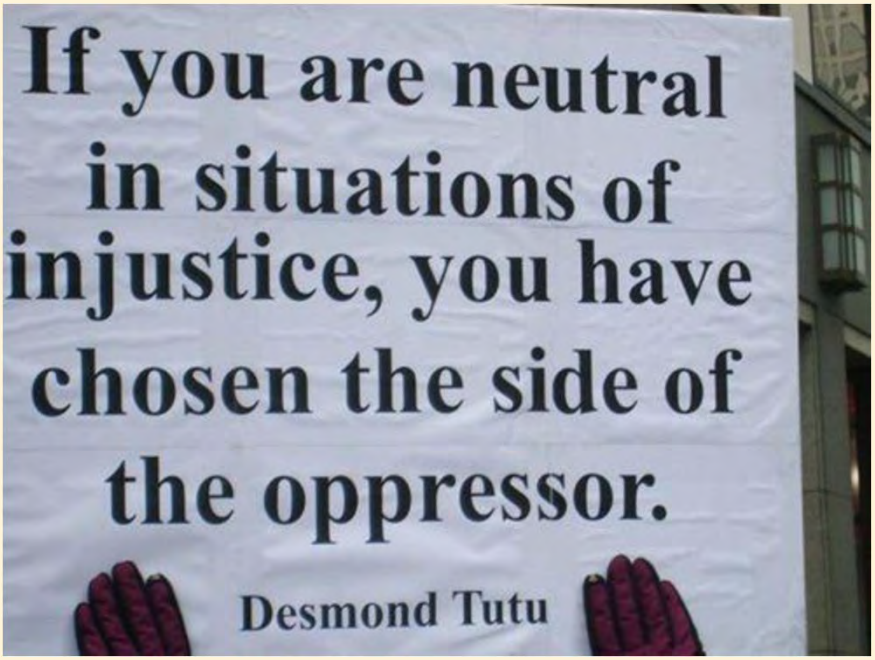
CLIENT RESISTENCE




Patience is also a
form of action.
~Auguste Rodin
theBigRocks.com


WAR
IS NOT THE
ANSWER!
www.fcnl.org


AHIMSA


If you are neutral
in situations of
injustice, you have
chosen the side of
the oppressor.
Desmond Tutu


YOU HAVE NEVER
REALLY LIVED
UNTIL YOU HAVE
DONE SOMETHING FOR
SOMEONE WHO CAN
NEVER REPAY YOU


helping one person might not change
the whole world,
but it could change the world for
one person.
chibird

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

In the Matter of: _____, Petitioner, and _____, Respondent.	Case No.: _____ STIPULATED SUPPLEMENTAL JUDGMENT APPOINTING PARENTING COORDINATOR

This matter came before the Court based on the agreement of the parties, as shown by the signatures below.

The Court has entered a judgment regarding custody and parenting time, dated _____, for the parties' minor child, _____, born _____. This Court has jurisdiction over child custody and parenting time issues pursuant to ORS 109.744 because the Court's initial child custody determination was consistent with the provisions of the UCCJEA. Appointment of a Parenting Time Coordinator (hereinafter "Coordinator") is necessary to assist the parents in implementing the terms of their parenting plan. This Court will have continuing jurisdiction for purposes of reviewing and implementing the Coordinator's recommendations pursuant to ORS 107.425(3) until the term of the Coordinator has expired or the Coordinator's appointment has otherwise been terminated, and all objections are resolved.

The Court's retention of jurisdiction does not affect the finality of the underlying

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judgment, which is intended by the Court to be an appealable judgment under ORS 19.205.

The Court finds the following conditions justify the appointment of a Coordinator in this case: The custody evaluator in this case has recommended that a parenting coordinator be enlisted to facilitate communication between the parents with sufficient authority to arbitrate impasses and preempt unnecessary litigation. The Court concludes that it is in the best interest of the child that the parents use a Coordinator with the power to coordinate parenting time, parenting exchanges, communication, exchange of information and records, arbitrate impasses and preempt unnecessary litigation.

1. Parenting Time Coordinator.

The Court, having reviewed the case file and documents presented and being fully advised, hereby orders that _____ is appointed as a Coordinator pursuant to the provisions of ORS 107.425(3). It is further ordered that the parties cooperate with the Coordinator and follow the terms specified in this Order.

The Coordinator may contact the parents and attorneys at the following telephone numbers.

Mother: _____
Telephone number: _____

Father: _____
Telephone number: _____

Attorney: _____
Telephone number: _____

Attorney: _____
Telephone number: _____

2. Term.

The term of the Coordinator's service shall be for a period of _____ years beginning _____. The Coordinator's appointment may be terminated prior to the

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end of the term if both parents agree to the termination and receive permission from the Court, if the Coordinator requests to withdraw, on the Court's own motion, or pursuant to paragraph (10) of this supplemental judgment.

3. Authority of the Parenting Time Coordinator.

3.1 Issues Subject to Parenting Time Coordination.

The Coordinator shall have authority to resolve disagreements relating to implementation of the parenting plan, including, but not limited to, the following issues: parenting time schedule and time share, including vacation and holiday scheduling; methods of safely exchanging the child including transportation; methods of communication (telephone, letters, e-mail, etc.); education, child care/babysitting and extra-curricular activities for the child; religious observances and training for the child; medical/psychological care decisions about the child; discipline of the child; daily routine; relocation of one or both parents; and other matters submitted by the agreement of both parents. The Coordinator's authority includes the ability to recommend new or modify parenting time provisions, to arbitrate impasses, and preempt unnecessary litigation.

In addition, the Coordinator shall have authority to make recommendations for financial or parenting time sanctions for initiating spurious court action or promoting unsubstantiated allegations of maltreatment.

3.2 Role of Parenting Time Coordinator.

The primary role of the Coordinator is to assist the parties in working out disagreements about the child in a way that minimizes conflict. S/he may resolve any issue within the scope of his/her authority by any appropriate dispute-resolution

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method. During this process, the Coordinator may coach and educate the parents about ways to better communicate about the child and about child development issues.

The Coordinator may request instructions from the Court, either in court or in writing directed to the Court, with notice to all parties and attorneys.

3.3 Appointments.

Appointments with the Coordinator shall be scheduled at the request of either parent by telephone or in person with no written notice required. Each parent shall make a good faith effort to be available for appointments when requested by the other parent or the Coordinator.

Whenever the Coordinator sets a time and place for a brief informational meeting both parents shall attend, or shall notify the Coordinator upon receipt of the meeting notice of any scheduling difficulties. Either parent may contact the Coordinator if meeting in the same room with the other parent would be uncomfortable, and alternative arrangements shall be made.

3.4 Process for Making Recommendations.

The Coordinator shall have discretion to set rules and procedures for the conduct of meetings which both parents shall abide by. The Coordinator shall decide matters submitted to him/her by meeting with the parents, reviewing written materials submitted to him/her, and considering any other information relevant to the matter at issue. Meetings may be held with both parents present or by meeting with one parent at a time. The Coordinator has discretion to allow either parent to appear by telephone.

The Coordinator may require the parties to obtain reports from professionals, family members and others who have information about the parents or child, such as

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therapists, custody evaluators, school teachers, etc., and may consider that information in making a recommendation. Any such information considered by the Coordinator shall be available to the parties for their review unless the person submitting the information requests that it not be disclosed and the Coordinator is satisfied that it is necessary in the best interests of the child to consider the information despite the limitation on disclosure. The Coordinator is authorized to interview the child privately in order to ascertain the child's needs as to the issues being decided. The Coordinator shall avoid forcing the child to choose between the parents.

The Coordinator shall decide any matter submitted to him/her within twenty-one (21) days, and shall send his recommendation to both parents and their attorneys, if they are represented. The Coordinator may issue an oral recommendation, as long as it is committed to writing as soon as possible.

The Parenting Coordinator will have the authority to recommend a psychological or psychiatric evaluation of one or both parents, or the child.

The Parenting Coordinator will have the authority to recommend parenting classes, parent training (including individual or group sessions), and such other interventions as are deemed appropriate by the Coordinator to enhance the parents' capacity to parent.

The Parenting Coordinator will have the authority to recommend a custody evaluation with a clinical psychologist.

The parties may request judicial review of the Coordinator's recommendation by filing a motion with the court within twenty-one (21) days of the date they received notice of the recommendation. If an appropriate motion is filed, the Court shall have

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jurisdiction to determine whether the Coordinator's recommendation shall be followed by the parents or shall be suspended pending the hearing. Prior to the scheduled hearing, the parents and counsel, if requested by the parents, shall meet and confer with the Coordinator to attempt to resolve the objections. In the event that the issues are resolved, a written stipulation shall be prepared by the Coordinator or counsel and submitted to the Court prior to the hearing.

The parties are required to follow any recommendations of the Coordinator until a timely request for judicial review is filed. If no request for judicial review is filed within the 21 day period, the Court shall review and approve the recommendation which will become binding unless modified or set aside. If the Coordinator's recommendation amounts to a substantial change of circumstance modification of the parenting plan, as determined by the Coordinator or either parent, the recommendation must be accompanied by a stipulated motion to modify.

4 Communication.

The parents and their attorneys, if they are represented, may communicate with the Coordinator ex parte (without the other parent present). This applies to oral communications and any written documentation or communication submitted to the Coordinator.

The Coordinator may communicate ex parte (alone) with the parents and their attorneys. This applies to both written and oral communications. The Coordinator may talk with each parent without the presence of either counsel. The Coordinator shall not communicate ex parte with the judge assigned to the case.

5 Confidentiality.

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There is no confidentiality concerning communications with the Coordinator. However, neither the Coordinator (nor the parties) will disclose any information that he/she (they) has (have) received in connection with a proceeding before the Coordinator to any parties not involved in the proceeding without advance written authorization from both the parties.

6 Cooperation with the Parenting Time Coordinator

The parents shall abide by the rules and procedures specified by the Coordinator. The parents shall attend all appointments scheduled by the Coordinator, or give at least 48 hours advance notice that the parent cannot attend. If one parent fails to appear for an appointment without 48 hours notice, the Coordinator may proceed at that time and make recommendations without the participation of that parent, or at the Coordinator's discretion, may continue the meeting to a future day with notice to the absent parent.

Within 15 calendar days of the date of this supplemental judgment, the parents shall provide all records, documentation and information requested by the Coordinator that is relevant to the matters being decided, with the exception of materials subject to attorney-client privilege.

7 Involvement of Parenting Time Coordinator in Litigation.

If either parent wishes the Coordinator to testify at a hearing other than to give a report on findings, the parent will be required to deposit with the Coordinator in advance a reasonable fee to cover the hourly rate of the Coordinator.

8 Quasi-Judicial Immunity.

The Coordinator acts as a quasi-judicial officer in his capacity pursuant to this

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Order, and, as such, has limited immunity consistent with Oregon law as to all actions undertaken pursuant to the Court appointment and this supplemental judgment.

9 Fees.

The Coordinator's hourly fee shall be set pursuant to an agreement between the parents and the Coordinator. If no agreement is reached, the Court shall set the Coordinator's fee. Father shall pay 50% and Mother shall pay 50% of the Coordinator's bill. The Coordinator may recommend to the Court that the allocation be modified if the Coordinator finds that one parent is using his/her services unnecessarily and, as a result, is causing the other parent greater expense, or if one parent is acting in bad faith. Ultimately, the Court shall determine the proper allocation of fees between the parents and may require reimbursement by one parent to the other parent for any payment made to the Coordinator. Either parent may request the fees be reallocated at any time during the Coordinator's term of appointment.

The Coordinator's fee includes time spent reviewing documents and correspondence, meetings and telephone calls with parents, attorneys, and other professionals involved in the case, and deliberation and issuance of recommendations. Costs shall include long-distance telephone calls, copies, fax charges, and all other similar costs incurred while working with the parents. The Coordinator shall also be compensated for time spent in any hearing, settlement conference or other court appearance that the Coordinator's presence is requested or required. Nonpayment of fees shall subject the nonpaying parent to prosecution for contempt of court. Prior to the first appointment, the parents shall pay any retainer required by the Coordinator. The parents must give at least 48 hours advance notice to cancel an appointment. If

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one parent does not appear at an appointment without giving 48 hours advance notice and the other parent is prepared to appear, the non appearing parent shall be responsible for both parents' fees for that appointment.

10. Grievances.

The Coordinator may be disqualified on any of the grounds applicable to a Judge or Arbitrator. Any grievance from either parent regarding the performance or actions of the Coordinator shall be dealt with in the following manner.

10.1 A person with a grievance shall discuss the matter with the Coordinator in person before pursuing it in any other manner.

10.2 If, after discussion, the parent decides to pursue a complaint, s/he must then submit a written letter detailing the complaint to the Coordinator, the other parent, and any attorneys representing the parents and/or children. The Coordinator shall provide a written response to the parents and attorneys within 30 days.

10.3 The Coordinator will then meet with the complaining parent and his/her attorney (if any), to discuss the matter.

10.4 If the complaint is not resolved after this meeting, the complaining party may file a motion with the Court for removal of the Coordinator. The motion shall proceed on the written documents submitted by both parents and the Coordinator unless the Court orders an evidentiary hearing.

10.5 The Court shall reserve jurisdiction to determine if either or both parents' and /or the Coordinator shall ultimately be responsible for any portions or all of the Coordinator's time and costs spent in responding to the

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grievance and the Coordinator's attorneys fees, if any.

10.6 The Court further reserves the right to impose sanctions for any conduct related to parenting time, not limited to those areas recommended by the evaluator or the Coordinator.

_____

STIPULATION

I sign this stipulated supplemental judgment on my own volition, with full knowledge of the facts, and with full information as to my legal rights and liabilities. In some instances, the terms of this stipulated supplemental judgment represent a compromise of disputed issues. However, I believe the terms and conditions to be fair and reasonable under the circumstances. I have read the stipulated supplemental judgment and agree it accurately reflects our agreement.

_____ _____
_____, Petitioner Date

_____ _____
_____, Respondent Date

Prepared and Submitted by:
Lorena Reynolds, OSB # 981319
Attorney for _____

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Domestic and Sexual Violence Resources:

Memoirs:
When Katie Wakes, by Connie May Fowler
A Piece of Cake, by Cupcake Brown
Intimate Politics, by Bettina Aptheker
Color Me Butterfly, by L.Y. Marlow
Becoming Maria, by Sonia Manzano
Between Two Worlds, by Zainab Salbi
Point Last Seen, by Hannah Nyala
Crazy Brave, by Joy Harjo
Lucky, by Alice Sebold
Out of Bondage, by Linda Lovelace
Crazy Love, by Leslie Morgan Steiner
I, Tina, by Tina Turner

Non-Fiction:
Splitting, by Bill Eddy and Randi Kreger
It Didn't Start with You, by Mark Wolynn
Trauma Stewardship, by Laura van Dernoot Lipsky
The Spirit Catches You and You Fall Down, by Anne Fadiman
Trauma and Recovery, by Judith Herman
The Body Keeps the Score, by Bessel van der Kolk

Everything Is Awful and I'm Not Okay: Questions to ask before giving up

Are you hydrated? If not, have a glass of water (or herbal tea).

Have you eaten in the past three hours? If not, get some food — something with protein, not just simple carbs. Perhaps some nuts or hummus?

Have you showered in the past day? If not, take a shower right now.

If daytime: are you dressed? If not, put on clean clothes that aren't pajamas. Give yourself permission to wear something special, whether it's a funny t-shirt or a pretty dress.

If nighttime: are you sleepy and fatigued but resisting going to sleep? Put on pajamas, make yourself cozy in bed with a teddy bear and the sound of falling rain, and close your eyes for fifteen minutes — no electronic screens allowed. If you're still awake after that, you can get up again; no pressure.

Have you stretched your body in the past day? If not, do so right now. A run or trip to the gym, a walk or roll around the block. Keep going as long as you please. If the weather's crap, drive to a big box store and go on a brisk walk through the aisles you normally skip.

Have you said something nice to someone in the past day? Do so, whether online or in person. Make it genuine; wait until you see something really wonderful about someone, and tell them about it.

Have you moved your body to music in the past day? If not, do so — go dancing with friends or just dance around the room for the length of your favorite upbeat song.

Have you cuddled a living being in the past two days? If not, do so. Don't be afraid to ask for hugs from friends or friends' pets. Most of them will enjoy the cuddles too; you're not imposing on them.

Do you feel ineffective? Pause right now and get something small completed, whether it's responding to an e-mail, loading up the dishwasher, or packing your gym bag for your next trip. Good job!

Do you feel unattractive? Take a goddamn selfie. Your friends will remind you how great you look, and you'll fight society's restrictions on what beauty can look like.

Do you feel paralyzed by indecision? Give yourself ten minutes to sit back and figure out a game plan for the day. If a particular decision or problem is still being a roadblock, simply set it aside for now, and pick something else that seems doable. Right now, the important part is to break through that stasis, even if it means doing something trivial.

Have you seen a therapist in the past few days? If not, hang on until your next therapy visit and talk through things then.

Have you been over-exerting yourself lately — physically, emotionally, socially, or intellectually? That can take a toll that lingers for days. Give yourself a break in that area, whether it's physical rest, taking time alone, or relaxing with some silly entertainment.

Have you changed any of your medications in the past couple of weeks, including skipped doses or a change in generic prescription brand? That may be screwing with your head. Give things a few days, then talk to your doctor if it doesn't settle down.

Have you waited a week? Sometimes our perception of life is skewed, and we can't even tell that we're not thinking clearly, and there's no obvious external cause. It happens. Keep yourself going for a full week, whatever it takes, and see if you still feel the same way then.

You've made it this far and you will make it through.

You are stronger than you think.

Adapted by Lorena Reynolds of The Reynolds Law Firm, PC, from the original posted on http://eponis.tumblr.com where there are other posts you might enjoy.

Parenting Plan Sample Language

Calendaring Provisions:

1. **School Year**. Each school year, Parent A will obtain the school year calendar and provide to Parent B a detailed parenting schedule for the following school year. Parent A is required to provide this schedule by July 15 each year.
   1.1. If Parent B disagrees with the schedule, he/she is required to inform Parent A by July 25.
   1.2. If the parents cannot resolve the dispute between them, [consider mandatory mediation language here] either may petition the Court for assistance in setting the schedule and the Court specifically retains jurisdiction to resolve any dispute relating to the calendar.
   1.3. During the time the matter is in dispute, the parenting schedule provided pursuant to this section by Parent A will remain in effect. The Court is specifically authorized to order compensatory parenting time if it finds that the calendar did not comply with the provisions of this parenting plan.
   1.4. A copy of the calendar will be easily accessible for the child at both homes so that the child knows what the schedule is.
2. **Summer**. Parent A will provide to Parent B a detailed parenting schedule for summer by March 15 each year. If Parent B disagrees with the schedule, Parent B is required to inform Parent A by March 25.
   2.1. If Parent B disagrees with the schedule, he/she is required to inform Parent A by July 25.
   2.2. If the parents cannot resolve the dispute between them, [consider mandatory mediation language here] either may petition the Court for assistance in setting the schedule and the Court specifically retains jurisdiction to resolve any dispute relating to the calendar.
   2.3. During the time the matter is in dispute, the parenting schedule provided pursuant to this section by Parent A will remain in effect. The Court is specifically authorized to order compensatory parenting time if it finds that the calendar did not comply with the provisions of this parenting plan.
   2.4. A copy of the calendar will be easily accessible for the child at both homes so that the child knows what the schedule is.

Unexpected No-School Days:

Sample #1: When a child is too sick to attend school or there is inclement weather that closes the school on a day when an exchange would normally occur, the parent who had parenting time with the child the night before is responsible for providing care during the no-school day. The parents will arrange an exchange of the child consistent with the normal schedule as soon as possible.

Sample #2: If school is cancelled for the day on a transition day, then the parents will cooperate in a non-school transition as soon as it is safe to do so.

By Lorena Reynolds, The Reynolds Law Firm, PC

Parenting Plan Sample Language

Sample #3: Whenever there is an unexpected no-school day, Parent A will provide care for the children. Parent B will drop the children off at Parent A's home and will pick the children up by 5:30 p.m. if the child is scheduled to be with Parent B that evening. As soon as Parent B knows the child will not be attending school, Parent B will inform Parent A so that Parent A can make arrangements to be home with the child.

Sample #4: When a child is too sick to attend school, the child will remain with the parent who had the child the night before the illness. The child will transition to the other parent at the end of the school day if it is a transition day or at the next regular transition if it is not a school day. If there is an unexpected school closure, the child will stay with the parent who had the child the night before. If it is a regular transition day, then the exchange will occur as soon after 12:00 noon that it is safe to exchange the child.

Halloween:

Sample #1: Graduated Schedule.

Until the child is age 3, Parent B will have parenting time with the child on October 31 from noon until 7:00 p.m. in even-numbered years and Parent A will have parenting time with the child on October 31 from noon until 7:00 p.m. in odd-numbered years.

When the child is age 3 or older, if Halloween does not fall on a Saturday or Sunday then Parent B will have parenting time with the child on October 31 from 5:00 p.m. until 7:00 p.m. in even-numbered years and Parent A will have parenting time with the child on October 31 from 5:00 p.m. until 7:00 p.m. in odd-numbered years.

When the child is age 3 or older, if Halloween falls on a Saturday or Sunday, Parent B will have parenting time with the child on October 31 from 9:00 a.m. until 7:00 p.m. in even-numbered years and Parent A will have parenting time with the child on October 31 from 9:00 a.m. until 7:00 p.m. in odd-numbered years.

[make sure times match up with regular parenting schedule]

[consider an overnight so parent who does not have the child doesn't have to deal with a too-much-candy-right-before-bed child]

Sample #2: Same Parent Every Year.

Parent B will have parenting time with the child each year. If Halloween falls during Parent A's regular parenting time then Parent B's Halloween parenting time will begin at 9 a.m. and end at 7:00 p.m. if Halloween falls on a Saturday or Sunday, or from 5 p.m. to 7 p.m. if Halloween falls on a weekday.

Sample #3: Alternating Years.

In even-numbered years, Parent B will have parenting time with the child on Halloween from 12:00 noon until 7:00 p.m. on Saturday or Sunday and from 5 p.m. to 8 p.m. on weekdays. In odd-numbered years, Parent A will have parenting time with the child on Halloween from 12:00 noon until 7:00 p.m. on Saturday or Sunday and from 5 p.m. to 8 p.m. on weekdays.

Sample #4: Costume

The parent who has the child for the times set forth in this section is responsible for providing a costume for the child unless otherwise agreed to by the parties and both parents will encourage the child to wear that costume, will not provide an alternative costume, or in any way disparage the costume provided by the other parent.

Things you can say when someone discloses abuse to you:

- I'm sorry this happened to you.
- I believe you.
- It wasn't your fault.
- You survived; obviously you did the right things.
- Thank you for telling me.
- I'm always here if you want to talk.
- You are strong enough to survive this.
- It took courage for you to talk to me.
- Take your time.
- What resources do you have that you can rally to help you? Are there friends, family, or service providers in your life already? If not, I will help you identify some.
  Can I do anything for you?
- Are you safe?

Things you should NEVER say:

- It was their fault
- That you don't believe them.
- That they did something to cause it.
- That they should have done something to stop it.
- That they should get over it.
- That it is no big deal.
- That they need to forgive the perpetrator and move on.

Don't assume:

- That because you think they are safe that they are safe.
- If or how they want to be touched
- That they do or do not want to talk about it
- They are or should be "over it" just because it happened a long time ago
- They want to pretend like it never happened
- That they hate the perpetrator
- That you understand the dynamics that are going on

Prepared by Lorena Reynolds of The Reynolds Law Firm, PC, from T.A. Henderson 1992

"What's the Problem Here?" How to Serve the Best Interest of the Child in "High Conflict" Custody Cases

Judge Karrie McIntyre, Lane County Circuit Court

Tips for Court

You've tried "Everything Else":

1) Status Quo and/or Temporary parenting time hearing
2) Mediation and Settlement Conferences

Hearings/Trial:
Think about your case from beginning to end:

1) Create clear client understanding of the process:
    a. Formal or informal trial presentation?
    b. Prepare not only for direct exam but cross examination as well.
        i. Find the subtle ways to allow a judge insight into the family dynamics at play, i.e. power, control, undermining.
2) Prepare your client that the judge may have questions:
    a. What positive things does the adverse party bring to the parenting role?
    b. What things can this parent do to improve the circumstances for their child?
3) Come prepared with options for a range of outcomes:
    a. Courts can be unpredictable as the Court's focus is ***on the child not the individual parent.***
4) Talk about appropriate behavior in and around the courthouse:
    a. Professional, courteous
    b. Safety plans
    c. What type of contact between parties and witnesses are appropriate?
5) Handling the children in litigation:
    a. Are they missing school?
    b. Do they have someone to sit with them through the hearing?
    c. Chambers or open court?
    d. Sealed or not?
    e. It's challenging to convey useful information through a child.
6) Understanding the Court may not designate parenting decisions to counselors or other third parties:
    a. Not Permitted: "based on the opinion of the counselor in determining if the child is emotionally prepared for increased parenting then parenting time increases."
    b. So, how can you and your client craft language to address this?
7) Parenting plans:
    a. Benefits of detailed parenting plans
    b. Staggered or built in stages
        i. Addiction issues
        ii. Mental Health issues
        iii. Education issues (domestic violence, parenting classes)
        iv. Absentee parent
        v. Child counseling progress

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Race, The Power of an Illusion: The House We Live In

Presenter:

Mariann Hyland, Assistant Vice Provost for Academic Affairs, University of Oregon.

Mariann is the chief Academic Affairs liaison with United Academics and HR's Office of Labor and Employee Relations, and she focuses on faculty personnel issues and policy review and development. Mariann has more than 18 years of experience in institution-wide management, strategic planning, and policy direction at educational and regulatory institutions. Prior to her position at UO, Mariann was the Oregon State Bar's director of diversity & inclusion, the director of affirmative action & equal opportunity at Oregon Health & Science University (OHSU), and in-house legal counsel and director of public safety, risk management, and contracts at Chemeketa Community College. Mariann began her career in law as an associate at Stoel Rives in Portland, Oregon, with an emphasis on labor and employment law. Mariann earned an M.S.W. from Portland State University, a J.D. from the University of Oregon School of Law, and a B.S. from the University of Oregon. Also, she is a 2011 graduate of OHSU's Fellowship in Interprofessional Health Care Ethics.

Race: The Power of an Illusion

Part III – The House We Live In

Discussion Questions

March 16, 2017

Presenter: Mariann Hyland, Assistant Vice-Provost for Academic Affairs at the University of Oregon

Race – The Power of An Illusion is a documentary series that analyzes the evolution of America's racialized society. It asks the questions: (1) What exactly is race?; (2) What is the difference between a biological and a social view of race?; and (3) Is race merely a social construct?

This presentation focuses on the third part of the series titled "The House We Live In" which juxtaposes the notion of a color blind society and the quest for equality.

Prior to watching the film, we would like you to consider the following questions.

Before Viewing the Video

1. Does race affect your life? Why or why not? If so, in what ways?

2. In 1964, the Civil Rights Act declared that forced racial segregation was illegal. In light of this, why do you think some neighborhoods, schools, and workplaces are still segregated?

3. Now, think about your neighborhood, workplace, schools you've attended or schools your children attend, would you describe them as diverse?

After Viewing the Video

1. Who was allowed to become a naturalized citizen before 1954 and who wasn't? What rights and privileges do citizens have that non-citizens don't have? What were the consequences for those denied citizenship?

2. How did European "ethnics" become white? What changes made this possible? How does the notion of race as a social construct impact this question?

3. How did federal housing policies institutionalize segregation and wealth disparities?

4. The video discusses the pattern of behavior towards immigrants that goes back generations, what similarities, if any, are present in current discussions of immigration and immigration reform

RACE

the power of an illusion

What is this thing called race?

itvs community connections project

table of contents

TABLE OF CONTENTS

letter from the executive producer

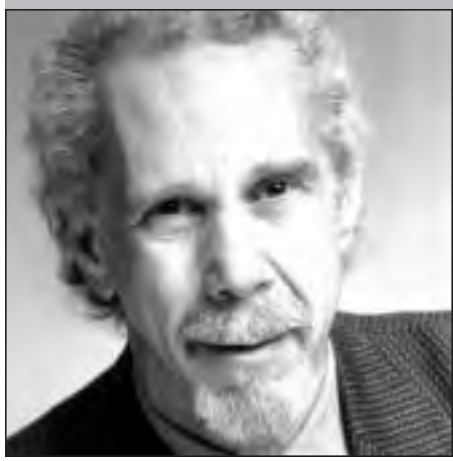
Dear Viewer,

Race is one topic where we all think we're experts. Yet ask 10 people to define race or name "the races," and you're likely to get 10 different answers. Few issues are characterized by more contradictory assumptions and myths, each voiced with absolute certainty.

In producing this series, we felt it was important to go back to first principles and ask, What is this thing called "race"? - a question so basic it is rarely raised. What we discovered is that most of our common assumptions about race – for instance, that the world's people can be divided biologically along racial lines – are wrong. Yet the consequences of racism are very real.

How do we make sense of these two seeming contradictions? Our hope is that this series can help us all navigate through our myths and misconceptions, and scrutinize some of the assumptions we take for granted. In that sense, the real subject of the film is not so much race but the viewer, or more precisely, the notions about race we all hold.

We hope this series can help clear away the biological underbrush and leave starkly visible the underlying social, economic, and political conditions that disproportionately channel advantages and opportunities to white people. Perhaps then we can shift the conversation from discussing diversity and respecting cultural difference to building a more just and equitable society.



— Larry Adelman
Executive Producer

using this guide

Using This Guide

To help people get the most from their viewing experience, we strongly recommend engaging audiences in the "Before Viewing" questions for each episode. Then take a look at the wide range of questions in the remainder of the guide and choose the ones that best meet the needs and interests of your group.

For each episode, you'll find six kinds of discussion starters and resources:

- **Before Viewing Questions:** These prompts are designed to help people become more conscious of the ideas they hold as they enter this discussion. Asking people to reflect upon what they think prior to viewing can sharpen their focus as they consider issues raised in the films.
- **Comprehension Questions:** RACE—The Power of an Illusion presents a lot of complex information that may be new to viewers. These questions can help make sure that everyone understands the core content of the program.
- **Discussion Questions:** These are open-ended questions designed to help participants deepen their understanding.
- **Activity Suggestion:** The ideas in this section can be tried after viewing as a way to delve more deeply into key concepts, or as before & after exercises to help make people aware of their beliefs and how those beliefs are challenged by the film(s).
- **Web Site Tips:** This section highlights activities on the companion Web site (www.pbs.org/race) to help you further explore the themes of each episode.
- **Key References:** For more advanced groups, we include this list of key historical documents, court cases, and laws cited in each episode.

Ten things everyone should know about race

Ten Things Everyone Should Know about Race

1. **Race is a modern idea.** Ancient societies, like the Greeks, did not divide people according to physical differences, but according to religion, status, class or even language. The English word "race" turns up for the first time in a 1508 poem by William Dunbar referring to a line of kings.

2. **Race has no genetic basis.** Not one characteristic, trait or even gene distinguishes all the members of one so-called race from all the members of another so-called race.

3. **Human subspecies don't exist.** Unlike many animals, modern humans simply haven't been around long enough, nor have populations been isolated enough, to evolve into separate subspecies or races. On average, only one of every thousand of the nucleotides that make up our DNA differ one human from another. We are one of the most genetically similar of all species.

4. **Skin color really is only skin deep.** The genes for skin color have nothing to do with genes for hair form, eye shape, blood type, musical talent, athletic ability or forms of intelligence. Knowing someone's skin color doesn't necessarily tell you anything else about them.

5. **Most variation is within, not between, "races."** Of the small amount of total human variation, 85% exists within any local population. About 94% can be found within any continent. That means, for example, that two random Koreans may be as genetically different as a Korean and an Italian.

6. **Slavery predates race.** Throughout much of human history, societies have enslaved others, often as a result of conquest or debt, but not because of physical characteristics or a belief in natural inferiority. Due to a unique set of historical circumstances, North America has the first slave system where all slaves shared a common appearance and ancestry.

7. **Race and freedom were born together.** The U.S. was founded on the principle that "All men are created equal," but the country's early economy was based largely on slavery. The new idea of race helped explain why some people could be denied the rights and freedoms that others took for granted.

8. **Race justified social inequalities as natural.** The "common sense" belief in white superiority justified anti-democratic action and policies like slavery, the extermination of American Indians, the exclusion of Asian immigrants, the taking of Mexican lands, and the institutionalization of racial practices within American government, laws, and society.

9. **Race isn't biological, but racism is still real.** Race is a powerful social idea that gives people different access to opportunities and resources. The government and social institutions of the United States have created advantages that disproportionately channel wealth, power and resources to white people.

10. **Colorblindness will not end racism.** Pretending race doesn't exist is not the same as creating equality.

There's less—and more—to race than meets the eye.

Program Descriptions

RACE—The Power of an Illusion is a provocative three-hour series that questions the very idea of race as biology. Scientists tell us that believing in biological races is no more sound than believing the sun revolves around the earth. So if race is a biological myth, where did the idea come from? And why should it matter today? RACE—The Power of an Illusion provides an eye-opening discussion tool to help people examine their beliefs about race, privilege, policy, and justice.

Episode I – "The Difference Between Us" examines how recent scientific discoveries have toppled the concept of biological race. The program follows a dozen diverse students who sequence and compare their own DNA. They discover, to their surprise, that their closest genetic matches are as likely to be with people from other "races" as their own. The episode helps us understand why it doesn't make scientific or genetic sense to sort people into biological races, as it dismantles our most basic myths about race, including natural superiority and inferiority.

Episode II – "The Story We Tell" uncovers the roots of the race concept, including the 19th-century science that legitimated it and the hold it has gained over our minds. It's an eye-opening tale of how America's need to defend slavery in the face of a radical new belief in freedom and equality led to a full-blown ideology of white supremacy. Noting the experience of Cherokee Indians, the U.S. war against Mexico and annexation of the Philippines, the film shows how definitions of race excluded from humanity not only Black people, but anyone who stood in the way of American expansion. The program traces the transformation of tentative suspicions about difference into a "common-sense" wisdom that people used to explain everything from individual behavior to the fate of whole societies, an idea of race that persists to this day.

Episode III – "The House We Live In" focuses not on individual behaviors and attitudes, but on how our institutions shape and create race, giving different groups vastly unequal life chances. Who defines race? In the early 20th century, the courts were called upon to determine who was white, employing contradictory logic to maintain the color line. After World War II, government policies and subsidies helped create segregated suburbs where Italians, Jews and other not-quite-white European ethnics were able to reap the full advantages of whiteness. The episode reveals some of the ordinary social institutions that quietly channel wealth and opportunity, so that white people benefit from a racist system without personally being racist. It concludes by looking at why we can't just get rid of race.

Facilitation Tips

RACE—The Power of an Illusion can challenge long and deeply held assumptions. People react to such challenges differently. Some will be inspired. Others may be disturbed. Either way, the power of the film can infuse discussions with emotion.

You can best help people engage in open and deep inquiry if you:

- View the film beforehand so you are not processing your own reactions at the same time that you are trying to facilitate a discussion.
- Know who is present and let their interests guide the discussion topics.
- Establish ground rules so that everyone knows they will be heard and no one can dominate the discussion or silence others.
- Encourage active listening.
- Invite people to participate.

suggestions for viewing

Suggestions For Viewing

You can significantly increase the impact of your discussion by asking people to assess their ideas about race prior to viewing the film. Here are some ways you can evoke people's beliefs and get them to reflect on their experience and preconceptions:

- Photocopy the "Ten Things Everyone Should Know about Race" in this guide and ask people to review and comment.
- Discuss the "Before Viewing" questions tied to the episode you're watching (see the "Discussion Starters" in the following pages). Ask people to make note of their answers. After viewing, return to those questions to see if answers were changed or challenged by anything in the films.

general questions

General Questions

After viewing, you might want to get the discussion started with a general question. Here are some possibilities:

- Reconsider your answers to the "Before Viewing" questions. Did the film change or challenge any of your assumptions? Did anything in the film(s) surprise you? Why?
- Two weeks from now, what will you most remember from the film(s) and why?
- How is this film different from or similar to other films you've seen about race?
- Review the "Ten Things Everyone Should Know about Race" handout. Do you understand each of the items? Which things in the list challenge your responses to the pre-viewing questions?

"Race is not based on biology, but race is rather an idea that we ascribe to biology."

— Alan Goodman,
biological anthropologist

Discussion Starters

Episode I—The Difference Between Us

Before Viewing

- How would you define race? What does it mean to you?
- How many races do you think there are? What are they? How do you decide which race someone belongs to?
- Look around the room or around your community. Who do you think is likely to be most similar to you, biologically or genetically? Why?
- Where do your ideas about race come from? What are the sources of your information?

Comprehension Questions

- What is the difference between a biological and a social view of race?
- Excluding your immediate family members, are you more likely to be genetically like someone who looks like you or someone who does not?
- Why is it impossible to use biological characteristics to sort people into consistent races? Review some of the concepts such as "non-concordance" and "within-group vs. between group variation."
- Who has benefited from the belief that we can sort people according to race and that there are natural or biologically based differences between racial groups?
- Besides race, what other things explain why some people might be more susceptible than others to disease? Think about the girl in the film with sickle cell anemia. How is ancestry different from race?

Discussion Questions

At the beginning of the film, the students are asked to predict whom they will be most like when they compare their DNA samples. How did the results compare with your expectations? Did you share the students' surprise? If so, why?

Anthropologist Alan Goodman says that "to understand why the idea of race is a biological myth requires a major paradigm shift." Do you agree? Did the film present anything that shifted your thinking in a major way? If so, what? Is it difficult to make this shift? Why?

episode 1 — the difference between us

Discussion Questions continued

Should doctors and other health professionals take biological race into account when diagnosing and treating illness? Why? Can you think of a situation where thinking about race as biological might be misleading or have a negative effect? How would considering social race be different?

Towards the end of this episode, the students are asked if they would trade their skin color. Would you trade your skin color? How do you think your life would be different if you looked like someone of a different race?

Turn-of-the-century scientists like Frederick Hoffman drew scientific conclusions based on what they believed to be true. How are scientists today influenced by their beliefs or their social context?

For many people, race is an important part of their identity. How do the following two comments from the film affect the way you think of yourself:

> "There's as much or more diversity and genetic difference within any racial group as there is between people of different racial groups." - Pilar Ossorio, microbiologist

> "Every single one of us is a mongrel." - student

Athletics is one arena where talking about ideas of inborn racial differences remains common. Why do you think some populations or groups seem to dominate certain sports but not others? What does it mean that the groups that dominate those sports have changed over time?

Try This Activity

Use the following list of inherited, biological traits to divide people into groups (i.e., first group people by hair color, then regroup by blood type, etc.):

Hair color
Blood types (A, B, O, A/B)
Whether or not your tongue curls
Lactose tolerance or intolerance (ability to digest milk products)
Left-handedness or right-handedness
Fingerprint types (loop, whorl, arch or tented arch)
Skin color (compare the inside of your arm)

Does the composition of the groups remain consistent from one criterion to the next? If the groups change depending on the criteria, what does that tell us about "group racial characteristics"? What are some reasons why we might classify using some traits, but not others?

Key References

1896 - Frederick Hoffman, *Race Traits and Tendencies of the American Negro*

1972 - Richard Lewontin, "The Apportionment of Human Diversity," *Evolutionary Biology*, Vol. 6, 381-398.

Web Site Tip:

Prior to viewing, visit the companion Web site at www.pbs.org/race and take the "Genetic Diversity Quiz" in the Human Diversity section. As you watch, see if any of your answers change. To follow up on the suggested activities, try the site's Sorting People activity. See if you can match people with their backgrounds just by looking at them.

Discussion Starters

Episode II—The Story We Tell

episode 2 — the story we tell

"Race was never just a matter of how you look, it's about how people assign meaning to how you look."

— Robin D. G. Kelley, *historian*

Before Viewing

- How long do you think the idea of race has been around? Where did it come from?
- Do you think Africans were enslaved in the Americas because they were deemed inferior, or were they deemed inferior because they were enslaved?

Comprehension Questions

- What are some ways that race has been used to rationalize inequality? How has race been used to shift attention (and responsibility) away from oppressors and toward the targets of oppression?
- What is the connection of American slavery to prejudices against African-descended peoples? Why does race persist after abolition?
- Why was it not slavery but freedom and the notion that "all men are created equal" that created a moral contradiction in colonial America, and how did race help resolve that contradiction?
- Contrast Thomas Jefferson's policy to assimilate American Indians in the 1780s with Andrew Jackson's policy of removing Cherokees to west of the Mississippi in the 1830s. What is common to both policies? What differentiates them?
- What did the publications of scientists Louis Agassiz, Samuel Morton, and Josiah Nott argue, and what was their impact on U.S. legal and social policy?
- What role did beliefs about race play in the American colonization of Mexican territory, Cuba, the Philippines, Guam and Puerto Rico?

Discussion Questions

What is the significance of the episode's title, "The Story We Tell"? What function has that story played in the U.S.? What are the stories about race that you tell? What are the stories you have heard? Did the film change the way you think about those stories? If so, how?

Organizers of the 1904 St. Louis World's Fair put on display people whom they defined as "other." Although few would do this today, many still see others as distinctly different from themselves. In your community, who is seen as "different"? What characterizes those who are defined as different?

In the film, historian James Horton points out that colonial white Americans invented the story that "there's something different about 'those' people" in order to rationalize believing in the contradictory ideas of equality and slavery at the same time. Likewise, historian Reginald Horsman shows how the explanation continued to be used to resolve other dilemmas: "This successful republic is not destroying Indians just for the love of it, they're not enslaving Blacks because they are selfish, they're not overrunning Mexican lands because they are avaricious. This is part of some great inevitability… of the way races are constituted." What stories of difference are used to mask or cover up oppression today? Why do we need to tell ourselves these kinds of stories?

episode 2 – the story we tell

Discussion Questions continued

How did expanding democracy and giving opportunities to more white men intersect with American society becoming increasingly "race based"? How did racism benefit white men? Are these practices still the case today? Is there an inevitable trade-off where one group gains privilege at the expense of another or can reversing racial inequality benefit all people, including white people who have traditionally benefited from racism? What might that look like?

Historian Matthew P. Guterl observes, "Most Americans believed that race was one of the most important parts of national life; that race mattered because it guaranteed this country a [glorious] future in the history of the world." While few would admit it today, do you think the definition of progress is still tied to being white? Can you think of historical or current instances in which those who are not defined as white are blamed for American weakness or problems?

How was the notion of Manifest Destiny shaped by beliefs about race? What is the relationship of Manifest Destiny to current foreign policies?

Compare current responses to racial inequity - e.g., calls for reparations or affirmative action - with the response of those who believed in the "White Man's Burden." Which solutions reinforce biological notions of race and/or white superiority? Which acknowledge the social construct of race without reinforcing those myths? Is it possible to address racial inequities without reinforcing biological notions of race? If so, how?

Try This Activity

Prior to viewing, define what it means to be "civilized." Make a list of what characteristics a civilized person possesses. After viewing, re-examine your list. How does your list compare to 18th & 19th century policies on American Indians, slaves, colonizing the Philippines, annexing Mexican land, etc.? How do beliefs about race influence beliefs about what it means to be civilized?

Key References

1776 - Johann Blumenbach, *On the Natural Varieties of Mankind*

1871 - Thomas Jefferson, *Notes on the State of Virginia*

1839 - Samuel Morton, *Crania Americana*

1854 - Josiah C. Nott, *Types of Mankind*

1830 - Indian Removal Act forcibly relocates thousands of Indians from the southeastern United States to west of the Mississippi River.

1857 - Supreme Court rules in *Dred Scott* that African Americans are ineligible for citizenship

1899 - Treaty of Paris - Spain cedes Guam, Puerto Rico & Philippine Islands to the U.S.

Web Site Tip:

Visit the Race Timeline section of the companion Web site (www.pbs.org/race) to explore key moments in the history and evolution of the race concept. See how ideas and definitions of race have changed over time, and how different groups were affected by these changes.

Discussion Starters

Episode III—The House We Live In

episode 3—the house we live in

Before Viewing

- Does race affect your life? Why or why not? If so, in what ways?
- Forty years ago, the Civil Rights Act declared that forced racial segregation was illegal. In light of this, why do you think some neighborhoods, schools and workplaces are still segregated?
- What stereotypes have you heard or seen about different racial groups? Where do they come from?
- Do you think people today should be held accountable for past discrimination? Why or why not?
- Define "racial preferences." List a couple of current examples. Do the preferences you see in practice today tend to most benefit whites, Blacks, or others?

"The slick thing about whiteness is that you can reap the benefits of a racist society without personally being racist."

— john a. powell,
legal scholar

Comprehensive Questions

- Who was allowed to become a naturalized citizen before 1954 and who wasn't? What rights and privileges do citizens have that non-citizens don't have? What were the consequences for those denied citizenship?
- How did European "ethnics" become white? What changes made this possible?
- How did federal housing policies institutionalize segregation and wealth disparities?
- Why do property values go down when a neighborhood changes from white to nonwhite? Who plays a role in this?
- What happens to measures of racial disparities in places like education and welfare rates when groups of similar income AND wealth are compared?

Discussion Questions

The film shows how government policies have created unfair advantages for whites in the past, resulting in a substantial wealth gap between whites and nonwhites. What examples of disparity exist in your community today? Will the wealth gap go away if we ignore race?

In the early part of this century, Asian immigrants were not eligible for citizenship, no matter how long they lived in the U.S. What is the legacy of those laws in terms of how Asian Americans are viewed today? What role does race play in current U.S. policy on immigration and granting of citizenship? How is our idea of citizenship still tied to race?

Commenting on the idea that the U.S. is a melting pot, sociologist Eduardo Bonilla-Silva says, "That melting pot never included people of color. Blacks, Chinese, Puerto Ricans, etc. could not melt into the pot." Think about the phrase "melting pot"—what does it imply? If this does not appropriately describe the U.S., what phrase would aptly describe the relationship between its various peoples?

Central to the concept of the American Dream is the notion that anyone who works hard enough will be rewarded—that anyone can "pull themselves up by their bootstraps." How has this been made more difficult for people not defined as white? What is the long-term impact of that denial? What difference does access to financial resources make in terms of your life opportunities?

episode 3—the house we live in

Discussion Questions continued

Cartoonist Bill Griffith comments on the all-white suburb where he grew up: "It certainly doesn't promote a feeling of a wider world to live in a place where there are only people who look like you." Do you agree? What does your neighborhood, workplace or school look like? Should geographical integration be a goal of public policy? Why or why not?

Psychologist Beverly Daniel Tatum summarizes the impact of institutionalized racial policies like FHA loan practices: "To the child of that parent, it looks like, 'My father worked hard, bought a house, passed his wealth on to me, made it possible for me to go to school....How come your father didn't do that?'" How would you answer the child of that privileged parent? How would you explain the situation to the child of the parent who was disadvantaged by government policies?

Supreme Court Justice Henry Blackmun said, "To get beyond racism we must first take account of race. There is no other way." Do you agree? Contrast Blackmun's statement with people who strive to be "colorblind" and judge people by the "content of their character rather than the color of their skin." Who benefits if we adopt a colorblind approach to society? How is colorblindness different from equality?

Given that race isn't biological, should we get rid of racial categories? Why might racial classifications still be useful? If we stop tracking racial information, how will we tell if disparities still exist?

How would you respond to Beverly Daniel Tatum's closing questions in the film:

- What can I influence?
- How am I making this a more equitable environment?
- Who is included in this picture and who isn't; who has had opportunities in my environment and who hasn't?
- What can I do about that?

Try This Activity

Ask each person to read through this list and give themselves a point for each item that is true for them:

1. My parents and grandparents were able to purchase or rent housing in any neighborhood they could afford.
2. I can take a job with an employer who believes in affirmative action without having co-workers suspect that I got it because of my race.
3. I grew up in a house that was owned by my parents.
4. I can look in mainstream media and see people who look like me represented fairly and in a wide range of roles.
5. I live in a safe neighborhood with good schools.
6. I can go shopping most of the time, pretty well assured that I will not be followed or harassed.
7. If my car breaks down on a deserted stretch of road, I can trust that the law enforcement officer who shows up will be helpful.
8. I don't have to worry about helping my parents out when they retire.
9. I never think twice about calling the police when trouble occurs.
10. Schools in my community teach about my race and heritage and present it in positive ways.
11. I can be pretty sure that if I go into a business and ask to speak to the "person in charge" that I will be facing a person of my race.

Discussion Questions continued

For additional examples of advantage, ask the group to brainstorm from their own experience or from the film. The list above is based partly on "White Privilege: Unpacking the Invisible Knapsack" by Peggy Macintosh, available in many places online.

After reviewing the list, ask people to notice who ends up with the most and fewest points. Do patterns emerge? Would people's answers have been different if they were a different race?

Conclude this activity by discussing legal scholar john a. powell's observation that in a racist system, privilege is often conveyed, not earned: "Most of the benefits can be obtained without ever doing anything personally. For whites, they are getting the spoils of a racist system, even if they are not personally racist." Talk about the difference between personal racism, where the beliefs and/or actions of an individual reflect prejudice or result in discrimination, and institutional racism, where people benefit or are disadvantaged without necessarily doing anything themselves. How might people address the institutional racism they identify during the activity?

Web Site Tip:

To learn more about housing and wealth, visit the Where Race Lives section of the companion Web site (www.pbs.org/race). You might also view the slide shows examining people's different perspectives on race in the Me, My Race, and I section.

Key References

1909 - U.S. Court of Appeals in Massachusetts case *In Re Halladjian* declares Armenians legally white

1913 - first alien land law passed in California

1922 - Supreme Court case of *Ozawa v. United States* declares Japanese ineligible for citizenship

1923 - Supreme Court case of *United States v. Thind* declares Asian Indians ineligible for citizenship

1924 - Johnson-Reed Immigration Act establishes immigration quotas based on national origin

1930-1940s - federal housing programs created, making home ownership possible for millions of white Americans for the first time

1954 - McCarran-Walter Act removes racial barriers from naturalization

1968 - Fair Housing Act passes, making housing discrimination illegal

resources

Resources

The companion Web site for RACE—The Power of an Illusion (www.pbs.org/race) includes a wealth of interactive exercises and in-depth resources, including background articles, lesson plans, and links to related organizations.

Acknowledgments

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To purchase the video, call 1-877-811-7495 or go to www.newsreel.org/films/race.htm.

Visit the companion Web site at www.pbs.org/race.

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cpb

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Procedural Fairness:
The Court's Foundation for Family Law Practice

Presenters:

The Honorable Maureen McKnight, Chief Family Court Judge, Multnomah County Circuit Court

Maureen McKnight is the Chief Family Court Judge in Multnomah County, Oregon, handling family, juvenile, and criminal matters. Her legal career, both before appointment to the bench and afterwards, has focused on systemic family law issues affecting low-income Oregonians, including operation of the state's child support program, access to justice issues such as self-representation, and the response of Oregon's communities to domestic violence. Judge McKnight is the lead on the Family Court Enhancement Project, a member of the Oregon Judicial Department's Family Law Advisory Committee, the author of numerous CLE articles, and the recipient of awards from the Oregon State Bar, Oregon Women Lawyers, and the Oregon Child Support Program

Jenny Woodson, Family Court Enhancement Project Coordinator, Multnomah County Circuit Court

Jenny Woodson is the Family Court Enhancement Project Coordinator with Multnomah County Family Court. She has previously worked with domestic violence survivors for over 14 years in rural and urban Oregon, predominately providing legal advocacy. She has a Master's in Public Administration for Portland State University.

Procedural Fairness:

Improving Access & Justice for Self-Represented Litigants & Others in Oregon's Family Courts

Hon. Maureen McKnight
Chief Family Court Judge, Multnomah County Circuit Court

Jennifer Woodson
Family Court Enhancement Project Coordinator, Multnomah County Circuit Court

SFLAC Conference, March 17, 2017

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1

Today's Topic

- Understanding the principles and research basis for procedural fairness
- Contextualizing procedural fairness principles with self-representation and other realities in Family Court
- Discussion of strategies and practical tools for measuring and improving public perceptions of fairness

2

Procedural Fairness (PF)

Definition: The perception that you are treated with respect and your concerns * are taken seriously by an unbiased decision-maker

* Includes your ability to *understand* the encounter

re•spect (ri spekt′), *n.* **1.** a particular, detail, or poi (usually prec. by *in*): *to differ in some respect.* **2.** rel tion or reference: *inquiries with respect to a route.* esteem for or a sense of the worth or excellence of a pe son, a personal quality or ability, or something consi ered as a manifestation of a personal quality or abilit *I have great respect for her judgment.* **4.** deference to

3

Why Start with Procedural Fairness in discussing Self-Representation?

FOUNDATIONAL: Research has shown that people are more likely to:

- **Accept and comply with decisions**
- **Cooperate in reporting problems and be involved in solutions, and**
- **Support and empower (with laws, funds, votes)**

an institution with authority (courts, police, etc.)
when they feel as if the PROCESS was fair

4

"PROCEDURAL FAIRNESS" PRINCIPLES -

- Voice -- opportunity to tell side
- Neutrality
- Respect
- Engagement on human level -- listening, conversing, and explaining understandably

How *litigants* view the court system is related more to their perceived fairness of the *process* than to their perceived fairness of the *outcome*

The public will not long entrust its confidence to a system of justice it often cannot navigate, afford, or understand.

Former Chief Justice John Broderick, New Hampshire Supreme Court

5

- Crime rates overall have been steadily dropping the last 20 years
- But confidence in the criminal justice system (which includes courts) has dropped by over 32% in the last 10 years
- And we have a wide racial divide in perceptions of fairness nationally & in Oregon

6

Research Basis

- **Immediate Effects:** PF is more influential than distributive justice (winning or losing) in determining compliance or intent to comply (Tyler & Huo 2002; Tyler and Jackson, 2012)

- **Enduring Effects:** PF can increase compliance with court orders, reduce crime, and reduce recidivism (e.g., Paternoster et al. 1997; Tyler and Huo 2002; Gottfredson et al. 2009)

7

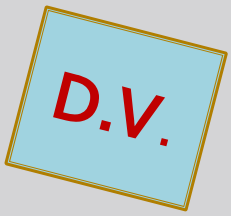
Prison survey in Slovenia --
Prison initiative in The Netherlands --

1. The guards treat inmates with respect.
2. Guards treat prisoners fairly.
3. The guards are courteous to inmates.
4. Guards explain their decisions to the prisoners.
5. The guards make decisions to handle problems involving inmates fairly.
6. Guards take time to listen to prisoners.

RESULT: Fair and respectful treatment by prison guards promotes rule compliance and reduce grievances

8

Research re Procedural Fairness in Contested Restraining Order proceedings - 2004



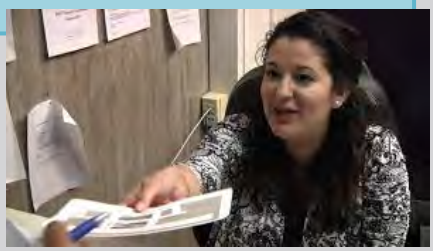
- Family Court in Minnesota – restraining orders
- Random assignment at contested hearings –
  - Full explanation re ruling (+ Q & A) or just ruling
  - Research staff debriefed afterwards in separate room

- Litigants who received full explanation of ruling gave higher fairness ratings that those who didn't
- Litigants who gave high fairness ratings reported they were more likely to comply
- Litigants who *didn't* get the ruling they wanted were more likely to report planned compliance when they had fair treatment + full explanation

9

"We should treat *each encounter* between the citizens and the police, courts, and other legal actors as a socializing experience – a teachable moment – that builds or undermines legitimacy"

- **Tom Tyler** (Yale University) - preeminent national scholar on legitimacy, trust, and procedural Justice



10

Consider a time when:

- You had to wait in a long line
- You were the lay person and someone in a position of authority failed to explain something important to you

11

How did you WISH you had been treated:

With respect ***(for your time, with eye contact, addressed by name)***

With an explanation of the process and what to expect

12

Making a decision is a sign of authority.

Explaining a decision is a sign of respect.

"Giving Reasons," Frederick Schauer, 47 Stanford Law Review 633 (1995)

Drill Sergeant

or

Doctor

13

Judges model for court staff,

who are sometimes the first rung on the ladder to justice

Sometimes *attorneys* or *mediators* are the first (and only) "face" of the court process

14

The public's interactions with <u>each</u> of us matter.

- Each of us could be the first stop on the ladder to justice;
- Each of us could be the first person someone talks to about their problem; and
- Each of us could be the first (or **only**) chance someone has to form an opinion about the legal system.

15

Breaking out the elements of Procedural Fairness:

VOICE –
opportunity to speak, to ask, to appeal

NEUTRALITY –
consistent principles, unbiased decision-makers, transparency in process

RESPECT –
treat with dignity, respect rights, be trauma-informed

ENGAGE on HUMAN LEVEL –
listen and explain understandably, connect as a person

16

What interferes with our providing optimal Procedural Fairness?

Language

Understandable Terms

- Use Plain English principles

Accessible interpreters

17

Plain English -- principles

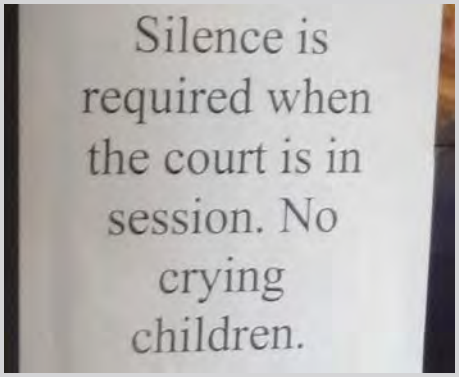
- Active voice, not passive
- **SHORT** words, sentences, paragraphs
- Lots of white space (350 words/page)
- Numbers that are graphical -- ①②③④⑤
- Sans serif fonts (Arial, Helvetica, Verdana)
- Font size 11-12 for body; 13-14 for heading
- No separate instructions
- Provide glossary (or parenthetical definition)

- FIELD TEST all forms
- + More (see hand-out)

18

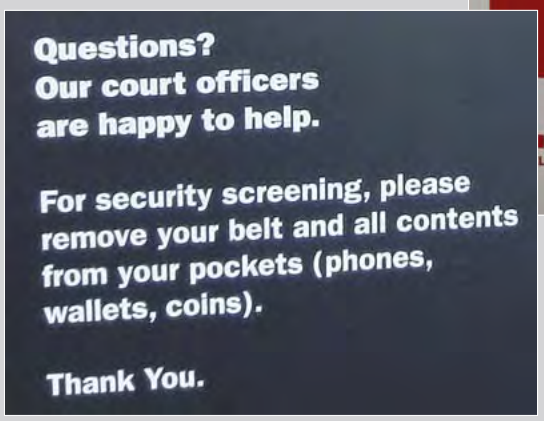
What undermines Procedural Fairness?

Signage



19

Better ?



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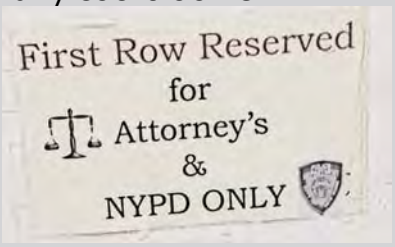
In many courtrooms:



Perceptions of neutral decision-making require:

- Decisions must be seen to be based on facts and rules,
- not personal opinions

- Rules are applied consistently across all people and cases

21

What Helps ?

Example:

WELCOME TO THE ARIZONA COURTS

WE WILL BE HAPPY TO HELP YOU IF WE CAN. AS WE MUST BE FAIR TO EVERYONE, WE ARE ALLOWED TO HELP YOU ONLY IN CERTAIN WAYS.

This is a list of some things court personnel can and cannot do for you:

****

We can	explain and answer general questions about how the court works.
We can	give you general information about court rules, procedures, and practices.
We can	provide you with the number for lawyer referral services, legal aid programs, and other services where you can get legal information.
We can	provide court schedules and information on how to get a case scheduled.
We can	give you information from your case file that is not restricted.
We can	provide you with court forms and instructions that are available.
We can	usually answer questions about court deadlines.

****

We cannot	tell you whether or not you should bring your case to court.
We cannot	tell you what words to use in your court papers or whether they are correct.
We cannot	tell you what to say in court.
We cannot	give you an opinion about what will happen if you bring your case to court.
We cannot	conduct legal research for you.
We cannot	talk to the judge for you or let you talk to the judge outside of court.
We cannot	alter court documents.

OUR ABILITY TO ASSIST YOU WILL DEPEND ON THE TIME AND RESOURCES AVAILABLE AS WELL AS THE SCOPE OF OUR RESPONSIBILITIES, KNOWLEDGE AND EXPERIENCE.

22

We will LISTEN to you

We will respond to your QUESTIONS about court procedure

We will treat you with RESPECT

23

Example:

Traffic stops in Australia

Traffic stop SCRIPTS that include elements of PF, *e.g.* respect, voice

Test	• 'I now require you to provide a specimen of breath for a breath test.' Etc …
Positive Message	• *If under the RBT limit* finish with this statement: I just want to finish off by thanking you for [positive thing that driver had done such as … child being buckled up in car seat in back/well maintained car/seat belt use for passenger or driver etc.] Thank you taking part in this Random breath test, I **appreciate your time and attention.** *If over the RBT limit*…process as usual.

RESULT: Higher satisfaction with police and increased compliance (compared to control group)

24

Scripts for Family Court conversations

(or standard explanations that recognize the frustration but stress the affirmative help):

"You're right. I can't give you advice about that. And I can see how frustrating that is, particularly after waiting X time to talk to someone here. But what I *can* do is give you some referrals for a low-cost attorney consultation . This costs only $35. *And* I can give you the forms that will set up the hearing you want."

25

Dealing with the Argumentative Litigant

Who says

"So you are saying she can do anything she wants. . . ."
"You aren't really helping me."
"So I'm just supposed to wait until he hurts me/them . . . . "
"Big surprise -- I knew I never had a chance here"

Affirm the emotion

"I can see how upset your are"
"I can see you much you care about your . . .. "
"I can understand how upsetting it is when . . . "

Articulate an *affirmative* step

Let's concentrate on what you/I can do . . . Your next time with Elijah will be .. " *or* "I'll be looking at the next hearing to see whether . . . "

26

Procedural Fairness Myths

- **MYTH #1:** Delivering bad news will always make you unpopular
- **MYTH #2:** People don't care about fair treatment as much when the stakes are high
- **MYTH #3**: Procedural justice is just about being nice to people

27

The courthouse doors are open to all.

If members of the public don't understand how to use the system,

and we don't tell them in some meaningful way,

we are denying them access.

28

Measuring Public Perceptions of Fairness

Multnomah County's Experience with Feedback Mechanisms

- Court-watches
- Focus Groups
- Surveys
- Comment Cards
- Peer Review & Courtroom Observation

Defendant Exit Survey

We would like to hear about your experience in court.

Your feedback will help us to improve the service we provide to court users. Your answers will not affect your case in any way.

Thank you for your time.

Today's Date: ___(MONTH) / ___(DAY) / _____ (YEAR)

The first 6 questions are about your experience today only.

Please write in the blank or fill in the bubble next to your selected response.

1. What is the name of the judge you saw today? _____ (Leave blank if you don't know)

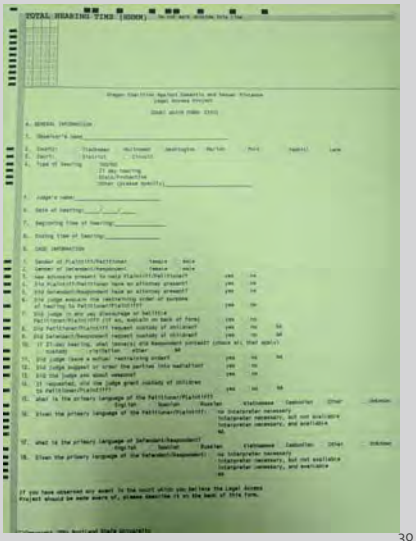
2. Approximately how long did you wait in the courtroom before your case was called today? _____ minutes

29

Courtwatches

A community project observing hearings for the purpose of collecting information.

Looking at:
Process, environment, and outcomes of cases



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1996-
1117 FAPA applications and 335 Contested Hearings in Marion, Multnomah, and Washington Counties

2008-2009 – 167 Contested Hearings in Multnomah County

31

Courtwatch Takeaways - 1996

- **Not enough time per hearing,** *averaged 9.6 minutes* per contested hearing
- *50% of the time* interpreters were needed, *none was available*
- *7% of the cases, judges discouraged or belittled* the petitioners
- *Less than 10%* of petitioners were represented by attorneys

32

Courtwatch Takeaways – 2008-09

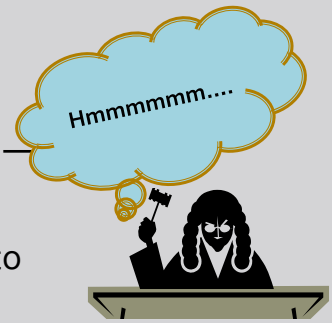
- ***92%*** of cases had at least one unrepresented party
  - If only one party represented, s/he was ***significantly more likely to prevail***
- Only *one case* went forward without an interpreter

- Average length of contested now *30 minutes w/o attorneys; 46 w/attorneys*
- Noted many *procedural differences* among judges

33

Courtwatch Impact

- Initial minimization by Judges



- Gradual acceptance of themes – Outside input mattered:
  - MultCty reorganized its dockets to provide more judicial time for contested restraining order hearings
  - MultCty Family Court increased efforts on behalf of SRLs and in DV cases
- Increased openness to more feedback

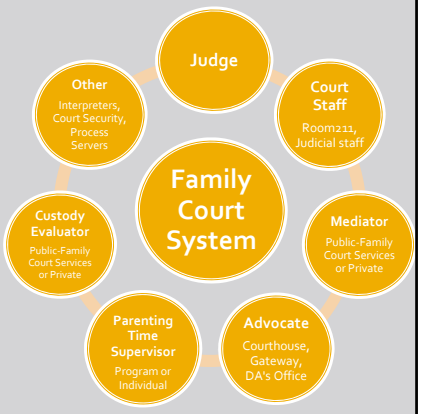
34

Focus Groups

VAWA-grant funded, worked with PSU

DV Survivors

- 30 DV survivors in 7 focus groups & 11 additional 1:1 interviews
- 4 groups in languages other than English
- "Looking at this, what worked and what didn't?"



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- **DV Survivors:**
  - had both positive and negative experiences with the system
  - did not have the information they need to get through court
  - felt frustrated and disappointed with custody and parenting time decisions
- **Court specific:**
  - problems with interpretation
  - felt judges applied rules unfairly
  - worries of safety/DV minimized or dismissed by judges
  - victim blaming by staff & judges
  - not enough assistance
  - not safe in building

36

Focus Groups – Family Law Professionals

- 4 Custody Evaluators
- 3 Children's Attorney
- 9 Attorney Representing Parents

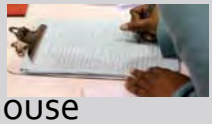
- Common themes:
  - Concern children's voices get lost
  - Cultural issues not understood by judges;
    - judges seen as biased
  - Lack of trauma practices by judges
  - Need shared understanding of DV
  - SRLs need more resources and help through process

37

Survey – Multnomah County

Method:

- Created survey after researching other courts' surveys
- Collaborative creation with attorneys, judges, advocates, court staff
- Distributed by hand, at customer service windows, and in courtrooms – at all court locations – 1 week
- Anonymous, not staff/judge specific
- Collections boxes on each floor
- Online option – access told at courthouse



38

Court Survey

The Multnomah County Circuit Court cares about its service to the public.

Please let us know how you feel about your time at the courthouse today. Drop your completed survey in any blue box marked "Courthouse Survey." The boxes are on each floor by the stairs and in the 1st floor lobby.

You do not need to identify yourself or anyone else by name on this survey. If you have any questions about this survey, please contact Jenny Woodson at 503-988-3918 or Jennifer.l.woodson@ojd.state.or.us

Why are you at the courthouse today?

[ ] Child custody or parenting time	[ ] Criminal case	[ ] Landlord-Tenant Case
[ ] Restraining/Protective Order	[ ] Probation Violation or Probation Issue	[ ] Small Claims Court
[ ] Family Law case (not listed above)	[ ] Traffic or [ ] Parking	[ ] Other Civil Matter
[ ] Juvenile case		[ ] Other _____

Who are you?

[ ] party in a case	[ ] victim in a criminal case	[ ] observer
[ ] attorney	[ ] support person	[ ] needed court documents
[ ] witness in a case	[ ] juror/jury duty	[ ] Other _____

Do you agree or disagree with the following statements?	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
The people who work in the courthouse were respectful to me.					
Court staff explained things to me in ways I could understand.					
When I left, I understood what the next steps in my case were.					
I felt safe while in the courthouse.					

If you appeared in a court hearing today, please respond to these additional statements:	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
At the start of the hearing, the Judge explained how the hearing would proceed.					
The Judge listened to me when I was speaking.					
I was able to share with the Judge the information I felt was important. (Or the Judge told me why he or she could not consider information I wanted the Judge to know about).					
The Judge conducted the hearing in a neutral manner.					
I understood what the Judge's decision was.					
The Judge explained the reasons for his or her decision.					
The Judge and staff in the courtroom were respectful to me.					

Thank you! Please use the space on the back of this page for any other comments you have.
You can complete the survey as many times as you visit the courthouse.

You can also fill out this survey on-line at https://www.surveymonkey.com/r/NWTJ5S3

39

Surveys -- Lessons Learned

- Most lessons are simple fixes –
  - "No opinion" option not helpful – did people check because did not apply to them, were neutral, or truly had no opinion?
  - Some court leadership felt we should not tell staff or they would change behavior. Will change next time.
  - Staff who did know were reluctant to give out, concerned about negative feedback
  - Gave to Jurors

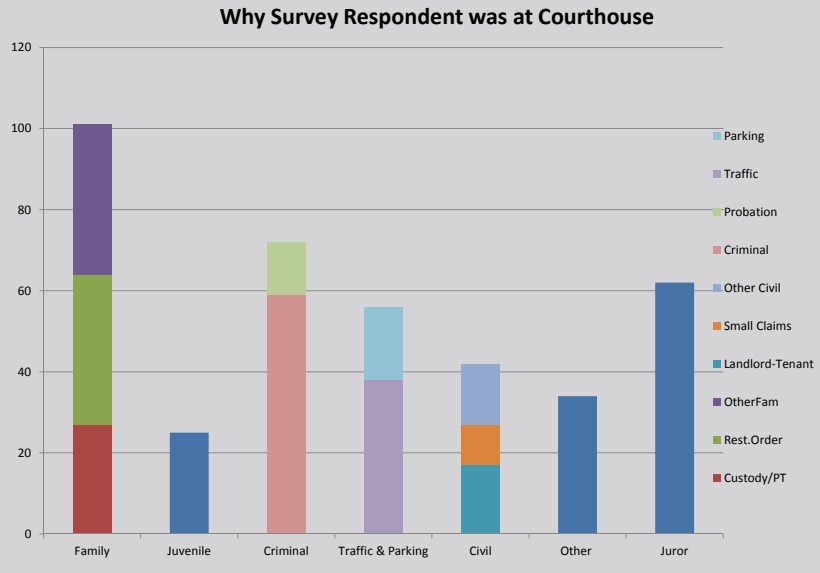
40

Surveys -- Numbers

- 392 completed surveys
  - (4 courthouses; 1 week)
- 199 were parties in a case
- For some comparisons , sample size was too small to be helpful
- Overall, very positive responses.
  - 85% strongly/agreed with all statements affirming positive results

41

Surveys -- Who filled them out?



42

Key Survey Conclusions – Family Law

- In general, parties in Family Law cases gave more negative responses than did parties in Criminal, Probation, Parking, and Traffic cases.
- Nevertheless, parties with the highest rated experiences were parties in Family Law restraining order cases.
- 100% of the parties in R.O. cases responded positively to the item *"The people in the courthouse were respectful to me."*
- Parties in Family Law cases were the least likely of all types of parties to report that they understood what the next steps in their case were.

43

Survey Responses: Family Law vs. Criminal/Civil

- Parties in Family Law matters:
  - Reported less positive experiences at the courthouse overall
  - Felt less safe in the downtown courthouse
  - Were less likely to strongly/agree that court staff had explained things in an understandable manner
  - Were less likely to strongly/agree that on leaving they understood the next steps
  - Were slightly less likely to strongly/agree that they understood the judge's decision BUT

- Were more likely to report having an opportunity to speak and perceiving the Judge as conducting the hearing in a neutral manner

44

Washington County Survey

- Judge specific
- Addressed following areas:
  - Case Management
  - Application and Knowledge of Law
  - Communications
  - Fairness
  - Demeanor
- Similar to a survey conducted in Linn County

45

Comment Cards

Available in Family Law Office –

Just started

46

Additional Resources

Publications:

Procedural Justice: Practice Tips for Courts
http://www.courtinnovation.org/sites/default/files/documents/P_J_Practical_Tips.pdf

Improving Courtroom Communication: A Multi-Year Effort to Enhance Procedural Justice
http://www.courtinnovation.org/sites/default/files/documents/Courtroom_Communications.pdf

Improving Courthouse Signage: Procedural Justice Through Design
http://www.courtinnovation.org/sites/default/files/documents/Red%20Hook%20OctoberFinalProofed_REDUCED%20%281%29.pdf

Procedural Fairness in California: Initiatives, Challenges, and Recommendations
http://www.courtinnovation.org/sites/default/files/documents/Procedural_Fairness_CA.pdf

Improving Courtroom Communication: A Procedural Justice Experiment in Milwaukee
http://www.courtinnovation.org/sites/default/files/documents/Improving%20Courtroom%20Communication.pdf

The Perceptions of Self-Represented Tenants in a Community-Based Housing Court
http://www.courtinnovation.org/sites/default/files/Perceptions_Tenants.pdf

A Judicial Guide to Child Safety in Custody Cases
http://www.ncjfcj.org/resource-library/publications/judicial-guide-child-safety-custody-cases

47

Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide
http://www.ncjfcj.org/resource-library/publications/navigating-custody-and-visitation

Family Violence Information Packets, including (among others) *Decision-Making in Child Custody Cases* and *Effects of Domestic Violence on Children*
http://www.ncjfcj.org/resource-library/publications/specialized-family-violence-information-packets

Civil Protection Orders: A Guide for Improving Practice
http://www.ncjfcj.org/resource-library/publications/civil-protection-orders-guide-improving-practice

Synergy, FVPSA 30th and VAWA 20th Anniversary issue, No. 1 of 2 (devoted to trauma)
http://www.ncjfcj.org/resource-library/publications/synergy-fvpsa-30th-vawa-20th-anniversary-issue-no-1-2

48

Web resources:

Center for Court Innovation
www.courtinnovation.org/proceduraljustice
www.courtinnovation.org/procedural-justice-practical-tips-and-tools

Professor Tom Tyler, Yale Law School
www.law.yale.edu/faculty/TTyler.htm

Procedural Fairness for Judges and Courts
www.proceduraljustice.org

49

Thank you!

Maureen.McKnight@ojd.state.or.us

Jennifer.L.Woodson@ojd.state.or.us

50

CENTER
FOR
COURT
INNOVATION

Procedural Justice: Practical Tips for Courts

by Emily Gold LaGratta

About the Center for Court Innovation

The Center for Court Innovation is a non-profit organization that seeks to help create a more effective and humane justice system by designing and implementing operating programs, performing original research, and providing reformers around the world with the tools they need to improve public safety, reduce incarceration, and enhance public trust in justice.

About This Report

This project was supported by Grant No. BJA 2010-DB-BX-K050 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the U.S. Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official positions or policies of the U.S. Department of Justice.

October 2015.

CENTER FOR COURT INNOVATION

Procedural Justice: Practical Tips for Courts

Research shows that when litigants believe the court process is fair, they are more likely to comply with court orders and the law generally. This concept – called "procedural justice" – refers to the perceived fairness of the procedures and interpersonal communications that defendants and other litigants experience in the courthouse and courtroom, as distinguished from distributive justice, which refers to the impressions derived from case outcomes (*i.e.* whether the litigant ultimately "won" or "lost" the case). Numerous studies have linked procedural justice to increased compliance with court orders and reduced recidivism.[1]

This resource was developed as part of a multi-year collaboration involving the Center for Court Innovation, National Judicial College, and the U.S. Department of Justice's Bureau of Justice Assistance, with guidance from a national advisory board of judges, court administrators, academics, and others. "Practical Tips for Courts" is a compilation of communication strategies that can be used to promote perceptions of fairness. Each of the suggested practices is tied to one or more of these critical dimensions of procedural justice: **voice** (litigants' perception that they have an opportunity to be heard), **respect** (litigants' perception that the judge and other court actors treat them with dignity), **neutrality** (litigants' perception that decisions are made without bias), and **understanding** (litigants' comprehension of the language used in court and how decisions are made).

This resource is not intended to be comprehensive but rather a sampling of the types of interactions that can enhance perceptions of fairness. For more information about procedural justice and the Improving Courtroom Communication project, please visit www.courtinnovation.org/proceduraljustice.

[1] *See, e.g.,* Tyler, T.R. 1990. Why People Obey the Law. Yale University Press New Haven: London; Frazer, M.S. 2006. The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center. New York, NY: Center for Court Innovation; Papachristos, Andrew V., Tracey Meares, and Jeffrey Fagan. 2007. "Attention Felons: Evaluating Project Safe Neighborhoods in Chicago," Journal of Empirical Legal Studies.

Courthouse environment

Security screenings

Ensure that all security measures, such as checkpoints and/or metal detectors, are administered with respect. Court officers should be encouraged to convey procedures orally and through signage that uses clear and respectful language.

Signage

Examine facility signage throughout the courthouse for comprehensibility. Signs should use an easy-to-read font type and size, written in plain language, and be posted at eye level. Limit the use of all capital letters and bold typeface, except for short titles and phrases.

Information desks

Clearly designate the hours of the information desk. Re-route court participants to another source of information when the desk is closed. Anticipate and address frequently asked questions with pre-printed materials.

Accessibility

Clearly designate handicap-accessible entrances and elevators. Ensure that oral and written instructions have ADA compliant versions for the visually and hearing impaired.

Décor

Opt for landscape pictures or other culturally neutral images.

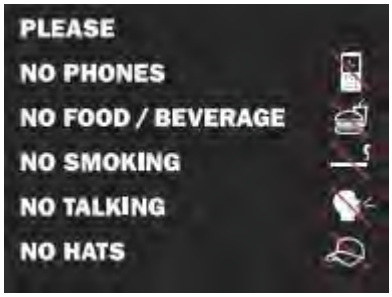
Feedback

Provide court users with an opportunity to offer regular feedback via a comment box or other method. You may also consider asking community members to help audit the navigability of the courthouse.

Post clear courtroom rules

Rules should be simple, clearly posted, and consistent throughout the courthouse.

EXAMPLE:



Efforts should be made to use respectful language. Whenever possible, rules should be communicated in images and words, using Spanish or other common secondary languages as needed. Court staff should enforce rules using a respectful tone of voice.

Explain the reason for late starts

Court sessions should begin promptly at the time scheduled to demonstrate respect for everyone's time. Thank audience members for being on time. If court does not start on time, court staff should tell the audience the reason for the delay and the anticipated start time.

EXAMPLE: *"Thank you for being here on time. We will begin court as soon as your attorneys have arrived. I appreciate your patience."*

Explain the order in which cases will be called

Giving information about the order in which cases will be called demonstrates respect for those who are waiting, including friends and family who are hoping to see a detained defendant. Consider explaining why certain cases are called first to reduce the risk that the practice will be perceived as showing favoritism or bias.

During each court appearance

Introduce yourself

Judges should introduce themselves at the beginning of proceedings, making eye contact with litigants and other audience members. Court staff can recite the basic rules and format of the court proceedings at the beginning of each court session. Written procedures can be posted in the courtroom to reinforce understanding.

Greet all parties neutrally

Judges should address litigants and attorneys by name and with eye contact. They should demonstrate neutrality by treating all lawyers respectfully and without favoritism. This includes minimizing the use of jokes or other communication that could be misinterpreted by court users.

Address any timing concerns

If court will be particularly busy, judges should acknowledge this and outline strategies for making things run smoothly. This can help relax the audience, as well as make the process seem more transparent and respectful.

EXAMPLE: *"I apologize if I seem rushed. Each case is important to me, and we will work together to get through today's calendar as quickly as possible, while giving each case the time it needs."*

Explain extraneous factors

If there are factors that will affect a judge's conduct or mood, they should consider adjusting their behavior accordingly. When appropriate, judges should explain them to the audience. This can humanize the experience and avoid court users' making an incorrect assumption.

EXAMPLE: *"I am getting over the flu, so please excuse me if I look sleepy or uncomfortable."*

EXAMPLE: *"Ms. Smith: I'm going to ask the prosecutor some questions first, then I'll ask your lawyer some questions. After that, you'll have a chance to ask questions of me or your attorney before I make my decision."*

Explain the court process and how decisions are made

The purpose of each appearance should be explained in plain language. The defendant should be informed if and when she will have an opportunity to speak and ask questions. Judges and attorneys should demonstrate neutrality by explaining in plain language what factors will be considered before a decision is made.

Use plain language

Minimize legal jargon or acronyms so that defendants can follow the conversation. If necessary, explain legal jargon in plain language. Litigants should be asked to describe in their own words what they understood so any necessary clarifications can be made.

Make eye contact

Eye contact from an authority figure is perceived as a sign of respect. Try to make eye contact when speaking and listening. Consider other body language that might demonstrate that you are listening and engaged. Be conscious of court users' body language, too, looking for signs of nervousness or frustration. Be aware that court users who avoid making eye contact with you may be from a culture where eye contact with authority figures is perceived to be disrespectful.

Ask open-ended questions

Find opportunities to invite the defendant to tell his/her side of the story, whether directly or via defense counsel. Use open-ended questions to invite more than a simple "yes" or "no" response. Judges should warn litigants that they may need to interrupt them to keep the court proceeding moving forward.

EXAMPLE: *"Mr. Smith: I've explained what is expected of you, but it's important to me that you understand. What questions do you have?"*

Explain sidebars

Sidebars are an example of a court procedure that can seem alienating to litigants. Before lawyers approach the bench, judges should explain that sidebars are brief discussions that do not go on the record, and encourage lawyers to summarize the conversation for their clients afterward.

Stay on task

Judges should avoid reading or completing paperwork while a case is being heard. If they do need to divert their attention, they should think about explaining this to the defendant and the audience. In general, judges should take occasional short breaks to keep themselves focused.

EXAMPLE: *"I am going to take notes on my computer while you're talking. I will be listening to you as I type."*

Personalize scripted language

Scripts can be helpful to outline key points and help convey required information efficiently. Wherever possible, scripts should be personalized – reading verbatim can minimize the intended importance of the message. Judges should consider asking defendants to paraphrase what they understood the scripted language to mean to ensure the proper meaning was conveyed.

EXAMPLE: *"Ms. Smith: I'm going to read you the three things I must consider at sentencing. It's important to me that you understand these factors. After I finish, I'm going to ask you to summarize those three things in your own words. "*

Tips for certain types of proceedings

Certain types of criminal proceedings may present unique obstacles to enhancing procedural fairness. Judges should consider the following:

Bail hearings

- Ask defendants to repeat back their understanding of any orders of protection. The order should be provided in clear, plain language and typed in a large font.
- Explain immediate next steps related to probation intake or pre-trial release mandates. Consider having staff or volunteers direct defendants to the intake office.
- Ensure that instructions for a defendant's next court appearance are given clearly – both orally and in writing.
- Call and/or send written reminders of subsequent court dates. Research shows that court date reminders using procedurally just language (*e.g.* respectful tone, clear expectations) are more effective than those that only emphasize the consequences of failure to appear.

Plea hearings

- Consider ways to give voice to defendants, either directly or via their attorneys, during plea allocutions and/or sentencing hearings.
- Go beyond rote plea colloquy questions to ensure true understanding. Consider asking defendants to repeat back their understanding of what rights they are surrendering by pleading guilty.

EXAMPLE: *"It's important to me that you understand your rights. For this reason, can you tell me whether you take any medications to clear your mind?*

- If a defendant seems unsure about his desire to plead guilty, offer a short recess so he can discuss with counsel and reflect on the terms of the plea. Also, consider having a clear, planned response for a defendant who wants to take a plea but also asserts that he is not guilty.
- If defendants must disclose any mental illness/medications to ensure they are of sound mind when making a plea decision, this should be clearly explained. Whenever possible, ask questions privately.

Sentencing

- Explain what factors will (and will not) be considered during sentencing, making it clear that while the defense attorney and prosecutors will have their say, their recommendations will not necessarily be followed.
- Describe the benefits of compliance and the consequences of non-compliance when outlining a sentence. Ask defendants to repeat back what is expected of them. Convey to defendants and to the audience that it is in everyone's best interest if the defendant is able to successfully complete his sentence.

- Provide a written summary of sentencing requirements in plain language. If the sentence includes probation or other community-based referral, briefly explain the intake process and what to expect going forward.
- Demonstrate interest in the defendant getting the help she needs to avoid future offending. Direct defendants to voluntary service providers or referrals that may be able to support them in getting their lives on track.

Addressing special populations

In-custody defendants

- Be aware of holding area conditions and acknowledge the effects of detention on defendants (*e.g.* hunger, fatigue).
- Consider opportunities for defendants to acknowledge and/or interact with family members in the audience; if not possible, explain why contact with family members will not be allowed.

Court users with limited English proficiency

- Focus on respectful and non-intimidating body language with limited English proficiency court users.
- Work to ensure that interpretation services are provided when needed.

EXAMPLE:

Defendants with social service needs

- Make connections with local service providers. Invite reputable providers to make presentations to judicial and other court staff during lunch meetings or other trainings.
- When appropriate, refer court users to additional services on a voluntary basis. Making voluntary referrals can be a way to show helpfulness, even if court users opt not to avail themselves of those services.

Other challenging populations

- Anticipate challenging or stressful populations – such as distraught family members or individuals with behavioral disturbances – by preparing scripts or other plans to respond appropriately.

Court Survey

The Multnomah County Circuit Court cares about its service to the public.

Please let us know how you feel about your time at the courthouse today. Drop your completed survey in any blue box marked "Courthouse Survey." The boxes are on each floor by the stairs and in the 1st floor lobby.

You do not need to identify yourself or anyone else by name on this survey.

Why are you at the courthouse today?		
[ ] Child custody or parenting time	[ ] Criminal case	[ ] Landlord-Tenant Case
[ ] Restraining/Protective Order	[ ] Probation Violation or	[ ] Small Claims Court
[ ] Family Law case (not listed above)	Probation Issue	[ ] Other Civil Matter
[ ] Juvenile case	[ ] Traffic or [ ] Parking	[ ] Other _____

Who are you?		
[ ] party in a case	[ ] victim in a criminal case	[ ] observer
[ ] attorney	[ ] support person	[ ] needed court documents
[ ] witness in a case	[ ] juror/jury duty	[ ] Other _____

Do you agree or disagree with the following statements?	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
The people who work in the courthouse were respectful to me.					
Court staff explained things to me in ways I could understand.					
When I left, I understood what the next steps in my case were.					
I felt safe while in the courthouse.					

<u>If you appeared in a court hearing today</u>, please respond to these additional statements:	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion
At the start of the hearing, the Judge explained how the hearing would proceed.					
The Judge listened to me when I was speaking.					
I was able to share with the Judge the information I felt was important. (Or the Judge told me why he or she could not consider information I wanted the Judge to know about).					
The Judge conducted the hearing in a neutral manner.					
I understood what the Judge's decision was.					
The Judge explained the reasons for his or her decision.					
The Judge and staff in the courtroom were respectful to me.					

Thank you! Please use the space on the back of this page for any other comments you have.

You can complete the survey as many times as you visit the courthouse. If you have any questions about the survey, please contact Jenny Woodson at 503-988-3918 or Jennifer.l.woodson@ojd.state.or.us.

You can also fill out this survey on-line at https://www.surveymonkey.com/r/NWTJ5S3

Prepared by:
BeaLisa Sydlik, Family Law Staff Counsel
February 8, 2008

FUNDAMENTALS OF PLAIN LANGUAGE FORMS[1]

Essential Resources

Plain English for Lawyers, by Richard Wydick
The Redbook – A Manual on Legal Style, by Bryan Garner

Definition

"Clear, concise and correct language" – Professor Richard Wydick, *Plain English for Lawyers*

Does "Plain Language" Matter?

Results from the first quantitative readability study of plain language court forms in the U.S. showed "*a marked and statistically significant improvement in reader comprehension…*" and "*significant economies for the court*" since users understood what they needed to do more clearly. (Maria Mindlin, "Is Plain Language better? Comparative Readability Study of plain Language Court Forms")

Fundamental Rules of Plain Language

1. Convert "**Passive Voice**" to "**Active Voice**".
   For example: A trial jury was requested by the Defendant.
   to → The Defendant requested a trial jury.

2. Maintain a **Glossary** of commonly-used, easy-to-understand legal words and terms.
   For example:
   cohabitate→live with
   consent→agree
   execute→sign
   maintain→keep
   purchase→buy
   request→ask
   surrender→give up
   conceal→hide

3. **Chunk Text:** Do not have long paragraphs of text. Improves interest and visual accessibility

4. **Field Test:** All draft forms before making public. Will tell you whether the form is understandable and usable

5. **No Separate Instructions!:** "If you have to have an instruction sheet, you have a failed document."

6. Get rid of old-style "caption" format in legal forms and pleadings! All forms should be **numbered**. The form **name** should be short and located at top left-hand corner.

7. Use **Headings** (in bold) followed by short paragraphs. Headings should contain the main message of the form

8. Use **Numbering** that is graphical (e.g., "CombiNumerals) for ease of navigation, e.g., ①②③④⑤

9. **Heading Fonts:** Should be Sans Serif (Arial-preferred, Helvetica, Verdana)[2]

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[1] The concepts in this document were presented at the Plain Language Seminar, Austin, Texas, January 29-30, 2008, sponsored by Legal Services Corporation, presented by Transcend, Inc. (Maria Mindlin, Instructor), www.transcend.net, (530) 756-5834.

[2] Studies show that most people only read the subheadings in a document. Subheadings should contain the message of the forms. Best kind of subheading is a question. Forms developers should devote the most thought to creation of the subheadings in a document.

10. **Text Fonts (Body):** Should be Serif (Times New Roman) - Should be different from subheadings. Studies show Serif font is easier to decode because it resembles the shape of the letters we learned to read with. It therefore increases reading speed and comprehension.

11. **Font Size:** 11-12 for body; 12-14 for headings. It is fine to **mix font sizes** to provide a way of navigating through the document

12. **Do NOT capitalize** all letters in **headings**. Instead, "**C**apitalize the **F**irst **L**etter of **E**ach **W**ord"

13. **Do NOT capitalize** all letters in the **text body**. It has been shown to be much harder to read

14. **Headings** should be in **Question (?) Format**. Question format has been shown to be the easiest to use; e.g., "*Where Should I File My Form?*"

15. Use **bold** to set off the most important info only; e.g., for headings or to capture attention

16. Use *italics* strategically. Use only for *foreign words* or to distinguish words from the rest of the text

17. Use underline only as a redline tool. Interferes with shape of letters/words and decreases readability

18. Use ~~strikeout~~ only as a redline tool

19. Avoid **Reverse Text** (white font on black background) – does not fax or copy well

20. **Justification** should be "ragged left", not "full justified"

21. Use **Text Boxes** to call attention to text but do not use shading

22. Change **Gerunds** (nouns that end in "*ing*") to **Infinitives**; e.g., "*Possessing a firearm is prohibited"* to "*It is against the law to possess a firearm."*

23. Can start a sentence with a **Conjunction** (Chicago Manual of Style) – makes language sound "natural"

24. **Leading** – Basic rule is that forms should be **single-spaced**, NOT double-spaced

25. Never use **Hyphenation**. Turn it off. Can only see part of the word shape when used, is less readable

26. **Margins** – Should be consistent within a document. Optimal line length is 30-50 characters (columns)

27. Keep words, sentences and paragraphs **SHORT**

28. The most read areas of a document are the TOP, the BOTTOM, and the first or last SUBHEADING or BULLET

29. Limit to **350 words** per page

30. Layout should have plenty of **white space**. Text should be black and white. Avoid **color**, particularly **red** (colorblind cannot read).

31. **Graphics** – Use at least one graphic to convey the main message

32. Aim for **5TH to 7th Grade** readability level for legal forms.

33. **Flesch-Kincaid Readability Statistics.** Is just one aspect of "readability." Based on word length, sentence length, use of passive voice, number of paragraphs, sentences per paragraph and use of pronouns and proper nouns. In Word 2007: Go to "Review" → "Spelling & Grammar." [NOTE: You have to run through entire spell check to get to the readability statistics for your document]

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Firearms & Domestic Violence: State and Federal Laws

Presenters:

Debra Dority, Attorney, State Support Unit, Oregon Law Center

Debra provides mentoring and technical assistance on family law and domestic violence to attorneys at the OLC and Legal Aid Services of Oregon (LASO). Before joining the SSU, Debra worked at the Pendleton LASO office and the Hillsboro OLC office and has been a legal aid lawyer since 2005. Throughout her legal career, Debra's practice focused on providing legal services to rural victims/survivors of domestic violence, sexual assault, and stalking in protective order and family law cases. Debra's move to the SSU has allowed her work on state-wide policy issues related to domestic and sexual abuse and stalking. Debra serves on the State Family Law Advisory Committee, co-chairing its Domestic Violence Subcommittee and is a member of the Oregon Judicial Department's Law and Policy Work Group.

Erin S. Greenawald, Senior Assistant Attorney General, Oregon Department of Justice

Since March 2010, Erin has been DOJ's Domestic Violence Resource Prosecutor (DVRP). As the state's DVRP, Erin provides resources and training specific to domestic and sexual violence issues to law enforcement, prosecutors, advocates and community organizations. For several years, Erin has focused on providing training opportunities to improve trauma-informed investigation and prosecution techniques in Oregon. To further that goal, Erin attended the two-week Special Victims Capabilities Course in Ft. Leonard Wood, Missouri in 2015. In addition to creating, hosting, and facilitating trainings and conferences around the state, Erin continues to handle complex domestic and sexual violence cases while also working on legislative and policy matters related to those same issues. Before joining the Department of Justice, Erin worked as a Deputy District Attorney in Yamhill and Marion counties. Since 1999, she has prosecuted domestic violence and major person felonies, including child and adult sex abuse crimes and homicides. Erin serves and has served on a number of statewide domestic and sexual violence–related work groups, including the Governor's Domestic Violence Prevention and Response Task Force, the Statewide Domestic Violence and Firearms Task Force (Chair), State Family Law Advisory Committee's Domestic Violence Sub-Committee, the Oregon Sexual Assault Task Force (SATF), and Oregon's Domestic Violence Fatality Review Team of which she is co-chair. Erin is also a prosecutor instructor with SATF's Sexual Assault Training Institute.

Disarming Domestic Violence: Tools and Tips

Debra Dority, Oregon Law Center
Erin Greenawald, Oregon Department of Justice

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2

Disclaimer #2

- We use female pronouns when talking about victims.
- We use male pronouns when talking about perpetrators.
- We know that both men and women perpetrate violence.
- We know that interpersonal violence happens in all types of relationships.

3

Topics

- Link Between Domestic Violence and Firearms
- Overview of Relevant Federal and State Firearms Laws
  - Misdemeanor Crimes of Domestic Violence
  - Qualifying Protective/Court Orders
- Judicial Notifications
- Firearms Findings
- Database Entry Requirements
- Firearm Dispossession Protocols
- Resources

4

Link Between DV & Firearms

LOW INCIDENCE BUT HIGH LETHALITY

Abuser's access to firearms → 5x higher risk of death

DV assaults involving a gun → 12 x higher risk of death than those involving other weapon or bodily force

Abuser's prior threat/assault with firearm → 20 x higher risk of death in intimate partner context

5

DV Firearm Deaths in Oregon

Between 2003 and 2012, **60%** of all DV-related homicides in Oregon were caused by a firearm.

In 2015 SIXTY Oregonians were killed in DV incidents. **50%** of the victims were murdered with a firearm.

6

Factors Correlated to DV Lethality

(OTHER THAN PRIOR PHYSICAL ABUSE, FOUND IN 70% OF DV HOMICIDES)

Within Preceding 2 years	At Time of Incident
✔High Control + Separation	✔Access to firearms
✔Access to firearms	✔New relationship by victim
✔Unemployment	✔Unemployment
✔Threats with weapon	✔Threats with weapon
✔Any threat to kill	✔Victim separating from Def.
✔Victim has non-joint child in home	✔High Control + Separation

Protective Factors

Never cohabited
Prior arrests for dv

7

✔Where an order of protection existed with a firearms possession ban, female intimate partner deaths were 13% lower (Vigdor & Mercy 2006)

☐10. **Firearms.** Respondent shall not **purchase or possess any firearms or ammunition.** 10._____
[OJIN Event Code: FQOR]
Other orders regarding firearms *(for court use only)*: _____

FIREARMS NOTIFICATION

If the firearms prohibition in Paragraph 10 is initialed by the judge, it IS unlawful under OREGON state law for you to possess or purchase a FIREARM, including a rifle, pistol, or revolver, and AMMUNITION.

You should consult an attorney if you have questions about this.

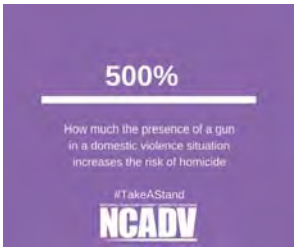
[OJIN EVENT CODE: NOGR]

8

Tools to Disarm Domestic Violence Offenders- State and Federal Laws

- Federal Law: Two major crimes aimed at domestic violence perpetrators: each amended Gun Control Act of 1968
  - 18 USC §922(g)(8) (protective orders) in 1994 at same time as VAWA and
  - 18 USC §922(g)(9) (MCDVs)in 1996, known as Lautenberg Amendment.
- State Law:
  - SB 525 codified at ORS 166.250 and ORS 166.255
  - FAPA, Stalking Citation, Stalking Protective Order, EPPDAPA, SAPO, Release Agreements, Standard Conditions of Probation.
- Criminal Background Checks to Prevent Firearms Purchases
- Firearm Surrender Protocols

9



10

Federal Laws Prohibiting Gun Possession

- Convicted felons
- Unlawful users of controlled substances
- Fugitives from justice
- Persons who have renounced their U.S. citizenship
- Persons dishonorably discharged from the armed services
- Illegal aliens
- Persons adjudicated as mentally defective or committed to a mental institution
- Persons subject to a final protection order
- Persons convicted of misdemeanor domestic violence

11

Federal Laws: The Brady Act

- In 1993, Congress enacted the "Brady Handgun Violence Prevention Act (Brady Act)".
- The Brady Act requires all federally licensed gun dealers to obtain a criminal background check of firearm purchasers before completing a sale.
- In Oregon, the background checks are completed by the OSP ID Services division.

12

Federal Laws: USC 922(g)(8): QPO

In 1994, Congress amended the Gun Control Act of 1968.

18 USC 922 (g)(8) made it a federal crime for a person who is subject to a "qualifying protection order" to possess a firearm or ammunition, to ship or receive a firearm or ammunition in interstate or foreign commerce.

13

QPO: Necessary Components

1. Hearing: The order was issued after a hearing and the respondent:
   - Received actual notice of the hearing and
   - Had an opportunity to participate or did participate in the hearing.
2. Intimate Partner Relationship
3. Restrains Future Conduct
4. Credible Threat Finding or Physical Force Prohibition.

14

Protective Orders… Just FAPA?

So long as 4 qualifying elements exist:

- ✓ FAPA Restraining Orders;
- ✓ EPPDAPA Restraining Orders;
- ✓ Stalking Protective Orders;
- ✓ Sexual Assault Protective Order;
- ✓ ORS 107.095 (in family law cases) no contact orders; and
- ✓ No contact provisions in release agreements, probation orders, etc.

15

Protective Order: Hearing

Protective Order must:

- Be issued after a hearing of which the individual received actual notice and at which the individual had an opportunity to participate. 18 USC §922(g)(8)(A).

Is an *ex parte* FAPA order, a qualifying protective order under federal law? No.

16

Does Failing to Attend Noticed Hearing Still= Opportunity?

- *U.S. v. Miles*, 2006 U.S. Dist. Lexis 27123 (W.D La. 2006) Didn't matter that Def. was never served with order issued there or otherwise didn't receive a copy of order resulting from that hrg.

17

Was There a "Hearing?"

- In-court stipulation to Order is enough
  - *US v. Banks*, 339 F.3d 67 (5th Cir. 2003); *U.S. v. Lippman* 369 F.3d 1039 (8th Circ. 2004)
  - Contrast: Stipulation about an order done out of court where no hearing was scheduled or occurred=not enough. *U.S. v. Spruill, 292 F.3d 207 (5th Cir. 2002). Especially when DA provides the stipulation and Respondent has no attorney.*
- *In-court request for set-over is enough*
  - *U.S. v. Calor,* 340 F.3d 428 (6th Cir. 2003).

18

QPO: Intimate Partner Relationship

Definition at 18 USC §921(a)(32)

- The person protected by the order must be:
  - A spouse or former spouse of the respondent;
  - The parent of respondent's child;
  - A person who does or did cohabit (live in a sexually intimate relationship) with respondent;
  - Respondent's child; OR
  - A child of an intimate partner of Respondent (spouse/former souse, cohabitant/former cohabitant, or parent of respondent's child).

19

Not All FAPA Relationships Qualify

- Federal law doesn't protect all relationships protected under Oregon's FAPA.
- RELATIONSHIPS COVERED BY FAPA BUT NOT FEDERAL LAW:
  - Sexually intimate partners within the last 2 years (no cohabitation); and
  - Adults related by blood, marriage, or adoption.

20

QPO: Must Restrain Future Conduct

18 USC §922(g)(8)(B)

- The protective order must restrain the individual from:
  - Harassing, stalking, or threatening the individual's intimate partner, or the intimate partner's child

OR

  - Engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the intimate partner or child.

21

QPO: Credible Threat Finding *or* Physical Force Prohibition Required

- Must include a finding that: the individual represents a credible threat to the physical safety of the intimate partner or child of intimate partner or child of individual

OR

- By its terms explicitly prohibits the attempted/threatened/use of physical force reasonably expected to cause bodily injury against intimate partner or child
- 18 USC §922 (g)(8)(C)

22

Federal Laws: USC 922(g)(9): QCDV

In 1996, Congress amended the Gun Control Act again in the "Lautenberg Amendment".

18 USC 922 (g)(9) made it a federal crime for a person convicted of a "qualifying misdemeanor crime of domestic violence" to possess a firearm or ammunition.

23

QCDV: Necessary Components

- Qualifying relationship between the parties
  - Current or former spouse, parent, or guardian of the victim
  - A person with whom the victim shares a child in common
  - A person who was cohabiting or had cohabited with the victim as a spouse, parent, or guardian;
  - A person similarly situated to a spouse, parent, or guardian of the victim
  - **No dating partners**
- Statutory elements of the crime are met
  - Has as an element:
    - The use or attempted use of physical force or
    - The threatened use of a deadly weapon.
- Procedural requirements
  - Represented by counsel or knowingly waived right to counsel
  - Jury trial or knowingly waived
  - Doesn't apply if conviction expunged; person pardoned or rights restored

24

25

State Laws

ORS 24.190: Full Faith and Credit

- Full Faith and Credit compels Oregon to recognize qualifying ROs issued by *another* tribal or state court and enforce them as their own
- Other states and tribal jurisdictions may routinely prohibit firearm possession as a term of their protection orders. Violation of a foreign protection order is subject to mandatory arrest in Oregon.

26

State Laws

- **ORS 107.718 (1)(h)**: Order Firearm Dispossession
- In FAPA order, the court has discretion to include firearm/ammunition prohibition as a term of RO if necessary to protect the safety of the children or Petitioner. (Model Protocol provides guidance)

27

Prohibition vs. Surrender

- Firearms prohibitions, box #10 on FAPA order
- *"Respondent shall not purchase or possess any firearms or ammunition"*
- "Other Orders Regarding Firearms" under box #10 = opportunity to set out surrender requirements:
  - On case-by-case basis or
  - Pursuant to local firearms surrender protocols.

More to come on this!

28

State Laws

- **ORS 107.720:** Entry of FAPA into LEDS (Law Enforcement Data System)/NCIC (National Crime Information Center)
- Requires entry of FAPA orders into LEDS and NCIC. Requires procedures to ensure than on officer at the scene may be informed of the order and its terms: (Task Force developed model protocols for this, too!)

29

State Laws

- **ORS 133.535:** Seizure of evidence
- A firearm which is evidence of a crime (violation of ORS 166.255 (SB 525), for instance), may be seized.

30

State Laws

- **ORS 135.250:** F/A Restriction in Release Agreement
- ORS 135.250(2)(d) provides that **ORS 107.720** applies to release agreements in "DV" cases. (Entry into LEDS/NCIC)
- "DV" is defined at **ORS 135.230(3)**
- Per **ORS 132.586**, "Constituting Domestic Violence" may be added to a charge if meets definition of DV.

31

State Laws

- **ORS 135.250(c):** "If the defendant was provided notice and an opportunity to be heard, the court shall also include in the agreement, when appropriate, terms and findings sufficient under (g)(8) to affect the defendant's ability to possess firearms and ammunition or engage in activities involving firearms."
- IF the judge orders dispossession/surrender as a condition of release, a violation of that condition may result in an arrest warrant.

32

State Laws

- **ORS 137.540:** Standard Conditions of Probation
- ORS 137.540(1)(L): The probationer shall not possess weapons, firearms, or dangerous animals.

33

State Laws

- **ORS 166.250:** Unlawful Possession of Firearms
- **ORS 166.250(B)(i):** The Defendant while a minor was found to be within the jurisdiction of the juvenile court for having committed an act which, if committed by an adult, would constitute a felony or a misdemeanor involving violence, as defined in ORS 166.470; and
- (ii) Was discharged from the jurisdiction of the juvenile court within four years prior to being charged under this section.

34

State Laws

- **ORS 166.470(1)(g):** Definition of "misdemeanor of violence"
- A misdemeanor described in ORS 163.160 (Assault IV), 163.187 (Strangulation), 163.190 (Menacing), 163.195 (REAP), or 166.155(1)(b) (Intimidation in the Second Degree—subjecting another person to offensive physical contact because of person's perception of the other's race, color, religion, sexual orientation, disability or national origin).

35

State Laws

- **ORS 166.255:** Possession of firearms or ammunition by certain persons prohibited
- We'll come back to this one!

36

State Laws

- **ORS 166.291 -293:** Issuance and denial or revocation of concealed handgun license
- **ORS 166.291:** Prohibitions on issuance of a CHL
- (e) Is on pre-trial release
- (g) Has been convicted of a misdemeanor within the four years prior to the application
- (k) Has been within the last four years prior to the application, adjudicated as a juvenile of a misdemeanor involving violence
- (m) Subject to a Stalking citation or FAPA and/or Stalking Order

37

State Laws

- **ORS 166.293:** Denial or revocation of license
- **Per ORS 166.293(3)(a):** "Any act or condition that would prevent the issuance of a concealed handgun license *is cause* for revoking a concealed handgun license."
- A sheriff may revoke a concealed handgun license
- A peace officer or corrections officer may seize a concealed handgun license and return it to the issuing sheriff if the license is held by a person who has been arrested or cited for a crime that can or would otherwise disqualify that person from being issued a CHL.

38

State Laws

- **ORS 166.470:** Limitations and Conditions for Sale or Transfer of Firearm
- (1) A person may not intentionally sell, deliver or otherwise transfer any firearm when the transferor knows or reasonably should know that the recipient:
- (g) Has been convicted of a misdemeanor involving violence within the previous four years.
- Case Example: OSP Trooper in Washington / Tillamook Counties

39

State Laws

- **ORS 166.435:** Transfer of weapons by unlicensed persons (SB 941)
- **SB 941,** passed in 2015, instituted new mandates regarding background checks in the transfer of firearms by individuals who are not gun dealers or at trade shows.
- However, the bill (now statute) includes a number of exceptions: if the transferor/transferee are in any one of a number of familial relationships (see subsection (4)(c)), a background check does not need to be completed.
- The familial relationships that are exempted include: transferor's spouse or domestic partner; transferor's child or stepchild; transferor's parent or stepparent.

40

State Laws

- **SB 525:** Possession of firearm or ammunition by certain persons prohibited
- Until the passage of SB 525 in 2015, there was no specific Oregon law which prohibited the possession of a firearm by qualifying protection order respondents or those convicted of qualifying domestic violence misdemeanors.
- SB 525, now codified in **ORS 166.255**, was meant to mirror federal law (18 USC 922 (g)(8) & (9)).

41

State Laws: QCO

- **ORS 166.255(1)(a):** The person is subject of a court order
- REQUIREMENTS:
- Was continued after a hearing of which the person had notice and opportunity to be heard;
- Restrains the person (respondent-perpetrator) from stalking, intimidating, molesting or menacing an **intimate partner**, a child of an **intimate partner** or a child of the person.
- Includes a finding that the person (respondent-perpetrator) is a credible threat to the physical safety of an **intimate partner**, a child of an **intimate partner** or child of the person.

42

State Laws: QCO

- **ORS 166.255(3)d):** Definition of **intimate partner** states that the respondent is:
  - Spouse, former spouse,
  - Cohabitant or former cohabitant in relationship akin to a spouse
  - A parent of the respondent's child

43

State Laws: QCO

- **ORS 166.255(1)(a):** Qualifying court order
- The ban last only for the duration of the order
- (2) There is an official use exemption (as in the federal law)
- Federal, state and local governmental employees when acting in their **official capacities** are exempt from the prohibition against possession under 18 USC §922(g)(8) and ORS 166.255(2), BUT **they remain subject to it in their personal capacities**.

44

State Laws: MCDV

- **ORS 166.255(1)(b):** Person has been convicted of a qualifying misdemeanor and, at the time of the offense, the person was a family member of the victim of the offense.
- **EASY STUFF FIRST: ORS 166.255(3)(c)**
- Family member means:
  - Victim was spouse of former spouse
  - Person with victim shares a child in common.
  - Victim's parent or guardian
  - Person cohabiting with victim or who has cohabited with victim as spouse, parent or guardian or a person similarly situated to a spouse, parent or guardian

45

State Laws: MCDV

- **ORS 166.255(3)(f):** Qualifying misdemeanor defined
- Has as an element use or attempted use of physical force or threatened use of a deadly weapon.
- Deadly weapon means any instrument, article, or substance specifically designed for and presently capable of causing death or serious physical injury. ORS 161.015

46

State Laws: MCDV

- **ORS 166.255** doesn't specify which crimes qualify, so….which crimes qualify?

- **Under 18 USC 922 (g)(9),** the FBI designated six Oregon crimes which qualified:
- ORS 163.160 – Assault in the Fourth Degree
- ORS 163.187 – Strangulation
- ORS 163.435 – Contributing to the Sexual Delinquency of a Minor
- ORS 163.445 – Sexual Misconduct
- ORS 166.025 – Disorderly Conduct
- ORS 166.190 – Pointing Firearm at Another

47

State Laws: MCDV

- Despite the FBI designation, and recent US Supreme Court cases like *U.S. v. Castleman*, the US Attorney's Office has historically only considered two of those crimes to be qualifying misdemeanors: Assault and Strangulation (or attempts thereof).
- There have been on-going discussions about whether the federal analysis and conclusion should or must be adopted in state level investigations and prosecutions of ORS 166.255.
- I've learned more about the categorical and modified categorical approach than I ever wanted. I will not torture you with the details. **You are welcome!**

48

State Laws: MCDV

- **ORS 166.255(1)(b):** Qualifying Misdemeanor Crimes
- **BOTTOM LINE:** Until we expand or modify the language of our state statute, the best practice seems to be to stick to the crimes that the FBI has determined qualify.
- **ALSO:** There is no "official use exemption" under 18 USC 922 (g)(9) or ORS 166.255(1)(b).
- **Another question:** Does the Defendant have to know that s/he was convicted of a qualifying misdemeanor conviction and/or of the consequences of the conviction?
  - The short answer is No.

49

50

Judicial Notifications

- **VAWA notice requirements:**
- The Violence Against Women Reauthorization Act of 2005 (VAWA), requires as a condition of eligibility for VAWA grants that the state certify that its judicial and administrative policies and practices include notification to domestic violence offenders of the requirements of the Brady firearm laws and any applicable related federal, state, or local firearms laws. Failure to notify in at least 90% of Oregon's domestic violence cases will cause Oregon to lose VAWA STOP grant funds.
- Notice can be given orally or in writing.
- OJD model FAPA, Stalking Protective Orders, SAPO, and EPPDAPA Notice to Respondent/Request for Hearing forms include the notice.

51

Judicial Notifications

- **ORS 135.385 Notice**
- **ORS 135.385(2)(f)** requires judges to inform a defendant at a plea of guilty or no contest that, if the defendant enters a plea of guilty or no contest to an offense involving domestic violence, federal law may prohibit the defendant from possessing, receiving, shipping, or transporting a firearm or ammunition, and the conviction may negatively affect the defendant's ability to serve in the Armed Forces of the United States or to be employed in law enforcement.
- Many OJD forms already include this language, including the Firearms Notification form, as well as the OJD arraignment video, the Uniform Plea Petition, and the Uniform Criminal Judgment. Some local courts have amended their plea petitions to provide this notice.

52

Brady Findings

- "Brady" findings are judicial findings to indicate that the terms of a protective order or a misdemeanor conviction may disqualify a respondent or defendant from possessing or other use of firearms and ammunition under federal law; document is labeled "Federal Firearms Findings (Brady)" and often is called a "Brady certificate."

53

"Brady" Findings Are Important

- Vital step in preventing firearms sales to those who cannot possess firearms under federal/state law.
- Provides initial determination that a protective order is qualifying for federal/state law purposes
- Drives home a clear message to defendants and respondents that possession of firearms and ammo is crime under federal and state law.
- Important for prosecutors in criminal misdemeanor cases and lawyers in protective orders cases to urge completion by judges.
- Failure to complete findings does **not** mean that laws do not apply.

54

Brady Findings: Certificates

- ODJ is working on the final draft of Brady Finding document for ORS 166.255(1)(b) (qualifying misdemeanor) cases.
- Handout: Draft template of Findings document

55

IN THE CIRCUIT COURT OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,
Plaintiff,
v.
_____,
Defendant.

Case No.

FIREARMS FINDINGS

MISDEMEANOR CRIME OF DOMESTIC VIOLENCE [18 USC §922 (g)(9); ORS 166.255)]

This **MISDEMEANOR CONVICTION** subjects the defendant during the defendant's lifetime to:
[X] federal prosecution for possession, receipt, shipping, transportation, or purchase of firearms or ammunition and
[X] state prosecution (in Oregon) for the possession of a firearm or ammunition

because the Court **FINDS**:

Relationship. At the time of the crime, Defendant was (*check all that apply*):
❑ Current or former spouse of victim *(may be same sex)*
❑ Person similarly situated to spouse of victim *(may be same sex)*
❑ Cohabiting or has cohabited with the victim, as a spouse *(may be same sex)* of victim, as a parent of victim, or as a guardian of victim
❑ A person who has a child in common with the victim *(child must be born)*
❑ Parent/Stepparent/Guardian of victim, or a person similarly situated to a parent or guardian of the Victim

and

Crime with Element of Force. Defendant was convicted under the following statute of a crime that is a misdemeanor under Oregon law and the crime has, as an element, the use or attempted use of physical force or threatened use of a deadly weapon:

QUALIFYING CRIMES INCLUDE THE FOLLOWING, PLUS *ATTEMPTS* RE THESE CRIMES	
❑ **Assault IV** – ORS 163.160(1) ❑ **Strangulation** –ORS 163.187 ❑ **Contributing to the Sexual Delinquency of a Minor**—ORS 163.435 ❑ **Sexual Misconduct** – ORS 163.445 ❑ **Disorderly Conduct** – ORS 166.025(1)(a) ❑ **Pointing Firearm at Another** –ORS 166.190	❑ **Attempt** re the crime identified in the left column

Due Process. Defendant was represented by counsel or knowingly and intelligently waived the right to counsel. If entitled to a jury trial, defendant had a jury trial or knowingly and intelligently waived the right to jury trial.

[Odyssey Event Code: ***ORBY****; LEDS Officer Safety Record:* ***EIP*** *with type* ***PDV; MCDV*** *in mis field]*

DATED _____ _____
CIRCUIT COURT JUDGE

56

SAMPLE

FAMILY ABUSE PREVENTION ACT ORDER

SAMPLE

CERTIFICATE OF COMPLIANCE WITH THE VIOLENCE AGAINST WOMEN ACT

Database Entry Requirements

- **ORS 107.720(1)(a)** requires the sheriff to enter FAPA orders into Law Enforcement Data System (LEDS) and National Crime Information Center (NCIC) once service is complete.
- **ORS 135.250(2)(d)** provides that ORS 107.720 applies to no contact orders (NCO) in release agreements executed by defendants charged with domestic violence offenses.
- Court staff should forward orders containing federal and state firearms findings to the Sheriff's Office for entry into LEDS and national databases.

58

Database Entry Requirements

- OJD tracks the issuance of judicial orders and notices related to firearms. Odyssey data entry codes have been assigned and should be entered by court staff when applicable.

Codes are:

- **Firearms Notification**: **NOGR** (Notice of Gun Restrictions)
- **Federal Firearms Findings (Brady)**: **ORBY** (Order re Brady)
- **Order Restricting Firearms under State law**: **FQOR** (Firearms Restrictions Order)
- POSSIBLE that ORBY should be used as an indicator for both federal and state firearms findings.
- CHECK WITH YOUR COURT ADMINISTRATOR

59

Database Entry Requirements

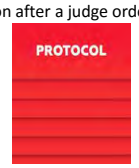
- **OJD's Odyssey Business Processes** on Flagging Domestic Violence in Criminal Cases and Criminal Charges "Constituting Domestic Violence" provide guidance on when to use and how to add the flag and charge modifier for domestic violence in criminal cases.
- In addition, the **Odyssey Business Processes** on Brady Indicators provide direction as to the steps necessary to capture the appropriate firearms data entry codes .

60

61

Firearm Dispossession Protocols

- MODEL FIREARM DISPOSSESSION PROTOCOL: Developed by the Oregon Firearms and Domestic Violence Task Force
- **What:** Protocol and court orders to prohibit Defendants from possessing firearms
  - No need to reinvent the wheel. The hard work has been done for you!
- **Why:** No Oregon statute sets out how firearms should be removed from a person after a judge orders dispossession



62

Firearm Dispossession Protocols

- **How:** To be used in DV cases *or* other cases in which:
  - Court orders dispossession, and
  - A nexus exists between the incident and firearms to be surrendered
  - **Nexus exists** when:
    - Defendant/Respondent used, attempted to use or threatened to use a firearm against Victim/Petitioner in the current case; *or*
    - D/R has a history of firearm use against the V/P
    - **Cases where it may be ordered:** FAPA, Stalking orders, EPPDAPA, Release Agreements, Judgments

63

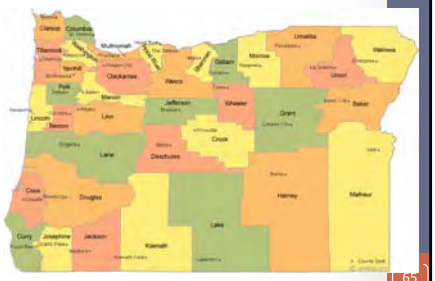
Common Protocol Components

- Respondent typically must:
  - Declare he has no firearms
  - Transfer firearms to a third party who is not barred from possessing (passes criminal background check) OR
  - Surrender to law enforcement
- Some protocols rely only on filing of affidavit or declaration of respondent while others schedule a "compliance" hearing that can be cancelled if affidavit or declaration filed.
- Return of firearms by third party or law enforcement only after a background check confirms respondent is eligible to possess.
- Commitment of law enforcement and DAs to enforce and prosecute violations of surrender terms.

64

Firearm Dispossession Protocols

- Clatsop
- Clackamas
- Marion
- Multnomah
- Washington



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Resources

Information on Firearms Restrictions in Domestic Violence Cases

- http://courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx

Contains links to the following:

- Summary of Firearms Information
- Firearms Prohibitions in Domestic Violence Cases: A Guide for
- Oregon Courts Misdemeanor Crimes of Domestic Violence – Oregon Benchsheet
- Qualifying Order of Protection/Restraint - Oregon Benchsheet

66

Thank You For Your Attention.

Let us know if you have questions!

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Debra Dority: ddority@oregonlawcenter.org

67

Firearms Restrictions in Domestic Violence

This website provides general legal information in summary form. The information is not a complete explanation of the law in this area and it is not intended to substitute for legal advice. The law in this area may change and the changes may not be noted here. Contact a lawyer for legal advice.

For more detailed information see:
Firearms Prohibitions in Domestic Violence Cases: A Guide for Oregon Courts
Misdemeanor Crimes of Domestic Violence - Oregon Benchsheet
Qualifying Order of Protection/Restraint - Oregon Benchsheet

Federal Law

Amendments made to the federal Gun Control Act of 1968 prohibit firearm possession by certain domestic violence perpetrators.

Protective Orders (Restraining Orders)

It is a federal crime for persons subject to qualifying protective orders to possess firearms or ammunition. In addition to Family Abuse Prevention Act (FAPA) Restraining Orders, firearms restrictions may apply to orders issued pursuant to the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), civil Stalking cases, Sexual Abuse Protective Order (SAPO) cases protecting minors, and pretrial release conditions and probation conditions in criminal cases. The federal prohibition lasts for the life of the protective order.

Law enforcement officers and military personnel are partially exempted from the restrictions in that they are permitted to use a service weapon in connection with that governmental service. This exemption is often referred to as the "official use exception."

It is a federal crime to sell or otherwise dispose of a firearm or ammunition to a person if the transferor knows or has reasonable cause to believe that such person is subject to a qualifying protective order.

Misdemeanor Crimes of Domestic Violence

It is a crime for persons who have been convicted of qualifying misdemeanor crimes of domestic violence (MCDV) to purchase, receive, ship, transport, or possess firearms and ammunition. This prohibition is a lifetime ban.

There is no official use exception for MCDV convictions. Thus, a member of the armed forces or a law enforcement officer who has a qualifying misdemeanor conviction is not able to possess a firearm or ammunition, even while on duty.

Oregon Law

Oregon law prohibits firearm possession by certain domestic violence perpetrators.

Protective Orders (Restraining Orders)

Oregon statutes provide for the court to provide "other relief" that the court considers necessary to provide for the safety and welfare of the petitioner and the children in the custody of the petitioner in cases brought under the Family Abuse Prevention Act (FAPA), Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), and in Sexual Abuse Protective Orders (SAPO). The court may include a "no firearms" provisions as part of these Orders.

Additionally, Oregon law makes it is unlawful for a person to knowingly possess firearms or ammunition if the person is subject to a court Order issued or continued after a hearing for which the person had actual notice and an opportunity to be heard if the Order:

- Restrains the person from stalking, intimidating, molesting, or menacing an intimate partner, a child of an intimate partner, or a child or the person, and
- Includes a finding that the person represents a credible threat to the physical safety of an intimate partner, a child of an intimate partner, or a child of the person.

Misdemeanor Crimes of Domestic Violence

Oregon law makes it is unlawful for a person to knowingly possess a firearm or ammunition if the person: was convicted o f a qualifying misdemeanor and, at the time of the offense, the person was a family member of the victim of the offense. A qualifying misdemeanor is a misdemeanor that has, as an element of the offense, the use or attempted use of physical force or the threatened use of a deadly weapon.

A person prohibited from possessing a firearm under this measure may be charged with unlawful possession of a firearm, a Class A misdemeanor.

A person prohibited from possessing or purchasing a firearm under this measure may file a petition with a circuit court for relief from the prohibition.

Judicial Notification

VAWA Notice

The Violence Against Women Reauthorization Act of 2005 (VAWA) requires that states certify that their judicial administrative policies and practices include notification to domestic violence offenders of the requirements of the federal firearm laws and any applicable related federal, state or local firearms laws.

Oregon Law Notice

Oregon law requires judges to inform defendants at a plea of guilty or no contest that, if the defendant enters a plea of guilty or no contest to an offense involving domestic violence, federal law may prohibit the defendant from possessing, receiving, shipping or transporting any firearm or ammunition and the conviction may negatively affect the defendant's ability to serve in the Armed Forces of the United States or to be employed in law enforcement.

Sale or Transfer of Firearms

Federal Brady Act

In 1993, Congress enacted the Brady Handgun Violence Prevention Act (Brady Act). It requires all federally licensed gun dealers to obtain a criminal background check of firearm purchasers before completing a sale. In most cases, the check is made through the National Instant Criminal Background Check System or "NICS," which is made up of several computer databases managed by the FBI. One of the databases is the National Crime Information Center Protection Order File, which contains information about state protection orders and state criminal history records.

Oregon Law

Oregon law requires a private party transferor of a firearm to appear before a licensed gun dealer with a private party transferee and request the dealer to perform a criminal background check on the transferee. Violation is a Class A misdemeanor for the first offense; it is a Class B felony for subsequent convictions. A transferor may ship or deliver the firearm to a licensed dealer located near or designated by the transferee, if the transferor and transferee live more than 40 miles from each other. Exceptions to the background check requirement for private party transfers include transfers between family members; transfers by or to a law enforcement officer or service member while that person is acting within the scope of official duties; transfers as part of a firearm turn-in or buyback event in which a law enforcement agency receives or purchases firearms from members of the public; or, transfers occurring because of the death of a firearm owner where the transfer is conducted or facilitated by a personal representative or a trustee and the transferee is related to the deceased firearm owner. The court is authorized to prohibit persons ordered to participate in assisted outpatient treatment from purchasing or possessing firearms during the period of treatment if the court makes a certain finding; violation of the order is considered unlawful possession of a firearm, a Class A misdemeanor.

Background Checks

During a background check, the FBI will search to determine whether the sale of the firearm would violate any state or federal laws. In Oregon, background checks are conducted by the Oregon State Police ID Services. If no state or federal prohibitions are found, the sale will be allowed.

Release Agreements & "No Contact" Orders in Criminal Cases

Oregon laws require pretrial release provisions to include an order that the defendant be prohibited from contacting or attempting to contact the victim, either directly or through a third party, while the defendant is in custody. The county sheriff is required to enter 'No Contact" orders in release agreements executed by defendants charged with an offense that constitutes domestic violence into LEDS and NCIC.

The release agreement may not be terminated at the request of a victim without a hearing.

In cases where the defendant is granted pretrial release which includes a No Contact Order, and defendant and victim are intimate partners, or the victim is a child of defendant or defendant's intimate partner, language may be included in the release agreement that would result in the agreement being a qualifying protective order that subjects the defendant to federal and state firearms prohibitions.

Full Faith and Credit

VAWA 1994 includes full faith and credit provisions that require enforcement of restraining orders across jurisdictional lines. These full faith and credit provisions require states to enforce restraining orders issued in other jurisdictions as if they had been issued by the enforcing state as long as certain requirements are met. Full faith and credit provisions apply to firearm restrictions in restraining orders and require that such restrictions be enforced even if the enforcing jurisdiction does not authorize judges to restrict firearm possession. Oregon laws contain similar requirements.

Forms

FAPA Order After Hearing (PDF)
EPPDAPA Order After Hearing (PDF)
Stalking Protective Order (PDF)

Firearms Prohibitions in Domestic Violence Cases

A Guide for Oregon Courts

Violence Against Women Act Project -
Oregon Judicial Department

TABLE OF CONTENTS

This Guide was originally developed in 2011 by Judge Paula Brownhill, Clatsop County Circuit Court, and Rebecca Orf, Senior Judge and VAWA Project Staff Counsel for the Oregon Judicial Department, with contributions from Judge Maureen McKnight, Multnomah County Circuit Court, Robin Selig, Oregon Law Center, and Brenda Wilson with the Oregon Judicial Department. It was updated 2016 by Robin Selig, Oregon Law Center and the State Family Law Advisory Committee's Domestic Violence Subcommittee/Firearms Work Group.

1. FEDERAL FIREARMS LAWS

Provisions of the federal Gun Control Act of 1968, 18 USC §921 *et seq*, prohibit firearm possession by certain domestic violence perpetrators.

Protective Orders

It is a federal crime for persons subject to qualifying protective orders to possess firearms or ammunition. In addition to Family Abuse Prevention Act (FAPA) Restraining Orders, firearms restrictions may apply to orders issued pursuant to the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), civil Stalking Protective Order cases, Sexual Abuse Protective Orders (SAPO) and pretrial release conditions and probation conditions in criminal cases.

To qualify under 18 USC §922(g)(8), a protective order must:

1) Have been issued after a hearing of which respondent/defendant received actual notice and at which respondent/defendant had an opportunity to participate;
2) Restrain respondent/defendant from harassing, stalking, or threatening an intimate partner of respondent/defendant or a child of the intimate partner or respondent/defendant ***or*** engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or the partner's child; ***and***
3) Include a finding that respondent/defendant represents a credible threat to the physical safety of the intimate partner or child ***or*** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

Federal law defines "intimate partner" for purposes of §922(g)(8) as a spouse or former spouse of respondent/defendant, a person who is a parent of the child of respondent/defendant, or a person who cohabits or has cohabited with respondent/defendant[1]. 18 USC §921(a)(32).

The federal prohibition lasts for the life of the protective order. 18 USC §922(g)(8).

Law enforcement officers and military personnel are partially exempted from the restriction in 18 USC §922(g)(8) in that they are permitted to use a service weapon in connection with that governmental service. 18 USC §925(a)(1). This exemption is often referred to as the "official use exception."

[1] Although the term "cohabit," within the meaning of "intimate partner," is not defined, the word is sufficiently precise in ordinary and common meaning. *U.S. v. Chapman*, WL 2403791 (W. Va. 2010). "Cohabit" implies a sexual relationship. *See Webster's II New College Dictionary 218* (2001).

Under 18 USC §922(d)(8), it is a federal crime to sell or otherwise dispose of a firearm or ammunition to a person if the transferor knows or has reasonable cause to believe that such person is subject to a qualifying protective order.

Misdemeanor Crimes of Domestic Violence

18 USC §922(g)(9) makes it a crime for persons who have been convicted of qualifying misdemeanor crimes of domestic violence to purchase, receive, ship, transport, or possess firearms and ammunition. This prohibition is a lifetime ban[2]. A qualifying "misdemeanor crime of domestic violence" (MCDV) is defined by 18 USC §921(a)(33) as an offense that is a misdemeanor under state, federal or tribal law and:

1) Has, as an element, the use or attempted use of physical force or the threatened use of a deadly weapon;
2) Is committed by a current or former spouse of the victim; parent or guardian of the victim; a parent of the victim's child; a person who is cohabiting or has cohabited with the victim as a spouse, parent or guardian; or a person similarly situated to a spouse, parent or guardian of the victim[3];
3) Defendant was represented by counsel or knowingly and intelligently waived counsel; and
4) If defendant was entitled to a jury trial, the case was tried to a jury or defendant knowingly and intelligently waived the right to jury trial.

Note that the prohibition of 18 USC §922(g)(9) is specifically excluded from the official use exception. 18 USC §925(a)(1). Thus, a member of the armed forces or a law enforcement officer who has a qualifying misdemeanor conviction is <u>not</u> able to possess a firearm or ammunition, even while on duty.

Under 18 USC §922(d)(9), it is a violation of federal law to sell or otherwise dispose of any firearm or ammunition to any person if the transferor knows or has reasonable cause to believe that such person has been convicted in any court of a misdemeanor crime of domestic violence.

The FBI has designated six Oregon misdemeanors that may meet MCDV requirements if a qualifying relationship exists and the charge includes, as an element, the use or attempted use of physical force or threatened use of a deadly weapon:

- ORS 163.160 -- Assault in the Fourth Degree
- ORS 163.187 -- Strangulation
- ORS 163.435 -- Contributing to the Sexual Delinquency of a Minor
- ORS 166.025 -- Disorderly Conduct

[2] Exclusions: convictions that have been expunged, set aside, or where defendant was pardoned or had civil rights restored, unless preserved by a state or federal judge.

[3] The 8th Circuit Court of Appeals interpreted the phrase "similarly situated" to the spouse of the victim to apply where there is an intimate personal relationship and no cohabitation. *US v. Cuervo*, 354 F3d 969 (8th Cir 2004).

- ORS 166.190 -- Pointing Firearm at Another
- ORS 163.445 -- Sexual Misconduct

The U. S. Attorney in Oregon, however, will prosecute a firearms violation after an Oregon MCDV conviction only if the defendant was convicted of **Assault in the Fourth Degree** or **Strangulation**, and the victim and defendant had the required relationship.[4]

2. STATE FIREARMS LAWS

SB 525, passed in 2015, created two state crimes that make it unlawful under state law for certain perpetrators of domestic violence to possess firearms and ammunition. These crimes mirror the federal prohibitions at 18 USC §922(g)(8) and 18 USC §922(g)(9), discussed above. Consequently, individuals who are prohibited from possessing firearms and ammunition under federal law are also prohibited from possessing under state law. Thus, state and local law enforcement officers and District Attorney's offices can take action against domestic violence perpetrators who possess unlawfully even when the federal government does not enforce and/or prosecute. The substance of SB 525 was codified at ORS 166.250 and ORS 166.255.

ORS 166.255 contains two scenarios that make possession of a firearms or ammunition unlawful. They are described below.

SUBJECT TO A COURT ORDER: ORS 166.255(1)(a) makes possession by a person subject to a court order unlawful when the order:

1. Was issued or continued after a hearing for which the person had actual notice and an opportunity to be heard;
2. Restrains the person from stalking, intimidating, molesting or menacing an intimate partner, a child of an intimate partner, or a child of the person; and
3. Includes a finding that the person is a credible threat to the physical safety of an intimate partner, a child of an intimate partner, or a child of the person.

The term "intimate partner" is defined at ORS 166.255(3)(d) and means a person, a person's spouse, a person's former spouse, a parent of the person's child, or another person who has cohabited or is cohabiting with the person in a relationship akin to a spouse.

Under ORS 166.255(1)(a), possession is unlawful only for so long as a person is subject to a court order, i.e., the duration of the order. Also, the prohibition does not apply to possession of a firearm or ammunition imported for, sold or shipped to, or issued for the use of federal or state

[4] The United States Supreme Court case, *Voisine ET AL., vs. United States* (*slip opinion*, 2016) determined that misdemeanor domestic violence convictions for reckless conduct (as opposed to intentional or knowing) can also trigger the federal firearm prohibition. Formerly, the US DOJ for the District of Oregon would only accept Assault convictions if they were charged and proven "intentionally or knowingly."

government entities. In other words, Oregon's law includes the 'official use exemption" that applies to 18 USC §922(g)(8) cases.

CONVICTED OF A QUALIFYING MISDEMEANOR: ORS 166.255(1)(b) makes possession unlawful if a person has been convicted of a qualifying misdemeanor and at the time the person was a family member of the victim of the offense.

1. "Convicted" is defined at ORS 166.255(3)(a) and means:
    a. The person was represented by counsel or knowingly and intelligently waived the right to counsel;
    b. The case was tried to a jury, if the person was entitled to a jury trial, or the person knowingly and intelligently waived the right to a jury trial; and
    c. The conviction has not been set aside or expunged, and the person has not been pardoned.
2. "Family member" is defined at ORS 166.255(3)(c) means with respect to the victim:
    a. The victim's spouse,
    b. The victim's former spouse,
    c. A person with whom the victim shares a child in common,
    d. The victim's parent or guardian, and
    e. A person cohabiting with or who has cohabited with the victim as a spouse, parent or guardian, or a person similarly situated to a spouse, parent or guardian of the victim.
3. "Qualifying misdemeanor," defined at ORS 166.253(f), is one that has, as an element of the offense, the use or attempted use of physical force or the threatened use of a deadly weapon.[5]

The terms "deadly weapon" (ORS 166.255(3)(b) and "possess" (ORS 166.255(3)(e) have the meaning given those terms in ORS 161.015. "Deadly weapon" means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury. ORS 161.015(2). "Possess" means to have physical possession or otherwise to exercise dominion or control over property. ORS 161.015(9)

ORS 166.255(1)(b) does not include an official use exemption and is a lifetime prohibition. ORS 166.250(1)(c)(G) states that a person commits the ***crime of unlawful possession of a firearm*** if

[5] SB 525 went into effect in January 2016. In light of the few months that have passed, it is as yet unknown what crimes state prosecutors will consider "qualifying misdemeanors"

the person knowingly possesses a firearm and the possession of the firearm by the person is prohibited under ORS 166.255. [6]

3. BRADY ACT[7]

In 1993, Congress enacted the Brady Handgun Violence Prevention Act (Brady Act). Public Law 103-159 (1993). It requires all federally licensed gun dealers to obtain a criminal background check of firearm purchasers before completing a sale. 18 USC §922(t)(1), *et seq*. In most cases the check is made through the National Instant Criminal Background Check System or "NICS," which is made up of several computer databases managed by the FBI. During a background check, the FBI will search databases to determine whether the sale of the firearm would violate state or federal laws. The FBI search is limited to three business days. In Oregon, the background checks are conducted by Oregon State Police Identification Services. If no state or federal prohibitions are found within three business days, the sale will be allowed to take place.[8]

Oregon law that requires court staff to deliver protective orders to county sheriffs for entry into the Law Enforcement Data System (LEDS) and the federal National Crime Information Center (NCIC) facilitates the effectiveness of criminal background checks required by the Brady Act. *See* e.g., ORS 107.720(1)(a) (FAPA); ORS 124.030(1) (EPPDAPA); ORS 163.741(2) (Stalking); and ORS 163.733(1) (SAPO).

The NICS Improvement Amendments Act of 2007

The NICS Improvement Amendments Act of 2007, Public Law 110-180 (2008), requires states to provide complete information to NICS on persons prohibited from receiving, possessing, or purchasing firearms. States must comply to avoid a match requirement on certain federal grants.

SB 525 Implications

Because Oregon's new laws mirror the federal domestic violence firearms crimes, any case that imposes federal liability will also impose state liability. For this reason, the firearms certificates for protective order and misdemeanor criminal cases have been revised slightly to reflect their applicability to both federal and state law. Judges, however, will need to complete only one firearms certificate in each case. Local civil deputies will enter the data into LEDS to flag that the respondent/defendant is prohibited from possessing or purchasing under both federal and

[6] ORS 166.274 provides the authority and sets out a process by which individuals who are barred from possessing firearms under ORS 166.250 or ORS 166.270 or barred from purchasing firearms under ORS 166.470 may file a petition for relief from the bar in circuit court.

[7] "Brady findings" are judicial findings to indicate that the terms of a protective order or a misdemeanor conviction may disqualify a respondent or defendant from possessing or other use of firearms and ammunition under federal law; document is labeled "Federal Firearms Findings (Brady)" and often is called a "Brady certificate."

[8] SB 941 passed in 2015 and codified at ORS 166.435 requires criminal background checks for some transfers of firearms by private parties.

state law. So doing will provide state law enforcement officers with information that will enable them to enforce state law and will facilitate criminal background checks required for firearms purchases.

4. FIREARMS NOTIFICATION

Violence Against Women Act (VAWA) Notice

The Violence Against Women Reauthorization Act of 2005 (VAWA), 42 USC § 3796gg-4(e), requires as a condition of eligibility for VAWA grants that the state certify that its judicial and administrative policies and practices include notification to domestic violence offenders of the requirements of the Brady firearm laws and any applicable related federal, state, or local firearms laws. Failure to notify in at least 90% of Oregon's domestic violence cases will cause Oregon to lose VAWA STOP grant funds.

Courts must enter the notice in Odyssey using code **NOGR.** This will allow Oregon to certify compliance with the VAWA judicial notice requirement. Use of the Firearms Notification form may help ensure that the NOGR code is entered in appropriate cases. Notice may be given orally or in writing. According to the FBI, best practice is to give the notice early in criminal cases, preferably at arraignment, although notice may be given at several stages of the criminal proceedings. In protection order proceedings, notice may be written in the order, written on other documents served on respondents, and/or given orally during 21-day, 5-day, and modification hearings. The OJD's model FAPA, Stalking Protective Orders, SAPO, and EPPDAPA Notice to Respondent/Request for Hearing forms include the notice.

ORS 135.385 Notice

ORS 135.385(2)(f) requires judges to inform a defendant at a plea of guilty or no contest that, if the defendant enters a plea of guilty or no contest to an offense involving domestic violence, federal law may prohibit the defendant from possessing, receiving, shipping, or transporting a firearm or ammunition, and the conviction may negatively affect the defendant's ability to serve in the Armed Forces of the United States or to be employed in law enforcement.

5. FULL FAITH AND CREDIT

VAWA includes full faith and credit provisions that require enforcement of protection orders across jurisdictional lines. Codified at 18 USC §2265-2266, these provisions require states to recognize and enforce valid protection orders issued in any jurisdiction in the United States. Full faith and credit provisions apply to explicit firearm restrictions in protection orders and require

that such restrictions be enforced even if the enforcing jurisdiction does not authorize judges to restrict firearm possession.

A protection order is entitled to full faith and credit if the order was issued by a state, tribal, or territorial court, and the court had jurisdiction over the parties and subject matter under the laws of the state, tribe, or territory, and the person who is restrained was given reasonable notice and an opportunity to be heard. In the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by the issuing court's laws, and in any event within a reasonable time after the order is issued. These orders must be enforced even if the order is not registered in the enforcing state and even if a hearing was not held after the ex parte order was issued.

The issuing jurisdiction determines whom the order protects, the terms and conditions of the order, and how long the order remains in effect. The enforcing jurisdiction determines how the order is enforced, the arrest authority of the responding law enforcement agency, detention and notification procedures, and penalties for violations.

OJD's model FAPA, EPPDAPA, SAPO, and Stalking Protective Order forms include Full Faith and Credit language.

6. NO CONTACT ORDER ENTRY

ORS 107.720(1)(a) requires the sheriff to enter FAPA orders into Law Enforcement Data System (LEDS) and National Crime Information Center (NCIC) once service is complete. ORS 135.250(2)(d) provides that ORS 107.720 applies to no contact orders (NCO) in release agreements executed by defendants charged with domestic violence offenses.

FEDERAL AND STATE FIREARM PROHIBITIONS
OREGON BENCHSHEET
Qualifying "Misdemeanor Crime of Domestic Violence" (MCDV)

In General: Persons who have been convicted in any court of a qualifying misdemeanor crime of domestic violence generally are prohibited under state and federal law from purchasing or possessing any firearm or ammunition. This is a lifetime prohibition.

NO Official Use Exemption: Federal, state, and local governmental employees are subject to this prohibition in both their personal and official capacities.

Required Elements: If the conviction meets all of the following requirements, it will generally be considered a "qualifying MCDV" and will subject an offending defendant to state and federal prosecution for firearm possession.

Violation: Violation of this prohibition is a state and federal offense punishable by a fine and/or imprisonment.18 USC 924(a)(2); ORS 166.250(5)

REQUIREMENTS:

FEDERAL (18 USC 922(g)(9))	STATE (ORS 166.250-166.255)
A QUALIFYING OFFENSE: ◆ Is a misdemeanor under federal, state, or local law; and ◆ Has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; **RELATIONSHIP REQUIREMENT:** ◆ At the time the crime was committed, the defendant was one of the following: ◆ A current or former **spouse, parent, or guardian** of the victim; ◆ A person with whom the victim shared a **child in common**; ◆ A person who **was cohabiting** with or **had cohabited** with the victim as a spouse, parent or guardian; or ◆ A person who was or had been **similarly situated** to a **spouse, parent, or guardian of the victim.**	**A QUALIFYING OFFENSE:** ◆ Is a misdemeanor; and ◆ Has, as an element of the offense, the use or attempted use of physical force or the threatened use of a deadly weapon; **RELATIONSHIP REQUIREMENT:** ◆ At the time of the offense, the person (defendant) was one of the following: ◆ A current or former **spouse** of the victim; ◆ A person with whom the victim shares a **child in common**; ◆ The **parent or guardian** of the victim; ◆ A person who **cohabited with or has cohabited** with the victim as a spouse, parent, or guardian; or ◆ A person **similarly situated to a spouse, parent, or guardian of the victim.**

CONVICTED:

For purposes of the firearms prohibition, a person has NOT been convicted of a misdemeanor crime of domestic violence:

- **UNLESS** the person was represented by counsel or knowingly and intelligently waived the right to counsel;
- **UNLESS,** if the crime was one for which the person was entitled to a jury trial, the case was tried to a jury or the person knowingly and intelligently waived the right to jury trial; or
- **IF** the conviction was set aside or expunged, the person was pardoned, or the person's civil rights were restored (Currently, no Oregon misdemeanor provides for the loss of civil rights.)

OREGON MCDVs:

The FBI has designated six Oregon misdemeanors that may meet the "qualifying offense" requirements[1]:

- ORS 163.160 – Assault in the Fourth Degree
- ORS 163.187 – Strangulation
- ORS 163.435 – Contributing to the Sexual Delinquency of a Minor
- ORS 163.445 – Sexual Misconduct
- ORS 166.025 – Disorderly Conduct
- ORS 166.190 – Pointing Firearm at Another

CONVICTED:

For purposes of the firearms prohibition, a person has NOT been convicted of a misdemeanor crime of domestic violence:

- **UNLESS** the person was represented by counsel or knowingly and intelligently waived the right to counsel;
- **UNLESS**, if the crime was one for which the person was entitled to a jury trial, the case was tried to a jury, or the person knowingly and intelligently waived the person's right to a jury trial; and
- If the conviction was set aside or expunged, and the person has been pardoned.

OREGON MCDVS:

ORS 166.255 does not designate which Oregon misdemeanors may qualify as an MCDV. Crimes which could qualify, depending upon the language in the charging document, include, <u>but are not limited to</u>:

- ORS 163.160 – Assault in the Fourth Degree
- ORS 163.187 – Strangulation
- ORS 163.190 – Menacing
- ORS 166.065 - Harassment

[1] The United States Supreme Court case, *Voisine ET AL., vs. United States* (*slip opinion*, 2016) determined that misdemeanor domestic violence convictions for reckless conduct (as opposed to intentional or knowing) can also trigger the federal firearm prohibition.

FEDERAL AND STATE FIREARMS PROHIBITIONS
OREGON BENCHSHEET
Qualifying Orders of Protection/Restraint

In General: Persons subject to a *qualifying* protection order (examples could include: FAPA, EPPDAPA, stalking, pre-trial or probation no-contact orders, juvenile) are generally prohibited from purchasing or possessing any firearms or ammunition under federal and state law.

Duration: The ban lasts for the **duration of the protective order**.

Official Use Exception: Federal, state, and local governmental employees in their official capacities are exempt from this prohibition, but remain subject to it in their personal capacities. 18 USC 925(a)(1); ORS 166.255(2)

Required Elements: If the order of protection or restraint includes one element **(indicated by the "◈")** from each of the four sections listed below, it will generally be considered to be a "qualifying order" which could subject an offending respondent[1] to federal and/or state prosecution for firearm purchase or possession.

Violation: Violation of this prohibition while the order is in effect is a federal and state offense punishable by a fine and/or imprisonment. 18 USC 924(a)(2); ORS 166.250(5)

A *QUALIFYING* PROTECTION OR RESTRAINING ORDER INCLUDES AT LEAST ONE ELEMENT FROM EACH OF THE FOLLOWING:

FEDERAL (18 USC 922(g)(8))	STATE (ORS 166.250, 166.255)
I. HEARING Respondent received actual notice of the hearing, and either: ◈ participated in the hearing, or ◈ had an opportunity to participate in the hearing.	**I. HEARING** Respondent received actual notice of the hearing, and either: ◈ participated in the hearing, or ◈ had an opportunity to participate in the hearing.
II. RELATIONSHIP The person protected by the order is: ◈ A spouse or former spouse of the respondent; ◈ The parent of a child of respondent; ◈ A person who does or did cohabit (live in a sexually intimate relationship) with respondent; ◈ Respondent's child; or	**II. RELATIONSHIP** The person protected by the order is: ◈A spouse or former spouse of the respondent; ◈ The parent of a child of respondent; ◈ A person who does or did cohabit with respondent in a relationship akin to a spouse; ◈ Respondent's child;

[1] Note: references to "respondent" encompass defendants in pre-trial or probation no-contact orders; references to "petitioner" encompass victims in pre-trial or probation no-contact order.

◈ A child of an intimate partner of respondent (Intimate partner is the spouse/former spouse, cohabitant/former cohabitant, or parent of respondent's child.)	◈ A child of an intimate partner of respondent. (Intimate partner is the spouse/former spouse, cohabitant/former cohabitant, or a parent of respondent's child.)
III. RESTRAINS FUTURE CONDUCT ◈ The order restrains respondent from harassing, stalking, or threatening the intimate partner, child of the respondent, or child of the respondent's intimate partner; or ◈ The order restrains respondent from engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the intimate partner.	**III. RESTRAINS FUTURE CONDUCT** ◈ The order restrains respondent from stalking, intimidating, molesting, or menacing an intimate partner, a child of an intimate partner, or a child of the respondent;
IV. CREDIBLE THREAT OR PHYSICAL FORCE ◈ The order includes a finding that respondent is a credible threat to the physical safety of the intimate partner or child of the intimate partner or of the respondent; or ◈ The order, by its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonable be expected to cause bodily injury.	**IV. CREDIBLE THREAT** ◈ The order includes a finding that the person represents a credible threat to the physical safety of an intimate partner, a child of an intimate partner, or a child of the respondent.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

What's New and Shiny in the Oregon Child Support Program?

Presenters:

Kate Cooper Richardson is the administrator of the Oregon Department of Justice Division of Child Support and the director of the Oregon Child Support Program, Oregon's federal Title IV-D program. Kate joined the Program in 2010, and was appointed by Attorney General Ellen Rosenblum in January 2013 as director. A graduate cum laude of Willamette University School of Law, her public service career spans work in all three branches of state government, including eight years as Chief of Staff to the Oregon State Treasurer. Kate is a board member of the National Child Support Enforcement Association and co-chair of its Policy & Government Relations Committee, and she is an active member of the National Council of Child Support Directors. She is currently leading her organization through a multi-year $129 million replacement of Oregon's legacy child support system.

Dawn Marquardt is the Deputy Director and Policy Section Chief of the Oregon Department of Justice Division of Child Support. She also serves as the Statewide Tribal Liaison for the Program. Prior to joining the Oregon Program in 2014, Dawn worked for nine years in the Wisconsin child support program. She received the Wisconsin Child Support Enforcement Association's "Hall of Fame Award" in 2014 and "Child Support Attorney of the Year" in 2009. Before moving to the public sector, Dawn practiced in the areas of family law, real estate, estate planning, and civil litigation. She is admitted to practice law in Oregon, Colorado, and Wisconsin. Dawn received her J.D. from the University of Wisconsin Law School and her B.B.A. from the University of Wisconsin–Whitewater.

Vera Poe is the Policy Development Manager of the Oregon Department of Justice Division of Child Support. Prior to joining the Oregon Program in 2015, she served for over twelve years as Assistant Attorney General with the Texas Child Support Program (2003-2015), and worked previously as an attorney with Legal Services of North Texas in Dallas, Texas (2000-2003), a sole practitioner in Dallas, handling civil litigation and family law matters (1999), Associate General Counsel for Metlife in New York (1995-1998), and Associate in the litigation section of Hopkins & Sutter in Dallas (1990-1995). An honors graduate of the University of Texas School of Law, Vera is licensed to practice law in Oregon (2015) and Texas (1990).

Mike Ritchey is a Senior Assistant Attorney General with the Oregon Department of Justice and has been serving as General Counsel for the Oregon Child Support Program since 2009. From 1985 to 2005, Mike was an attorney and partner with Bricker, Zakovics, and Querin in Portland and represented injured railroad workers in state and federal court throughout the western United States.

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Claudia Garcia Groberg is the Attorney In Charge of the Civil Recovery Section with the Oregon Department of Justice. Claudia earned her B.A. from Idaho State University in 1994 and her J.D from the University of Oregon School of Law in 2003. After law school, Claudia clerked at the Lane County Circuit Court for the Honorable Lauren Holland, worked as a staff attorney at the Workers' Compensation Board, and joined the Oregon Department of Justice in 2006. Claudia provides legal advice to the Division of Child Support and represents the agency in several counties. She also appears at monthly wage withholding hearings at the Siletz Tribal Court and once a year for per capita distribution hearings. When she's not working, Claudia enjoys spending time with her family, which includes her husband, three grown sons, two dogs, and an assortment of cats.

Carol Anne McFarland has been the Oregon District Attorney Association (ODAA) Child Support Liaison since June, 2014. She has a Bachelor's in American Studies, Pre Law from OSU and a J.D. from Thomas Jefferson School of Law in San Diego. Before returning to Oregon, Carol Anne practiced law in San Diego, focusing on family law. She returned to her native Oregon to raise her children and continue her legal career. Carol Anne worked as a deputy district attorney in the Clackamas County Family Support Office from 1990 until her retirement in September, 2013. She has been an active member of the Oregon State Bar and served on the House of Delegates. She is a charter member of Oregon Women Lawyers (OWLS). When Clackamas Women Lawyers was formed as a chapter of OWLS, Carol Anne served as the first president and continues to be active with that group. As the ODAA Child Support Liaison, Carol Anne works with the 25 District Attorney county child support offices and the Oregon Child Support Program regarding child support issues. She is a member of several standing committees within the Program and is also a member of the SFLAC Subcommittee on Courts/Child Support.

What's New and Shiny in the Oregon Child Support Program?

Oregon Judicial Department | State Family Law Advisory Committee
Family Law Conference
Salem, Oregon | March 17, 2017

Presented by
Oregon Child Support Program
Oregon Department of Justice

Topics for Discussion

- Oregon's new child support system—coming soon-ish
- Implementation of new federal final rule
- Update on 2017 Legislative Session

2

But wait – there's more!

- Recent Oregon Child Support Program rule and policy updates
- Adoption of UIFSA 2008
- Implementation of the Hague Convention

3

Child Support System Project Background

Since 2010, DOJ has been working on a multi-biennium plan to replace its current COBOL-based mainframe child support case management and financial system

- Feasibility study report (Nov 2011 to Oct 2012)
- Business process re-engineering (Dec 2012 to Dec 2013)
- Planning approval (2013 Legislative Session)
- Planning and implementation (2015 Legislative Session)

4

System Functionality

A certified child support system must provide a number of key components

5

System Replacement Goals

- Increase in support collections for families
- Remove risk of catastrophic failure of current system
- Compliance with federal and state regulations and data security requirements
- Data warehousing and business intelligence
- Timely completion of legal actions
- Reduction in manual processes
- Public cost savings
- Recoveries for state agencies

6

Oregon's Solution

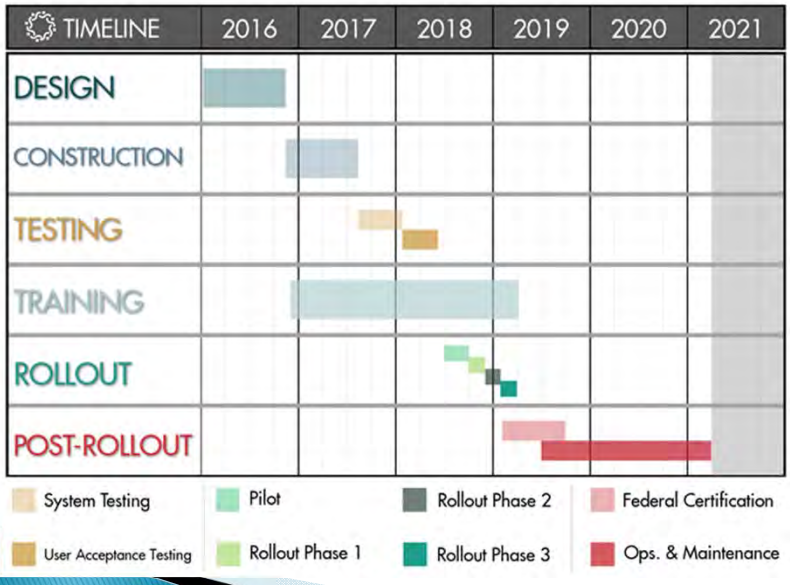
Origin will be based on current web-interface technology

- Functional and technical components from California
- Augmenting with components from Michigan and New Jersey
- Contracted vendor with industry experience and expertise (Deloitte Consulting)
- Oregon will own and plans to self-support completed system

ORIGIN
Supporting kids begins with modern technology

7

Project Schedule

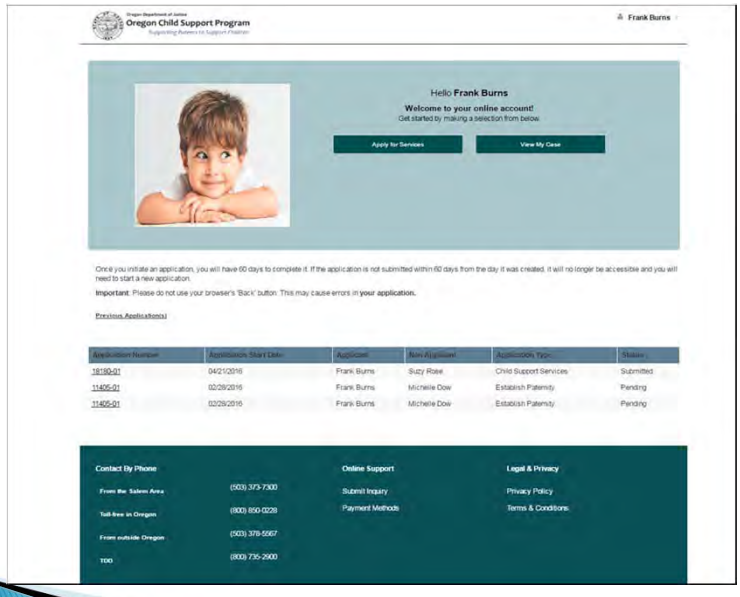


8

Customer Portal

- Greater access to information
- Ability to communicate with case manager
- Attorneys will have same access as their clients through portal

9



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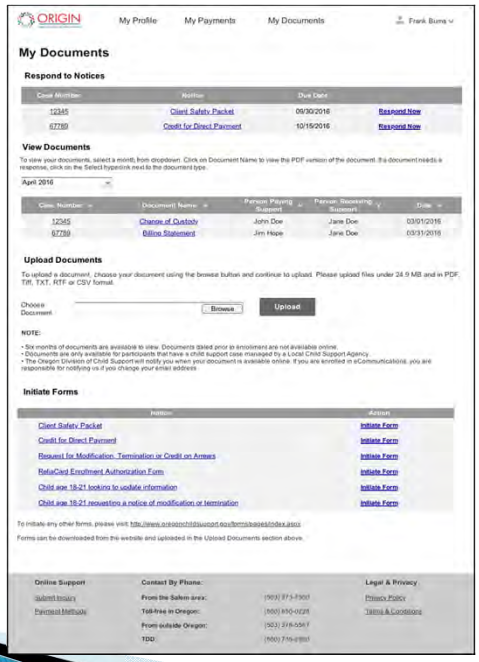
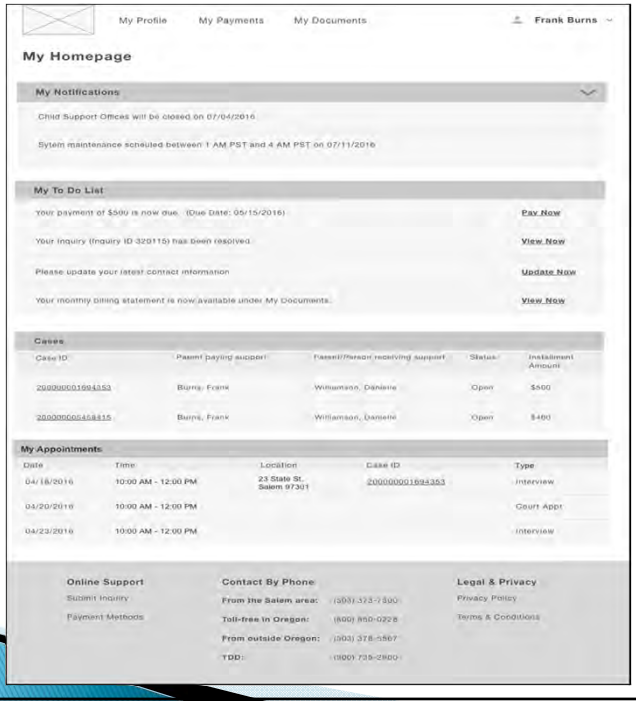

ORIGIN
My Profile
My Payments
My Documents
Frank Burns
My Documents
Respond to Notices
Case Number
Notice
Due Date
12345
Client Safety Packet
09/30/2016
Respond Now
67789
Credit for Direct Payment
10/15/2016
Respond Now
View Documents
To view your documents, select a month from dropdown. Click on Document Name to view the PDF version of the document. If a document needs a response, click on the Select hyperlink next to the document type.
April 2016
Case Number
Document Name
Person Paying Support
Person Receiving Support
Date
12345
Change of Custody
John Doe
Jane Doe
03/01/2016
67789
Billing Statement
Jim Hope
Jane Doe
03/31/2016
Upload Documents
To upload a document, choose your document using the browse button and continue to upload. Please upload files under 24.9 MB and in PDF, Tiff, TXT, RTF or CSV format.
Choose Document
Browse...
Upload
NOTE:
• Six months of documents are available to view. Documents dated prior to enrollment are not available online.
• Documents are only available for participants that have a child support case managed by a Local Child Support Agency.
• The Oregon Division of Child Support will notify you when your document is available online. If you are enrolled in eCommunications, you are responsible for notifying us if you change your email address
Initiate Forms
Action
Client Safety Packet
Initiate Form
Credit for Direct Payment
Initiate Form
Request for Modification, Termination or Credit on Arrears
Initiate Form
ReliaCard Enrollment Authorization Form
Initiate Form
Child age 18-21 looking to update information
Initiate Form
Child age 18-21 requesting a notice of modification or termination
Initiate Form
To initiate any other forms, please visit http://www.oregonchildsupport.gov/formspages/index.aspx
Forms can be downloaded from the website and uploaded in the Upload Documents section above.
Online Support
Submit Inquiry
Payment Methods
Contact By Phone:
From the Salem area:
Toll-free in Oregon:
From outside Oregon:
TDD:
Legal & Privacy
Privacy Policy
Terms & Conditions

11


My Profile
My Payments
My Documents
Frank Burns
My Homepage
My Notifications
Child Support Offices will be closed on 07/04/2016
Sytem maintenance scheduled between 1 AM PST and 4 AM PST on 07/11/2016
My To Do List
Your payment of $500 is now due. (Due Date: 05/15/2016)
Pay Now
Your inquiry (Inquiry ID 320115) has been resolved
View Now
Please update your latest contact information
Update Now
Your monthly billing statement is now available under My Documents.
View Now
Cases
Case ID
Parent paying support
Parent/Person receiving support
Status
Installment Amount
2000000001694353
Burns, Frank
Williamson, Danielle
Open
$500
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Burns, Frank
Williamson, Danielle
Open
$400
My Appointments
Date
Time
Location
Case ID
Type
04/18/2016
10:00 AM - 12:00 PM
23 State St, Salem 97301
2000000001694353
Interview
04/20/2016
10:00 AM - 12:00 PM
Court Appt
04/23/2016
10:00 AM - 12:00 PM
Interview
Online Support
Submit Inquiry
Payment Methods
Contact By Phone
From the Salem area: (503) 373-7300
Toll-free in Oregon: (800) 850-0228
From outside Oregon: (503) 378-5567
TDD: (800) 735-2900
Legal & Privacy
Privacy Policy
Terms & Conditions

12

Updated technology requires review of policies and practices

- The Child Support Program won't have system limitations we experience in CSEAS
- 2017 proposals for legislative bills largely focused on changes for system implementation

13

New federal final rule

- Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs
  - Published December 20, 2016
  - Effective January 19, 2017
  - Varying compliance deadlines
- How is the Oregon Child Support Program affected?

14

Civil Contempt Guidelines

- Intended to bring all states into compliance with *Turner v. Rogers*, 564 U.S. ___, 131 S Ct. 2507 (2011)
- Applies only to Title IV-D cases
- Court not constrained, affects which cases are referred for remedy

15

Income withholding

- Clarifies all income withholding orders must be on the OMB form
- Requires all withheld income to be paid to the State Disbursement Unit (DOJ)
  - regardless whether the Child Support Program is providing services

16

Disbursements only to Families

- State may not disburse payments to a private collection agency or attorney
  - Even if the receiving parent authorizes
- State statutory change required for ORS 25.020(3)

17

Guidelines changes

- Oregon generally positioned well
- Guidelines already contain many of the newly required features
- Substantive changes
  - Imputation of income
  - Minimum wage presumption
  - Minimum order rule
- Guideline review process
  - Increased transparency
  - Data driven review

18

Incarcerated Obligors

- State must either modify or notify parties when paying parent is or will be incarcerated at least 6 months
- Oregon initiates modification
  - Pursuant to OAR 137-055-3300, effective February 1, 2016

19

Protection of SSI benefits

- Prohibits garnishment of accounts to extent they contain SSI or SSI/SSDI benefits
- Requires refund of any garnishments within 5 days of learning account contained SSI or SSI/SSDI

20

Medical Support

- Removes requirement for private insurance if child fully covered by public insurance

21

Case closure

- Allows a child support case to be closed in additional situations, such as:
  - The Program does not have a good address for a party
  - The paying parent will be institutionalized, incarcerated, or disabled for child's minority
  - The paying parent's sole source of income is SSI or SSI combined with SSDI

22

Modernization

- Internet applications
- Electronic signatures
- Use of customer portal for document delivery
- Electronic communication and notifications

23

2017 Legislative Session

- **Most Oregon Child Support Program bills are to support Origin functionality**

ORIGIN

Supporting kids begins with modern technology

24

Senate Bill 509

- Grants rulemaking authority to determine distribution priority and application of payments
- Supports automated processing and ensures compliance with federal distribution rules

25

Senate Bill 516

- Legal accrual on the 1st of month
- Enforcement of current support on 1st of month even if order due date is later

26

Senate Bill 517

- Limits direct payment credit to existing balance owed to person who received the direct payment

27

Senate Bill 513

- Eliminates certain statutory mandates to send courtesy copies of enforcement notices to persons who receive support (obligees)
  - State tax offset, required by ORS 25.610
  - Income withholding, required by ORS 25.399
  - Credit reporting, required by ORS 25.650(2)(b)
  - Liens on property of parent who pays, required by ORS 25.670(3)(b)

28

Senate Bill 511

- Provides for creation of a state debt for any person who is overpaid by the Child Support Program
  - To specifically include parents who pay, caretakers, and children attending school who receive money in error

29

Senate Bill 510

- Adds “insurance claim” to definition of account for which insurance companies must match data with Child Support Program

30

Senate Bill 513

- Eliminates state law requirement to give 10 days' notice by certified mail before accessing consumer report information of parents who pay support
  - State law based on federal Fair Credit Reporting Act (FCRA) requirements
  - Mandate to send notice removed from FCRA in 2015

31

Senate Bill 512

- Extends by statute the marital presumption of parentage to any person married to a woman who gives birth to the child during the marriage
  - To statutorily overrule dicta in *Shineovich** construing presumption as of biological paternity
  - To enable Program to use single process for all presumed parentage cases

* *Shineovich and Kemp*, 229 Or App 670, 214 P3d 29, rev den, 347 Or 365 (2009)

32

Recent Policy and Rule Updates

- Incarcerated Obligors
  - OAR 137-055-3300
- Past Support
  - OAR 137-055-3220
- Actual Income (ability to pay)
  - OAR 137-050-0715

33

UIFSA 2008 & Hague Convention

- UIFSA governs coordination and enforcement of child support when 1 state has issued child support order and 1 or both parents have now moved to another state
- Provides a similar process when the parties are living in different countries
- Oregon adopted UIFSA 2008 in 2015 session – Senate Bill 604 (2015)

34

- Hague Convention became effective 1/1/17 in U.S.
- 35 convention countries
- Hague Convention recognizes U.S. due process requirements
- Allows a court to refuse recognition of an order if manifestly incompatible with public policy
- Applications can be made through the Child Support Program or directly to circuit court as set forth in ORS 110.653

35

Questions?

- We've got answers (probably)

36

Thank you

- Kate Cooper Richardson
  - Director, Oregon Child Support Program & Division of Child Support, DOJ
- Dawn M. Marquardt
  - Deputy Director, Division of Child Support, DOJ
- Vera L. Poe
  - Policy Manager, Division of Child Support, DOJ
- Claudia G. Groberg
  - Attorney-in-Charge, Civil Recovery Section, DOJ
- Michael Ritchey
  - Oregon Child Support Program General Counsel, DOJ
- Carol Anne McFarland
  - Child Support Liaison, Oregon District Attorneys Association

37

References (attached unless indicated)

1. **Topic: New federal final rule**

    a. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (federal final rule published 12/20/2016). (318 pages, not attached)

    b. Summary and comments regarding selected updates to federal regulations (pages 2 - 10)

2. **Topic: Legislation for Oregon's 2017 session**

    a. Senate Bill 512 Extension of marital presumption to same sex spouse of birth mother. (50 pages, not attached)

    b. Summary of proposed amendments to Senate Bill 512 (page 11)

    c. Senate Bill 516 Requires support orders to provide for accruals on the first of the month (page 12)

    d. Summary of proposed amendments to Senate Bill 516 (page 13)

3. **Major rule updates of the Oregon Child Support Program**

    a. Oregon Administrative Rule 137-055-3300; Incarcerated Obligors (pages 14-15)

    b. Oregon Administrative Rule 137-055-3220; Establishment of Past Support Orders (pages 16-17)

    c. Past Support Memo (sent by Hope Hicks by email October 26, 2016) (pages 18-23)

On December 20, 2016, the federal Office of Child Support Enforcement published its final rule entitled **Flexibility, Efficiency, and Modernization in Child Support Enforcement Program** proposed in the November 17, 2014, Notice of Proposed Rulemaking. The rule amends sections in 45 CFR Parts 301, 302, 303, 304, 305, 307, 308, and 309.

The rule includes regulatory improvements that cover three topics:

1) Procedures to promote program flexibility, efficiency, and modernization;

2) Updates to account for advances in technology; and

3) Technical corrections which are not considered substantive changes. These correct cross-references and outdated addresses, remove provisions that applied only for specified years (now past), update terminology (such as changing "putative father" to "alleged father"), or provide clarifying language.

Key changes that may be of interest are summarized below.

Section: 45 CFR § 302.32
Effective/Compliance Date: January 19, 2017
Summary of changes: Clarifies that the State Disbursement Unit (SDU) must process payments from Income Withholding Orders (IWO) for non-IV-D child support cases.
Program comments: A non-IV-D child support case is an order entered by or registered in an Oregon court, but for which the Program has not received an application or referral for full services. The Program is in compliance with this requirement and processes IWO payments for all cases whether or not the parties are receiving IV-D services.

Section: 45 CFR § 302.33
Effective/Compliance Date: December 20, 2017 (unless state law changes are needed, then either October 1, 2017, or January 1, 2018, depending on when the 2017 legislative sessions ends)
Summary of changes:
1) Eliminates the requirement to send notice of continuation of services if the IV-D agency determines that such services and notice are no longer appropriate. This recognizes that children leaving foster care often return to intact families who do not need child support services.

2) Creates an option to provide limited services for paternity only in intrastate (within Oregon) cases. The NPRM had suggested the possibility of a wider range of limited services (such as income withholding only, or *ala carte* selection of services), which was removed based on public comment.
Program comments: The Program already offer paternity only services and by policy allows a paternity-only order and closure upon completion of the service.

Section: 45 CFR § 302.38
Effective/Compliance Date: October 1, 2017, except January 1, 2018, if 2017 legislature adjourns after June 30, 2017.
Summary of changes:
Requires that the SDU only disburse payments directly to the resident parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, judicially-appointed conservator with a legal and fiduciary duty to the custodial parent and the child, or alternate caretaker designated in a record by the custodial parent. An alternate caretaker is a nonrelative caretaker who is designated in a record by the custodial parent to take care of the children for a temporary period.
Program comments: We will not be able to disburse payments to private collection agencies or private attorneys. In the 2017 legislative session, the Program is seeking amendments to ORS 25.020(3), which currently provides for disbursement to private collection agencies when authorized by the obligee.

Section: 45 CFR § 302.56
Effective/Compliance Date: Requirements for the substance of the guidelines must be incorporated into the state guidelines with the first guideline review occurring after December 20, 2017. Requirements for the guideline review process must be used for the subsequent guideline review.
Summary of changes:
1) Requires that state guidelines consider the following:

- All earnings and income of the noncustodial parent (and custodial, at state option).
- Basic subsistence needs of the noncustodial parent (and custodial, at state option) such as with a self-support reserve (other methods also allowed).
- The "specific circumstances" of the noncustodial parent (and custodial, at state option) if imputing income, including assets, residence, employment and

earnings history, job skills, educational attainment, literacy, age health, criminal record and other employment barriers, record of seeking work, local job market, availability of employers willing to hire the noncustodial parent, prevailing earnings in the local community, and other relevant background factors.

2) Provides that the guidelines must address provision of child's health care needs through private or public health care coverage and/or through cash medical support.

3) Requires the guidelines to be included in the State Plan and be published on the internet for the public, along with all reports from the guidelines reviewing body, resulting from quadrennial review.

4) Requires that rebuttal of the guideline amount must be under criteria established by the state, which must take into account the best interest of the child and require that the guideline amount be stating in a finding in the order, along with a justification for why the order varies from the guideline.

5) Specifies requirements for the guideline review process including that the state must:

- Consider economic data on the cost of raising children, labor market data (such as unemployment rates, employment rates, hours worked, and earnings) by occupation and skill-level for the State and local job markets, the impact of guidelines policies and amounts on custodial and noncustodial parents who have family incomes below 200 percent of the Federal poverty level, and factors that influence employment rates among noncustodial parents and compliance with child support orders;
- Analyze case data, gathered through sampling or other methods, on the application of and deviations from the child support guidelines, as well as the rates of default and imputed child support orders and orders determined using the low-income adjustment required under paragraph (c) (1) (ii) of this section. The analysis must also include a comparison of payments on child support orders by case characteristics, including whether the order was entered by default, based on imputed income, or determined using the low-income adjustment required under paragraph (c) (1) (ii). The analysis of the data must be used in the State's review of the child support guidelines to ensure that deviations from the guidelines are limited and guideline amounts are appropriate based on criteria established by the State under paragraph (g); and

- Provide a meaningful opportunity for public input, including input from low-income custodial and noncustodial parents and their representatives. The State must also obtain the views and advice of the State child support agency funded under title IV-D of the Act.

Program comments: Guidelines are included in the State Plan and to the public via the internet. Current guidelines take many of the newly required considerations into account (obligor's subsistence needs, income and earnings of both parents) but also include features inconsistent with the rule, such as the presumption by rule of minimum wage income for purposes of our calculation for a custodial parent receiving TANF, the minimum wage presumption in the absence of other data, and the imposition of a minimum order when support based on actual, very low, income results in a low dollar amount order. The Program is considering statutory changes to the incarcerated modification statute (ORS 416.425) for the 2017 session.

Section: 45 CFR 303.2 (a) (2), (3)
Effective/Compliance Date: January 19, 2017
Summary of changes: Allows customers to request and submit applications by email or other electronic means including via the internet.
Program comments: The Program will be able to accept an electronically signed and submitted application for services.

Section: 45 CFR § 303.4 (b)
Effective/Compliance Date: 1 year after completion of first guideline review that commences after December 20, 2017.
Summary of changes:
Requires that establishment statutes, procedures, and legal processes include:

- Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources;
- Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case, gathering available information about the specific circumstances of the noncustodial parent, including § 302.56(c)(1)(iii) factors;

- Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including § 302.56(c)(1)(iii) factors; and
- Documenting the factual basis for the support obligation or the recommended support obligation in the case record.

Program comments: As discussed above in connection with § 302.56(c) (1) (iii), the Program's imputation of imputed income or presumed income in the calculation of support obligations, and its imposition of a minimum order when the obligation based on actual income is below a threshold (even with the existing exceptions to the rule), may not be compliant with these new requirements.

Section: 45 CFR § 303.6
Effective/Compliance Date: February 19, 2017 (unless state law changes are needed, then either October 1, 2017, or January 1, 2018, depending on when the 2017 legislative sessions ends).
Summary of changes: Requires state to establish guidelines for the use of civil contempt citations in IV-D cases that include requirements that the IV-D agency:

- Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order;
- Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and
- Provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action.

Program comments: This change is intended to bring states into compliance with *Turner v. Rogers*, 564 U.S. ___, 131 S Ct. 2507 (2011). The Program formed a workgroup composed of Assistant Attorneys General and Deputy District Attorneys to discuss and develop best practices for contempt cases that can form the basis of the required guidelines for use of civil contempt. The Program also will review its form notices and

pleadings to ensure they provide clear notice that ability to pay constitutes the critical question. Note that these guidelines will apply only in IV-D cases.

Section: 45 CFR § 303.8 (b) (7)
Effective/Compliance Date: December 20, 2017 (unless state law changes are needed, then either October 1, 2017, or January 1, 2018, depending on when the 2017 legislative sessions ends).
Summary of changes:
1) Allows state to elect in its State Plan to review, and if appropriate, adjust an order after learning that a parent who pays will be incarcerated more than 180 days without the need for a request.
2) If the state does not so elect, requires notice to both parents of the right to request a review and adjustment sent within 15 days of learning that a parent who pays will be incarcerated more than 180 days.
Program comments: Because the Program has already elected to initiate a modification upon learning a parent who pays will be incarcerated for at least six consecutive months (see OAR 137-055-3300, eff. February 1, 2016), Oregon is already in compliance.

Section: 45 CFR § 303.8 (c)
Effective/Compliance Date: 1 year after completion of the first guideline review that commences after December 20, 2017.
Summary of changes: Prohibits states from excluding incarceration as a basis for determining that the existing obligation is not guideline (i.e., that incarceration is voluntary unemployment and thus not a basis for modification).
Program comments: The Program is already in compliance.

Section: 45 CFR § 303.8 (d)
Effective/Compliance Date: One year after completion of the first guideline review that commences after December 20, 2017.
Summary of changes: Removes language that had stated that Medicaid cannot be considered to meet the need to provide for the child's health care needs.
Program comments: If an order provides that a child has health care coverage through Medicaid, it would not require a modification to attempt to secure alternate coverage.

Section: 45 CFR § 303.11
Effective/Compliance Date: January 19, 2017

Summary of changes:

1) Requires that the IV-D agency, if electing to close a case, must maintain supporting documentation for the case closure decision in the case record. New closure options include:

- No current support and all arrearages are assigned to the state;
- No current support, all children have reached age of majority, the parent who pays is entering or has entered long-term care, and has no income or assets above the subsistence level available for support;
- The parent who pays is living with the minor children, either as primary caregiver or in an intact, two-parent household, and the IV-D agency has determined that services are not or are no longer appropriate;
- No locate for two years (reduced from three) when there is sufficient information to initiate automated locate;
- No locate for six months (reduced from one year) when there is not sufficient information to initiate automated locate;
- No locate for one year when there is sufficient information to initiate automated locate, but no verified social security number;
- The IV-D agency has determined that throughout the duration of the child's minority or afterward; the parent has no evidence of support potential because they are institutionalized in a psychiatric facility, are incarcerated, or have a medically verified total and permanent disability; and the parent has no income or assets above subsistence level for support;
- The parent's sole source of income is Supplemental Security Insurance (SSI) or a combination of SSI and Social Security Disability Insurance (SSDI);
- A limited service under 302.33(a)(6) [paternity establishment only] has been completed;
- The case was opened as the result of an inappropriate referral and there is no application for services from the parent/person who receives support; and
- A IV-D case has been transferred to a Tribal IV-D program through procedures as specified (see new section 21).

2) Mandates closure of a case opened on a Medicaid referral and the child is eligible for health care services from the Indian Health Service. (Compliance date for this provision is December 20, 2017, unless state law changes are needed, then either October 1, 2017, or January 1, 2018, depending on when the 2017 legislative sessions ends).

3) Allows closure notification to be sent electronically to a recipient who has consented to receive electronic notifications and the IV-D agency has maintained documentation of the consent in the case record.
4) Requires a "good faith effort to contact the recipient through at least two different methods" before closing a case because the IV-D agency is unable to contact a recipient who is not required to cooperate.
Program comments: The Program will be able to close cases sooner for no locate, and it can close other cases for which future collection potential is doubtful due to incarceration, disability, or institutionalization. The Program will also have the option to elect to close arrears-only cases where all support is assigned, or to close a case based on a change of physical custody or reconciliation. We will be updating our rules to provide for these additional options and reviewing our caseload to identify cases newly eligible for closure. The Program will review its processes for attempting contact in non-assistance cases to ensure a good faith effort through at least two different methods, such as a phone call and a letter, or an email and a letter, etc.

Section: 45 CFR § 303.100
Effective/Compliance Date: January 19, 2017
Summary of changes: Specifies that OMB income withholding form must be used when initiating income withholding
Program comments: This requirement applies to all income withholding orders issued, whether by the Program or by a court.

Section: 45 CFR § 307.11
Effective/Compliance Date: December 20, 2017 (unless state law changes are needed, then either October 1, 2017, or January 1, 2018, depending on when the 2017 legislative sessions ends).
Summary of changes:
1) Requires states to build automatic processes designed to preclude garnishing financial accounts of noncustodial parents who are recipients of Supplemental Security Income (SSI) payments or individuals concurrently receiving both SSI and Social Security Disability Insurance (SSDI) benefits.
2) Requires that funds must be returned to a parent's account within five business days after the agency determines they were improperly garnished because they contain SSI or SSI/SSDI funds.

Program comments: The Program already avoids garnishing accounts to the extent they contain SSI benefit payments. Procedure updates will be required to include accounts that contain a combination of SSI and SSDI benefits and to provide for the return of erroneously garnished funds. In Origin, garnishments will be automatically held for 40 days to provide the parent who pays an opportunity to contest. We may need to modify our notice to request that parents contact us if the garnished account contained SSI or SSI/SSDI benefits. Many cases where the parent's sole source of income is these benefits will be eligible for closure under updates to 303.11. However, in the event that the case remains open, and the parent does not contest the collection as containing SSI or SSI/SSDI benefits, it is possible that a garnishment from an account will be disbursed to the person who receives support prior to the Program learning that it contained such benefits.

Section: 45 CFR § 301.1
Effective/Compliance Date: January 19, 2017
Summary of changes: Updates definitions to substitute "record" for "written" regarding format of required procedures, and defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."
Program comments: This change will facilitate maximum use of electronic communication, storage, signatures, etc.

Summary of amendments to Senate Bill 512 proposed by the Oregon Child Support Program

1. Modify the language referring to a woman giving birth as a mother to more inclusive, less-gendered terms to ensure that it does not exclude persons who have legally changed their gender before or after giving birth, while still identifying who is "mother."

2. Do not broaden the application of the filiation statute.

3. Add language to clarify that blood test evidence is required for a court to set aside or vacate an order only if the parentage determination was of a person who was physically capable of impregnating a woman.

4. Include "paternity or parentage" when referencing acknowledgments or determinations that may come from other jurisdictions that offer acknowledgments or initial parentage determinations for unmarried non-biological parents, retaining "paternity" in statutes concerning biological parentage, and using "parentage" alone when referring to legal parentage that could include paternity but would Remove a number of sections from the measure for this reason.

4. Make conforming amendments to ORS 109.030 to remove gendered language limiting the application to parents consisting of a mother and father, ORS 109.124 to provide for the possiblity that the woman giving birth may not be married to a husband, and to ORS 109.243 to provide for parentage for a consenting spouse, particularly since this statute has been extended to same-sex spouses by the decision in the *Madrone v. Madrone*, 271 Or App 214 (2015).

79th OREGON LEGISLATIVE ASSEMBLY--2017 Regular Session

Senate Bill 516

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Requires that all orders for payment of child support and spousal support have monthly due date of first day of month in which payment is due.

Provides that for purposes of support enforcement, any support payment that becomes due and payable on day other than first day of month in which payment is due shall be considered to have accrued and become due and payable on first day of month.

Provides exception for determinations of due dates in issuance of liens and writs under ORS chapter 18.

A BILL FOR AN ACT

Relating to due dates for payment of support obligations.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) Any court order or administrative order in a proceeding under ORS chapter 107, 108, 109, 110, 416, 419B or 419C that contains an order for the payment of child support or spousal support must have a due date for the payment of support on the first day of the month in which the support is due.

(2) For purposes of support enforcement, any support payment that becomes due and payable on a day other than the first day of the month in which the payment is due shall be considered to have accrued and become due and payable on the first day of the month.

(3) Any court order or administrative order that contains an award of child support or spousal support that accrues on other than a monthly basis may, for support enforcement purposes only, be converted to a monthly average.

(4) This section does not apply to the determination or issuance of support arrearage liens, installment arrearage liens, judgment liens, writs of garnishment or any other action or proceeding that affects property rights under ORS chapter 18.

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

Summary of amendments to Senate Bill 516 proposed by the Oregon Child Support Program

1. Include a requirement that all orders issued or modified revert to a due date that is the first of a specific month with subsequent due dates being the first of subsequent months. This change addresses the issue when a judgment is effective in a month other than the month it is signed, a common occurrence.

2. Limit the ability to enforce a payment that has not come due as of the first of the month to payments remitted in response to income withholding orders, which generally will collect an average amount intended to, over time, result in collection of the appropriate total amount. However, due to employer pay dates not always coinciding with payment due dates, the suggested change ensures that the correct amount can be remitted and applied to the month's current support.

Suggested edits to the measure's text:

SECTION 1. (1) Any court order or administrative order issued or modified in a proceeding under ORS chapter 107, 108, 109, 110, 416, 419B or 419C that contains an order for the payment of child support or spousal support must specify [have a] an initial due date for the payment of support that is [on] the first day of a calendar month and year, [the month in which the support is due] with subsequent payments due on the first day of each subsequent month for which the support is payable.

(2) For purposes of support enforcement, any support payment that becomes due and payable on a day other than the first day of the month in which the payment is due shall be [considered to have accrued and become due and payable on] enforceable by income withholding as of the first day of that [the]month.

137-055-3300
Incarcerated Obligors

(1) For purposes of establishing or modifying a support order, the following definitions apply:

(a) “Correctional facility” means any place used for the confinement of persons charged with or convicted of a crime or otherwise confined under a court order, and includes but is not limited to a youth correction facility as provided in ORS 162.135.

(A) “Correctional facility” applies to a state hospital only as to persons detained therein charged with or convicted of a crime, or detained therein after having been found guilty except for insanity of a crime under ORS 161.290 to 161.370.

(B) “Correctional facility” includes alternative forms of confinement, such as house arrest or confinement, where an obligor is not permitted to seek or hold regular employment.

(b) “Incarcerated obligor” means a person who:

(A) Is or may become subject to an order establishing or modifying child support; and

(B) Is, or is expected to be, confined in a correctional facility for at least six consecutive months from the date of initiation of action to establish a support order, or from the date of a request to modify an existing order pursuant to this rule.

(2) The provisions of this rule do not apply to an obligor who is incarcerated because of nonpayment of support.

(3) For purposes of computing a monthly support obligation for an incarcerated obligor, all provisions of the Oregon child support guidelines, as set forth in OAR 137-050-0700 through 137-050-0765, will apply except as otherwise specified in this rule.

(4) The incarcerated obligor’s income and assets are presumed available to the obligor, unless such income or assets are specifically restricted, assigned, or otherwise inaccessible pursuant to state or federal laws or rules regarding the income and assets of incarcerated obligors.

(5) If the incarcerated obligor has gross income less than $200 per month, the administrator shall presume that the obligor has zero ability to pay support.

(6) If the provisions of section (5) of this rule apply, the administrator will not initiate an action to establish a support obligation if the obligor is an incarcerated obligor, as defined in subsection (1)(b) of this rule, until 61 days after the obligor’s release from incarceration.

(7) Upon receipt of proof that an obligor is an “incarcerated obligor” as defined in subsection (1)(b) of this rule, the Administrator will initiate a modification of the support obligation.

(8) An order entered pursuant to ORS 416.425 and this rule, that modifies a support order because of the incarceration of the obligor, is effective only during the period of the obligor's incarceration and for 60 days after the obligor's release from incarceration. The previous support order is reinstated by operation of law on the 61st day after the obligor's release from incarceration.

(a) An order that modifies a support order because of the obligor's incarceration must contain a notice that the previous order will be reinstated on the 61st day after the obligor's release from incarceration;

(b) Nothing in this rule precludes an obligor from requesting a modification based on a periodic review, pursuant to OAR 137-055-3420, or a change of circumstances, pursuant to OAR 137-055-3430.

Stat. Auth.: ORS 180.345 and 416.455
Stats. Implemented: ORS 416.425
Effective: February 1, 2016

137-055-3220
Establishment of Past Support Orders

(1) For purposes of this rule the following definitions apply:

(a) "Past support" means the amount of child support that could have been ordered based on the Oregon Child Support Guidelines and accumulated as arrears against a parent for the benefit of a child for any period of time during which the child was not supported by the parent and for which period no support order was in effect.

(b) "Supported by the parent" in subsection (1)(a) means payments in cash or in kind in amounts or in-kind value equal to the amount that would have accrued under the Oregon Child Support Guidelines from the obligor to the obligee for purposes of support of the child.

(c) The Oregon Child Support Guidelines means the formula for calculating child support specified in ORS 25.275.

(2) The administrator may establish "past support" when establishing a child support order under ORS 416.400 through 416.470.

(3) When an obligor has made payments in cash or in kind an obligee for the support of the child during the period for which a judgment for past support is sought, and providing that those payments were in amounts equal to or exceeding the amount of support that would have been presumed correct under the Oregon Child Support Guidelines, no past support will be ordered.

(4) When such payments as described in section (3) were made in amounts less than the amount of support presumed correct under the Oregon Child Support Guidelines, the amount of the past support judgment will be the correct amount presumed under the Oregon Child Support Guidelines minus any amounts of support paid.

(5) The obligor must provide evidence of such payments as described in sections (3) and (4) by furnishing copies of:

(a) Canceled checks;

(b) Cash or money order receipts;

(c) Any other type of funds transfer records;

(d) Merchandise receipts;

(e) Verification of payments from the obligee;

(f) Any other record of payment deemed acceptable by the administrator.

(6) The administrator may decide whether to accept evidence of such cash or in-kind support payments for purposes of giving credit for them. If any party disagrees, the past support calculation may be appealed to an administrative law judge as provided in ORS 416.427.

(7) For any month or part of a month for which past support is ordered, the amount of support shall be a full month increment and shall not be prorated.

(a) Past support may not be ordered for any period of time prior to the first day of the month the Notice and Finding of Financial Responsibility and proposed Order Establishing Support are issued.

(b) If the Notice and Finding of Financial Responsibility and proposed Order Establishing Support are issued in the same month an application or mandatory referral is received, past support may not be ordered for any period of time prior to the application or mandatory referral.

(8) If the parties are filing for annulment, dissolution or separation under ORS 107.105 and a judgment will be entered for months when the proceeding was pending, any order for past support may only include amounts owed for a time period prior to the filing of the judicial action.

(9) If the order to be entered does not include current support and the past support would be owed only to the State of Oregon or another jurisdiction, the administrator will not enter an order for past support that covers a period of less than four months.

(10) Past support will be calculated under the Oregon Child Support Guidelines and will use current income for the parties in calculating past support monthly amounts. Parties may rebut use of current income by presenting evidence of income in differing amounts for the months for which past support is being ordered.

Stat. Auth.: ORS 180.345
Stats. Implemented: ORS 416.422
Effective: October 1, 2016

OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

October 24, 2016
(SENT BY EMAIL)

MEMORANDUM

TO: Presiding Judges
Trial Court Administrators
Family Law Judges

FROM: Hope Hicks, Child Support Program Analyst
Juvenile and Family Court Programs Division

RE: Message from Oregon Division of Child Support Policy and Development Manager Vera Poe, Past Support Rule Change

Please review the attached message regarding changes to the establishment of past support on administrative child support orders. For questions, please contact Vera Poe at Vera.L.Poe@doj.state.or.us.

(From DOJ) –

The Oregon Child Support Program has adopted a new policy and administrative rule concerning past support. After several years of discussion and research, the Program determined that it is in the best interest of both our customers and the state to limit the amount of past support ordered in initial administrative orders issued by the Program. This new policy and amended OAR 137-055-3220 were effective October 1, 2016.

> **New Policy: The Oregon Child Support Program will seek past support beginning with the month in which the Program initiates the Notice and Finding of Financial Responsibility and proposed order.**

The Oregon Child Support Program adopted this policy because studies show—and we have found to be true—that large past support awards have unfavorable outcomes, such as:

- Reducing the likelihood parents will pay current support.
- Hurting the paying parent's credit standing and other negative effects.
- Inducing parents to work for cash to avoid income withholding.
- Contributing to an undesirable dynamic between the parents.

- Competing for family resources (when past support is assigned to the state).
- Promoting a culture of non-compliance rather than compliance.

Additional information

The rule and policy will be applied to all newly issued proposed orders, amended actions, and actions heard by the Office of Administrative Hearings. Support for the month the order is signed will continue to be treated as current support. An order issued and signed in a single month, such as a consent order, would not have past support.

137-055-3220
Establishment of Past Support Orders

(1) For purposes of this rule the following definitions apply:

(a) "Past support" means the amount of child support that could have been ordered based on the Oregon Child Support Guidelines and accumulated as arrears against a parent for the benefit of a child for any period of time during which the child was not supported by the parent and for which period no support order was in effect.

(b) "Supported by the parent" in subsection (1)(a) means payments in cash or in kind in amounts or in-kind value equal to the amount that would have accrued under the Oregon Child Support Guidelines from the obligor to the obligee for purposes of support of the child.

(c) The Oregon Child Support Guidelines means the formula for calculating child support specified in ORS 25.275.

(2) The administrator may establish "past support" when establishing a child support order under ORS 416.400 through 416.470.

(3) When an obligor has made payments in cash or in kind an obligee for the support of the child during the period for which a judgment for past support is sought, and providing that those payments were in amounts equal to or exceeding the amount of support that would have been presumed correct under the Oregon Child Support Guidelines, no past support will be ordered.

(4) When such payments as described in section (3) were made in amounts less than the amount of support presumed correct under the Oregon Child Support Guidelines, the amount of the past support judgment will be the correct amount presumed under the Oregon Child Support Guidelines minus any amounts of support paid.

(5) The obligor must provide evidence of such payments as described in sections (3) and (4) by furnishing copies of:

(a) Canceled checks;

(b) Cash or money order receipts;

(c) Any other type of funds transfer records;

(d) Merchandise receipts;

(e) Verification of payments from the obligee;

(f) Any other record of payment deemed acceptable by the administrator.
(d) The administrator may decide whether to accept evidence of such cash or in-kind support payments for purposes of giving credit for them. If any party disagrees, the past support calculation may be appealed to an administrative law judge as provided in ORS 416.427.

(e) For any month or part of a month for which past support is ordered, the amount of support shall be a full month increment and shall not be prorated.

- Past support may not be ordered for any period of time prior to the first day of the month the Notice and Finding of Financial Responsibility and proposed Order Establishing Support are issued.

- If the Notice and Finding of Financial Responsibility and proposed Order Establishing Support are issued in the same month an application or mandatory referral is received, past support may not be ordered for any period of time prior to the application or mandatory referral.

(6) If the parties are filing for annulment, dissolution or separation under ORS 107.105 and a judgment will be entered for months when the proceeding was pending, any order for past support may only include amounts owed for a time period prior to the filing of the judicial action.

(7) If the order to be entered does not include current support and the past support would be owed only to the State of Oregon or another jurisdiction, the administrator will not enter an order for past support that covers a period of less than four months.

(8) Past support will be calculated under the Oregon Child Support Guidelines and will use current income for the parties in calculating past support monthly amounts. Parties may rebut use of current income by presenting evidence of income in differing amounts for the months for which past support is being ordered.

Stat. Auth.: ORS 180.345
Stats. Implemented: ORS 16.422
Effective: October 1, 2016

If you have questions regarding this rule change, or other child support issues, please contact me at Hope.L.Hicks@ojd.state.or.us or (503) 986-5851.

137-055-3220
Establishment of Past Support Orders

(1) For purposes of this rule the following definitions apply:

(f) "Past support" means the amount of child support that could have been ordered based on the Oregon Child Support Guidelines and accumulated as arrears against a parent for the benefit of a child for any period of time during which the child was not supported by the parent and for which period no support order was in effect.

(g) "Supported by the parent" in subsection (1)(a) means payments in cash or in kind in amounts or in-kind value equal to the amount that would have accrued under the Oregon Child Support Guidelines from the obligor to the obligee for purposes of support of the child.

(h) The Oregon Child Support Guidelines means the formula for calculating child support specified in ORS 25.275.

(9) The administrator may establish "past support" when establishing a child support order under ORS 416.400 through 416.470.

(10) When an obligor has made payments in cash or in kind an obligee for the support of the child during the period for which a judgment for past support is sought, and providing that those payments were in amounts equal to or exceeding the amount of support that would have been presumed correct under the Oregon Child Support Guidelines, no past support will be ordered.

(11) When such payments as described in section (3) were made in amounts less than the amount of support presumed correct under the Oregon Child Support Guidelines, the amount of the past support judgment will be the correct amount presumed under the Oregon Child Support Guidelines minus any amounts of support paid.

(12) The obligor must provide evidence of such payments as described in sections (3) and (4) by furnishing copies of:

(a) Canceled checks;

(b) Cash or money order receipts;

(c) Any other type of funds transfer records;

(d) Merchandise receipts;

(e) Verification of payments from the obligee;

(f) Any other record of payment deemed acceptable by the administrator.
(i) The administrator may decide whether to accept evidence of such cash or in-kind support payments for purposes of giving credit for them. If any party disagrees, the past support calculation may be appealed to an administrative law judge as provided in ORS 416.427.

(j) For any month or part of a month for which past support is ordered, the amount of support shall be a full month increment and shall not be prorated.

- Past support may not be ordered for any period of time prior to the first day of the month the Notice and Finding of Financial Responsibility and proposed Order Establishing Support are issued.

- If the Notice and Finding of Financial Responsibility and proposed Order Establishing Support are issued in the same month an application or mandatory referral is received, past support may not be ordered for any period of time prior to the application or mandatory referral.

(13) If the parties are filing for annulment, dissolution or separation under ORS 107.105 and a judgment will be entered for months when the proceeding was pending, any order for past support may only include amounts owed for a time period prior to the filing of the judicial action.

(14) If the order to be entered does not include current support and the past support would be owed only to the State of Oregon or another jurisdiction, the administrator will not enter an order for past support that covers a period of less than four months.

(15) Past support will be calculated under the Oregon Child Support Guidelines and will use current income for the parties in calculating past support monthly amounts. Parties may rebut use of current income by presenting evidence of income in differing amounts for the months for which past support is being ordered.

Stat. Auth.: ORS 180.345
Stats. Implemented: ORS 16.422
Effective: October 1, 2016

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

The Intersection of Probate Court and Family Court: Guardianship and Conservatorship

Presenters:

Murray Petitt, Attorney at Law, Thorp, Purdy, Jewett, Urness & Wilkinson

Murray earned his BA from the University of California at Davis, 1993, and JD from the University of Oregon School of Law, 1996. He was admitted to the Oregon State Bar in 1996 and admitted into the US District Court for District of Oregon in 1998. Murray is a Past Chair of Lane County Bar Family and Juvenile Law Committee and Past -President of Lane County Bar Association. He is currently a member of the Oregon State Bar Family Law Executive Committee, and serves as a CLE presenter on Creditor's Claims in Probate. Murray's current practice is primarily in the areas of Probate, Trust, Guardianship and Conservatorship Litigation; Elder Abuse; Family Law; and General Business Litigation.

Mark Williams, Attorney at Law, Gaydos Churnside & Balthrop

Mark M. Williams earned his J.D. from Notre Dame Law School, 1981, B.A. University of Portland, magna cum laude is an attorney with Gaydos Churnside & Balthrop in Eugene, Oregon, and a fifth generation Oregonian. Mark focuses his practice in estate planning, probate, elder law (medical and financial issues facing the aging and incapacitated), and legal ethics. He is past chair of the Oregon State Bar Elder law Section, a member (and past president) of the Oregon Law Institute board from 1995 to 2013, and adjunct professor at Concordia University and University of Oregon School of Law. He has addressed estate planning issues at a number of national and local forums including the National Academy of Elder Law Attorneys Annual Symposium, American Society on Aging; Joint Conference on Law and Aging; the Oregon Law Institute; and Oregon State Bar.

CHOOSING FIDUCIARIES IN GUARDIANSHIPS AND CONSERVATORSHIPS

Mark M. Williams

I. INTRODUCTION

In general, a guardian has control over the "person" while a conservator has control over the person's property. Either one deprives the protected person of substantial rights and should be obtained only if a real need exists. Alternatives to guardianship and conservatorship should be considered prior to petitioning for a full guardianship and/or conservatorship. Note: Other states use different terms or reverse the meanings. If you have a client with a guardianship or conservatorship from another state, you will need to check the definitions of guardian and conservator in that state.

II. POWER OF ATTORNEY

1. A Power of Attorney is one alternative to a conservatorship.

2. A person who understands the nature and significance of his actions can grant legal authority over his financial affairs to another person by giving that person a power of attorney. The person granting the authority is called the principal. The person receiving the authority is called the agent or attorney-in-fact.

3. The agent has the right to sign the principal's name in order to conduct business or transactions of the principal as allowed by the power of attorney. The agent should sign as follows: Joe Principal by Susan Agent, as attorney-in-fact, or as "POA" is also acceptable.

4. A person who does not have the mental ability to understand the nature and significance of the creation of a Power of Attorney cannot create a valid Power of Attorney.

5. The agent has a fiduciary duty to act in the best interest of the principal.

6. The form for a Power of Attorney is not controlled by statute. There are several types of pre-printed forms that are available. A Power of Attorney can also be prepared by an attorney to fit the specific needs of the person.

7. The procedure to grant a Power of Attorney is simple. The person simply signs the Power of Attorney document. ORS 127.005(1). Although signing before a notary public is not legally required, most banks, institutes and county recorder's offices will not accept the document if it is not notarized.

8. The Power of Attorney does not need to be recorded in the county recorder's

office unless it is used to transfer real property.

9. Unless the document specifies otherwise, it is a Durable Power of Attorney. ORS 127.005(1). This means that the Power of Attorney remains valid even after the principal becomes incapacitated.

10. All Powers of Attorney automatically end when the agent has notice that the principal is deceased.

11. When drafting a Power of Attorney, the following factors should be considered:

a. Should the power be a general power of attorney or should it be for a limited purpose.

b. Should the agency be valid immediately or should it be a "springing" Power of Attorney. A springing Power of Attorney states that the document is only effective if the principal becomes disabled. "Disabled" should be defined in the document.

c. Should gifting powers be included. A Power of Attorney does not give the agent authority to give the assets of the principal away unless the document specifically provides for it. Gifting, however, may be important for tax reasons or for planning to obtain government benefits such as Medicaid. It is essential that the principal authorize these gifting provisions in the document. It is good practice to place limitations on the gifting, if possible.

d. Should one person be named or should there be co-agents. If there are co-agents, an authority to delegate may be included.

e. Should the authority to sign tax returns be included.

12. A Power of Attorney can be revoked at any time by the principal provided the principal understands what he or she is doing. A revocation is not required to be in writing, but from a practical standpoint, it should be. Once revoked, notice of the revocation should be given to the agent and anyone else who has dealt with the agent, such as banks and brokerage firms.

13. A Power of Attorney cannot be used to cash or endorse a federal check, such as Social Security.

III. ADVANCE DIRECTIVES FOR HEALTHCARE. ORS 127.505 et seq.

1. An advance directive has a statutory form which allows for the designation of a health care representative and delineation of treatment wishes in end of life scenarios. The health care representative had broad authority to make placement and medical treatment decisions for the incapacitated principal.

2. The appointment of a guardian does NOT supercede the authority of the health care representative absent specific revocation of the authority of the health care representative by the court.

3. Where there is a validly executed Advance Directive pursuant to ORS 127.510, there should be no need for a court to impose a guardianship.

IV. PROTECTIVE PROCEEDINGS

A protective proceeding means any proceeding under ORS 125. Types of protective proceedings include guardianships, conservatorships, limited guardianships, limited conservatorships, and temporary guardianships and conservatorships. ORS 125 refers to the proposed protected person in a protective proceeding as Respondent.

A. PRESUMPTION OF CAPACITY. A lawyer should presume that an adult client has the necessary mental competency to make legal choices, then critically assess whether this is true. There are no automatic tests. Even a client that has had a guardian appointed is not presumed to be incompetent. See ORS 125.300(2); *First Christian Church v. McReynolds*, 194 Or 68, 73-74 (1952). Oregon case law presumes a person to be competent. Van v. Van, 12 Or App 14 (1973).

B. "SLIDING SCALE" OF COMPETENCY. Competency should be viewed as a flexible concept, which is subject to many factors. Therefore, determining the competency of a client may be a complex issue. For example, a clinical diagnosis of Alzheimer's disease or other form of dementia-causing condition suggests diminished capacity, but a lawyer should not assume that a person is not competent to participate in or consent to a transaction because of that diagnosis. The lawyer must view competency in terms of the client's ability to perform a specific task. A person may be competent for certain tasks but lack capacity for others.

C. ATTORNEY INVESTIGATION.

1. Reasonable investigation required. When a client suggests a need for a guardianship for another person, the attorney for the petitioner must establish that a) the needs exists (and that the court will likely recognize that need); and b) that the proposed guardian is appropriate for the role. This is usually done based on information provided by

the petitioner and without contact with the proposed protected person. The attorney is required to make a reasonable investigation before filing a petition and must believe the petition is well founded in law and fact. ORCP 17; Whitaker v. Bank of Newport, 101 Or App 327, 333, 795 P2d 1170 (1990), aff'd, 313 Or 450 (1992).

2. Incapacity. The need exists when the proposed protected person is "incapacitated," that is, suffering from an impairment which affects the person's ability to receive and evaluate information or to communicate decisions to such an extent that the person presently lacks the capacity to meet the essential requirement for physical health or safety. "Meeting the essential requirements for physical health or safety means those actions necessary to provide the health car, food , shelter, clothing, personal hygiene and other without which serious physical injury or illness is likely to occur. ORS 125.005(5).

3. Medical support. In order to get an order from the court, it is simplest if medical evidence be offered. A letter from the treating or primary care physician of the proposed protected person stating that there a medical condition warranting the imposition of the guardianship may be obtained under some circumstances, but not available in others.

4. Other evidence. Important information may be provided by social workers, caregivers and other persons with the ability to observe the functioning of the proposed protected person. Depending on the credentials of these individuals (R.N., LCSW, MSW, Ph.D.), their evidence may be sufficient to support a petition. You may need to rely solely on the observations of friends and neighbors. Opportunity to observe, and length and nature of relationship are important factors to describe.

5. Alternatives to Guardianship. Always consider lesser measures than a full-blown guardianship/conservatorship to achieve the purpose of protection. Intervention and support from a local area agency on aging may be adequate to meet their needs. Powers of Attorney, Advance Directives for health care and living trust may exist or be creatable. Make certain these avenues have been explored. If so, they may provide additional evidence to support the petition.

V. FIDUCIARY PREFERENCES

A. Due process. Oregon differs from all other states in its due process requirements. Extremely state-specific. Oregon's practices are shocking to practitioners around the country, and even in neighboring California and Washington.

B. Preference statute ORS 125.200. The court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to

1. the specific circumstances of the respondent,
2. any stated desire of the respondent,
3. the relationship by blood or marriage of the person nominated to be fiduciary to the respondent,
4. any preference expressed by a parent;
5. the estate of the respondent;
6. and any impact on ease of administration that may result from appointment.

C. Disqualified to serve: ORS 125.205

1. incapacitated (needs their own guardian)
2. financially incapable (needs their own conservator)
3. a minor
4. a health care provider (i.e., long term care facility operator).

D. Judicial discretion is paramount, and almost insurmountable.

E. "PROFESSIONAL FIDUCIARIES" Surprisingly ORS 125.240 No licensing requirements used to be required for professionals: If you were appointed by the court for 3 or more persons unrelated to the fiduciary, you were deemed a "professional" fiduciary with little additional information required. As of 2013, it is now required that the professional fiduciary, or an individual responsible for making decisions for clients or for managing client assets for the professional fiduciary, is certified by the Center for Guardianship Certification or its successor organization as a National Certified Guardian or a National Master Guardian.

F. Guardianship/Conservatorship Association of Oregon. Self-regulating, self-interested group. Responsible for the excellent strides toward raising the level of professionalism in fiduciaries. See www.gcaoregon.org

VI. ETHICAL DUTIES OF REPRESENTATION OF INCAPACITATED CLIENTS.

A. RPC 1.14. Oregon and ABA ethical rules and guidelines provide limited guidance for the lawyer in determining the competency of a client. The Oregon Rules of Professional Conduct provide:

A lawyer may seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest, whether because of minority, mental disability, or for some other reason.

The conservative view is that the disciplinary rule permits the attorney to "take other protective action" by referral of the case to another attorney, but not by filing a petition with the client as a respondent. It does not allow the attorney to act against the expressed wishes of the client by doing what the attorney believes is best for the client. This approach allows the attorney to continue representing the client in the ensuing protective proceeding and allow a court or other independent reviewer to make the ultimate determination of the client's status, rather than actually usurping the client's decision-making role.

B. MAINTAIN NORMAL CLIENT RELATIONSHIP. When a client's ability to make adequately considered decisions in connection with the representation is impaired, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interest of the client. If the lawyer reasonably believes the client to be impaired, and no guardian or conservator has been appointed, the lawyer, with respect to a question within the scope of his or her representation, should pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to exercise rational judgment on the question, even if the client expresses no wishes to give *contrary* instructions.

C. REMEMBER WHO IS THE DECISION-MAKER. The attorney-client relationship is one of agent and principal. The attorney acts as agent for the client, *subject to the client's control*. Therefore, the client's autonomy and control of decision-making constitute the core of the relationship.

D. "SUBSTITUTED JUDGMENT" OF THE CLIENT. The lawyer needs to determine what the client's decision would have been if the client were able to make the decision. In making a substitute judgment on a client's behalf, the lawyer must carefully consider the client's circumstances, problems, needs, character, and values to the extent the lawyer can determine them. If the client, when able to decide, had expressed views relevant to the decision in question, the lawyer should follow them, unless there is reason to believe that changed circumstances would change the client's views.

E. "BEST INTERESTS" OF THE CLIENT. This approach is more paternalistic and asks the lawyer to determine the best interest of the client based on the lawyer's own determination after weighing all of the circumstances. Given the traditional requirements that lawyers follow the decisions of clients, this permits the attorney to be in the anomalous position of disregarding the client's expressed wishes in favor or a determination that will arguably better serve the client.

VI. PITHY PARTING THOUGHTS.

A. BEWARE THE POISONED WELL

B. THERE ARE ALWAYS TWO SIDES TO A STORY.

C. "HE NEEDS AN AGGRESSIVE ADVOCATE…" (like he needs a hole in the head; like a fish needs a bicycle…).

D. LOOK BEFORE YOU LEAP. Almost no situation benefits from proceeding without diligent investigation.

FILED: January 29, 2003

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Guardianship of
Katharine Elizabeth Goodwin.

HARRIET BURK,

Appellant,

v.

CHRISTOPHER HALL,
DANA HALL,
and KATHARINE ELIZABETH GOODWIN,

Respondents.

00C-13904; A112154

Appeal from Circuit Court, Marion County.
Claudia M. Burton, Judge pro tempore.
Argued and submitted November 13, 2002.
W. Brad Coleman argued the cause and filed the briefs for appellant.
Tahra Sinks argued the cause and filed the brief for respondents Christopher Hall and Dana Hall.
Dennis Sarriugarte argued the cause and filed the brief for respondent Katharine Elizabeth Goodwin.
Before Landau, Presiding Judge, and Armstrong and Brewer, Judges.
BREWER, J.

Reversed.

BREWER, J.

Harriet Burk appeals from an order appointing Christopher and Dana Hall as the permanent legal co-guardians of Burk's minor daughter, Katharine Goodwin. Burk asserts that the trial court erred in determining that Katharine was "in need of a guardian" under ORS 125.305(1)(a), and she also asserts that the order violated her constitutional rights as a fit parent to have custodial authority over her child. Because we conclude that the Halls were not entitled to appointment as co-guardians, we reverse.

Katharine resided with Burk until January 12, 2000, when, at age 13, she ran away from home. During the next four months, Katharine stayed at a runaway shelter, at the home of her school principal, and with the parents of a friend. On May 5, 2000, the Halls filed a petition in Marion County Circuit Court seeking appointment as co-guardians of Katharine. Dana Hall is Katharine's half-sister, and Christopher Hall is Dana's spouse. The petition alleged that a guardianship was necessary because Burk had physically abused Katharine and had not been adequately meeting her needs. The petition also alleged that, since January 18, 2000, Katharine had been staying with friends and at the shelter.

In May 2000, the trial court entered an *ex parte* order appointing the Halls as Katharine's temporary co-guardians. On May 24, the court held an evidentiary hearing to determine whether the temporary guardianship should be extended. Burk participated at the hearing, objected to the petition, and presented

evidence. Nevertheless, the court extended the guardianship and authorized the Halls to move Katharine to New Jersey to reside with them. On August 14, 2000, the trial court held a further hearing to determine whether or not to appoint the Halls as permanent co-guardians. Once again, Burk participated in the hearing, presented evidence, and objected to the appointment. On October 3, 2000, the court entered an order granting permanent co-guardianship of Katharine to the Halls. Burk appeals from that order.

At trial and on appeal, the parties have shared two sets of assumptions that have guided their arguments. First, they have assumed that this action is governed solely by ORS 125.305(1) and other general guardianship statutes found in ORS chapter 125.[(1)] Second, they agree that, because this case involves a dispute between a legal parent and opposing contestants concerning the care, custody, and control of a minor child, the governing statutes must be construed in light of the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). *See* *Wilson and Wilson*, 184 Or App 212, 217-19, 55 P3d 1106 (2002) (discussing *Troxel*); *Harrington v. Daum*, 172 Or App 188, 197-98, 18 P3d 456 (2001) (same).

In litigating the case based on the foregoing assumptions, the parties have paid only passing attention to another statute, ORS 109.119.[(2)] That statute provides, in part:

"(1) Any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, *guardianship* or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

"(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

"* * * * *

"(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, *guardianship*, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

"(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

"* * * * *

"(8) As used in this section:

"(a) *'Child-parent relationship' means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with*

necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

"* * * * *

"(e) 'Ongoing personal relationship' means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality."

(Emphasis added.)

In their brief on appeal, the Halls argue that the constitutional standards adopted in cases construing ORS 109.119 for the purpose of resolving disputes between legal parents and third parties should apply by analogy to this case. That assertion appears to flow from the assumption of both parties that ORS 125.305, not ORS 109.119, is the controlling statute. In her reply brief, Burk asserts:

"[The Halls] attempt to apply some of the standards of ORS 109.119 to this case, however it is questionable whether or not [that] statute does in fact, apply. ORS 109.119, first requires that the persons seeking custody, must have a 'child-parent relationship' (ORS 109.119(3)(a), 1999 version)[.] It is clear in this case that [the Halls] did not have such a relationship at the time the Court's order was entered."

The quoted argument was not preserved in the trial court. However, if ORS 109.119 applies to this action, the parties may not prevent the court from noticing and invoking that statute merely because they have failed to assert its applicability. *Miller v. Water Wonderland Improvement District*, 326 Or 306, 309 n 3, 951 P2d 720 (1998); *State v. Smith*, 184 Or App 118, 122, 55 P3d 553 (2002).

If ORS 109.119 applies to this action, it is readily apparent that the Halls were not entitled to be appointed as Katharine's co-guardians. Only a person with a "child-parent relationship" with the would-be protected person can bring an action to establish a guardianship under ORS 109.119. *See* ORS 109.119(3)(a). Subsection (8)(a), in turn, restricts child-parent relationships to those in which the petitioner either had physical custody of, resided in the same household with, or provided day-to-day resources for the child "within the six months preceding the filing of an action under this section." It is undisputed that Katharine was not in the Halls' physical custody, did not reside with them, and did not receive relevant day-to-day resources from them before this action was filed. Although the Halls may or may not have had an "ongoing personal relationship" with Katharine within the meaning of subsection (8)(b) before they filed this action, that status would have entitled them only to bring an action for "visitation or contact rights," not for guardianship. *See* ORS 109.119(3)(b). Therefore, if ORS 109.119 applies to this action, the Halls were not entitled to appointment, and the trial court's order must be reversed.

The question, then, is whether this action is subject to the requirements of ORS 109.119. The problem is one of statutory construction, involving both ORS 109.119 and ORS 125.305, which we resolve under the methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We examine first the text of the statutes in context to determine whether the legislature's intended meaning has been expressed unambiguously. If either statute is ambiguous, then we resort to legislative history and other aids to construction. *Id.* at 611-12. At first blush, it is easy to understand why the parties have not focused on ORS 109.119. After all, ORS chapter 125 establishes what appears to be a comprehensive framework, both substantive and procedural, of statutory law governing guardianship proceedings. However, an examination of the text and context of both statutes reveals that ORS 125.305(1) must be construed in light of the requirements of ORS 109.119.

ORS 125.305(1) makes clear that it does not specify all of the requirements for establishing a guardianship of a minor. Subsection (1)(a) provides that the court may appoint a guardian for a minor who "needs" one, but that power is subject to the preliminary determination, prescribed by the preface to subsection (1), that "conditions for the appointment of a guardian have been established." ORS 125.305(1). Moreover, subsection (1)(c) further restricts the court's authority to the appointment of a guardian who is "both qualified and suitable." ORS 125.305 does not further specify the criteria for establishing the qualifications and suitability of prospective guardians. Thus, it is apparent from the text of the statute that it cannot be interpreted in a vacuum that disregards other statutes, like ORS 109.119, that prescribe qualifications for guardians of children.[(3)]

ORS 109.119, in turn, is quite clear and specific in scope. It provides substantive requirements for actions in which a nonparent seeks custody or guardianship of a minor child over the objection of a legal parent. Nothing contained either in the text or context of that statute suggests that the legislature intended for persons who cannot satisfy those requirements to bypass them by proceeding solely under ORS 125.305(1). It makes no sense to assume that the legislature intended to create such a loophole. To the contrary, it makes sense only to conclude that ORS 109.119 is, within the meaning of ORS 125.305(1), a separate source of "conditions for the appointment of a guardian" and of criteria for determining whether the nominated person "is both qualified and suitable." Accordingly, the two statutes can be harmonized in such a way as to give full effect to both. *See* ORS 174.010.

However, even if we were to determine that the statutes are in conflict, we would conclude that this action is subject to the requirements of ORS 109.119. The courts have held that when "one statute deals with a subject in general terms and another deals with the same subject in a more minute and definite way," the specific statute controls over the general if the two statutes cannot be read together. *State v. Guzek*, 322 Or 245, 268, 906 P2d 272 (1995); *see* ORS 174.020(2). That maxim is applicable at the first level of statutory construction analysis. *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 374, 50 P3d 1163 (2002). As pertinent here, although ORS 125.305(1) does address guardianships for minors, it does not specifically address the type of contested guardianship proceeding at issue here, where a third party seeks guardianship of a child over the objection of the child's legal parent. That specific circumstance is provided for by ORS 109.119(1) and (3)(a). It follows that ORS 109.119, the more specific statute, would control in the case of a conflict.

In *Kelley v. Gibson*, 184 Or App 343, 349-50, 56 P3d 925 (2002), we held that ORS 125.305 does not apply to guardianships established pursuant to a court's juvenile dependency jurisdiction because ORS 419B.365 provides the only statutory procedure for the establishment of a permanent guardianship for a child within juvenile court jurisdiction. In so holding, we noted but did not reach the issue raised here. We said:

"[I]t is arguable whether ORS 125.305 would apply were this not a dependency case. ORS 109.119 appears to address guardianships with respect to children who have a living legal parent and contains various presumptions and procedures to protect that parent's rights as enunciated by the United States Supreme Court in [*Troxel*]. However, we need not decide that issue here."

Kelley, 184 Or App at 350 n 4 (citations omitted). We now decide that issue. We conclude that guardianship actions involving a child who is not subject to a court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of a guardian are--in addition to the requirements of ORS 125.305--subject to the requirements of ORS 109.119.[(4)] Because the Halls were not entitled to appointment as Katharine's co-guardians under ORS 109.119(3)(a), the trial court did not have the authority to enter the order so appointing them. Accordingly, we reverse.[(5)]

Reversed.

1. ORS 125.305(1) provides:

"(1) After determining that conditions for the appointment of a guardian have been established, the court may appoint a guardian as requested if the court determines by clear and convincing evidence that:

"(a) The respondent is a minor in need of a guardian or the respondent is incapacitated;

"(b) The appointment is necessary as a means of providing continuing care and supervision of the respondent; and

"(c) The nominated person is both qualified and suitable, and is willing to serve."

Return to previous location.

2. This action was filed while ORS 109.119 (1999) was in effect. Because subsections (1), (3), and (8) of the 2001 version are, in all pertinent respects, identical to the comparable subsections of the 1999 version, we apply the 2001 version of ORS 109.119.

Return to previous location.

3. ORS 125.200 establishes preferences in appointing fiduciaries, including a requirement that the court consider "any preference expressed by a parent of the respondent." In addition, ORS 125.205 and ORS 125.210 establish certain qualifications for fiduciaries. However, none of those statutes in any way limits or impairs the applicability of the additional requirements of ORS 109.119 to this action.

Return to previous location.

4. We are not called upon to decide whether ORS 109.119 has any application to guardianship actions where a minor protected person does not have a living legal parent or the minor's legal parent does not object to the appointment as guardian of a person who lacks a child-parent relationship with the minor. Of course, the legislature, in its policy judgment, is free to address that and any other issue of concern that is raised by our decision here.

Return to previous location.

5. Because the Halls do not have a child-parent relationship with Katharine for purposes of ORS 109.119, we do not address the statutory presumption in favor of a legal parent in the 2001 version of the statute nor the relationship between the current version of the statute and *Troxel*.

Return to previous location.

ORS 109.119 (2015)

109.119 Rights of person who establishes emotional ties creating child-parent relationship or ongoing personal relationship; presumption regarding legal parent; motion for intervention.

(1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

(b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.

(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

(4)(a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The petitioner or intervenor is or recently has been the child's primary caretaker;

(B) Circumstances detrimental to the child exist if relief is denied;

(C) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

(D) Granting relief would not substantially interfere with the custodial relationship; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The legal parent is unwilling or unable to care adequately for the child;

(B) The petitioner or intervenor is or recently has been the child's primary caretaker;

(C) Circumstances detrimental to the child exist if relief is denied;

(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(5) In addition to the other rights granted under this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for

custody or visitation under this section or may petition the court for the county in which the child resides for adoption of the child. The stepparent may also file for post-judgment modification of a judgment relating to child custody.

(6)(a) A motion for intervention filed under this section shall comply with ORCP 33 and state the grounds for relief under this section.

(b) Costs for the representation of an intervenor under this section may not be charged against funds appropriated for public defense services.

(7) In a proceeding under this section, the court may:

(a) Cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist the parties in creating and implementing parenting plans under ORS 107.425 (3).

(b) Assess against a party reasonable attorney fees and costs for the benefit of another party.

(8) When a petition or motion to intervene is filed under this section seeking guardianship or custody of a child who is a foreign national, the petitioner or intervenor shall serve a copy of the petition or motion on the consulate for the child's country.

(9) This section does not apply to proceedings under ORS chapter 419B.

(10) As used in this section:

(a) "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

(b) "Circumstances detrimental to the child" includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.

(c) "Grandparent" means the legal parent of the child's legal parent.

(d) "Legal parent" means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(e) "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality. [1985 c.516 §2; 1987 c.810 §1; 1993 c.372 §1; 1997 c.92 §1; 1997 c.479 §1; 1997 c.873 §20; 1999 c.569 §6; 2001 c.873 §§1,1a,1e; 2003 c.143 §§1,2; 2003 c.231 §§4,5; 2003 c.576 §§138,139]

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Proposed Legislation and Family Law

Presenter:

Ryan Carty, Attorney at Law, Saucy & Saucy

Lawyer. Litigator. Problem-solver. Negotiator. Peacemaker. Arguer. Bargainer. Troublemaker. Those are just a few of the titles thrown at Ryan Carty with some regularity. Ryan is a family law practitioner, which is the polite way to explain at a fancy dinner party that he is a divorce lawyer without the word divorce ever spilling out across the table. Ryan spends most of his days in court, preparing for court, or explaining to his clients why they should attempt to avoid court at all costs.

Ryan plays an active role in Oregon's legislative arena. Ryan serves as a Member of the State Family Law Advisory Committee where he chairs the Legislative Subcommittee. He has chaired or co-chaired the Legislative Subcommittee for the Oregon State Bar Family Law Section since 2010. Ryan frequently testifies at the Oregon State Legislature on issues related to family law and is a recurring speaker at state-wide CLEs.

Ryan has played bass guitar in a punk rock band. He once coached a 1st and 2nd grade flag football team to an undefeated season (not that anyone was keeping score). And he can often be seen on stage with Theatre 33 (most recently voicing sixteen different characters in a world-premiere production of A Christmas Carol, A 1940s Radio Show).

Ryan and his wife, Allison, reside in Salem where they daily attempt to keep up with the escapades of their three young boys.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Focused Discussion: Court Staff and Legal Advice

Presenter:

Lindsey K. Detweiler, Assistant Legal Counsel, Legal Counsel Division, Oregon Judicial Department

Lindsey Detweiler joined the Legal Counsel Division (LCD) as assistant legal counsel in the spring of 2016. Prior to joining OJD, she was a deputy defender at the Office of Public Defense Services for over seven years. She represented indigent criminal defendants convicted of serious felony crimes on direct appeal in the Oregon Court of Appeals and the Oregon Supreme Court as well as inmates on judicial review from adverse decisions of the Oregon Board of Parole and Post-Prison Supervision. During law school, Lindsey worked as a certified law student for Multnomah Defenders in Portland. She earned her law degree from Lewis and Clark Law School and a Bachelor of Arts in Creative Writing from San Francisco State University.

Samantha M. Benton, Program Manager, Family Law Program, Oregon Judicial Department

Samantha joined the Juvenile and Family Court Programs Division, OJD in 2014. Previously, she clerked for the Honorable Valeri L. Love at the Lane County Circuit Court, primarily in juvenile dependency, juvenile delinquency, and criminal dockets. Samantha graduated from the University of Oregon School of Law in 2012, with a Certificate of Completion in Estate Planning and was Editor-in-Chief for the Oregon Review of International Law. During law school she participated in the Probate Mediation Clinic, gaining valuable experience in dispute resolution and probate matters, and was a regional finalist for the ABA Client Counseling Competition. She earned her B.A. in History from the University of Puget Sound, and before attending law school worked in state and federal government, most recently as Chief of Staff to State Representative Scott Bruun in the 2009 Oregon Legislature.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Focused Discussion Group: Is it Time to Update Oregon's Mediator Qualification Rules

Presenters:

Leola L. McKenzie, Director, Juvenile & Family Court Programs Division, Oregon Judicial Department.
Leola has been with the Office of the State Court Administrator since January 1995. Leola has worked in various analyst, supervisor, manager, and director roles related to the development, implementation, management, and evaluation of statewide court programs, policies, and services related to juvenile and family law. Leola earned a Bachelor of Arts Degree in English and Secondary Education from Nazareth College in Rochester, New York and a Masters Degree in Public Administration from Portland State University. Past work experiences include five years of nonprofit management, one year as a counselor/advocate in a juvenile delinquency diversion program, and two years teaching at the secondary level. Leola is an adoptive parent of Clay (age 20) and Claire (age 17).

Amy Benedum, J.D., Program Analyst, Juvenile & Family Court Programs Division, Oregon Judicial Department
Amy Benedum graduated from the University of Oregon School of Law in 2011. She clerked for the Honorable Charles Zennache at the Lane County Circuit Court before joining the Juvenile and Family Court Programs Division of the Oregon Judicial Department in 2012. She was a field manager with the Citizen Review Board, Oregon's foster care review program, for almost three years before starting her current position as a program analyst for the division.

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Tribal and Family Court Issues

Presenter:

The Honorable Jeremy Brave-Heart, Chief Judge, Klamath Tribes

Chief Judge Jeremy Brave-Heart, a citizen of the Shawnee Tribe of Oklahoma, holds a J.D. from the University of Michigan Law School, and has degrees in Anthropology and Political Science. Mr. Brave-Heart serves as Chief Judge for the Klamath Tribes, was a Judge for the Hopi Tribal Courts, and is concurrently Of Counsel to the Indian Law firm Ceiba Legal, LLP. As a tribal member and lawyer specializing in all aspects of Federal Indian and Tribal Law and Policy, Mr. Brave-Heart has been honored to serve dozens of tribes. Before returning home to the West, Mr. Brave-Heart was in private practice in Washington, D.C., at the Indian Law firm of Hobbs, Straus, Dean, & Walker, LLP. While in Washington, D.C., Mr. Brave-Heart defended and advocated for critical tribal issues such as Education, Health, Gaming, Treaty Rights, Federal Indian Policy, and as is so often necessary these days, litigation on behalf of tribes at the state and federal courts. Mr. Brave-Heart also served as the Assistant Attorney General for the Eastern Shoshone Tribe, where he represented the Tribe as co-counsel in defending its reservation boundary in the United States Court of Appeals for the 10th Circuit, as well as representing dozens of its tribal departments. Outside of serving tribes and their citizens, Mr. Brave-Heart's passions include ceremony, shooting, hunting, fishing, writing music and poetry, and above all, spending time with his wife and two daughters.

TRIBAL COURT/STATE COURT FORUM
Memorandum of Understanding
Between
The Oregon Judicial Department
and
The Nine Federally Recognized Tribes of Oregon

This Memorandum of Understanding (MOU) sets forth the terms and understanding between the Oregon Judicial Department and the Nine Federally Recognized Tribes of Oregon to establish an ongoing forum of state, tribal and federal judiciaries.

Background

Oregon has nine federally recognized Indian tribes: the Burns Paiute Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Confederated Tribes of Grand Ronde; the Confederated Tribes of Siletz Indians; the Confederated Tribes of the Umatilla Indian Reservation; the Confederated Tribes of Warm Springs; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; and The Klamath Tribes. Oregon also has 36 Circuit Courts and six Federal Courts including one US District Court in four locations, one Bankruptcy Court and one Ninth Circuit Court of Appeals. State, Federal and tribal courts have a range of common responsibilities. However, at times, they can misunderstand, misinterpret and disagree about issues important to each jurisdiction. These parallel and sometimes overlapping responsibilities require open communication between court systems. In August of 2015, six Tribal judges, twelve Circuit Court Judges and one Federal Judge convened to discuss cross jurisdictional issues affecting all of their systems. At the conclusion of their meeting, they unanimously expressed a need for an ongoing forum to continue the work.

Purpose

The Tribal Court/State Court Forum will create and institutionalize a collaborative relationship between judicial systems in Oregon, identify cross-jurisdictional legal issues affecting the people served by those systems, and improve the administration of justice of all our peoples. It will allow judges and court representatives to gain knowledge of their various court procedures and practices, identify strategies and facilitate improvements in their interactions, and allow them to coordinate and share resources, educational opportunities and materials.

Membership

The membership of the forum shall consist of equal representation of nine state court representatives from diverse locations and nine tribal representatives. One state court judge and one tribal court judge shall serve as co-chairs of the forum. The co-chairs can designate an attorney representative with knowledge of Indian Law and a federal court representative to serve as members of the forum.

Meetings

The forum will meet up to two times each year and will alternate between tribal and state locations.

Funding

This MOU is not a commitment of funds.

Duration

This MOU is at-will and may be modified by mutual consent of the members. This MOU shall become effective upon signature by the authorized officials listed below and will remain in effect until modified or terminated by any one of the partners by mutual consent.

Non-Binding

The parties understand that this MOU is not legally binding on them but is designed to reflect an understanding of the way in which they can effectively cooperate to create a tribal/state court forum in Oregon. Nothing in the MOU restricts any party from exercising independent judgment or discretion given it under applicable statutes, regulations, or other sources.

OREGON JUDICIAL DEPARTMENT
SIGNED
SEPTEMBER 29, 2016
CHIEF JUSTICE BALMER

CONFEDERATED TRIBES OF WARM SPRINGS
PENDING BEFORE TRIBAL COUNCIL

BURNS PAIUTE TRIBE
SIGNED
AUGUST 22, 2016
CHARLOTTE RODERIQUE, TRIBAL COUNCIL

COQUILLE INDIAN TRIBE
PENDING BEFORE TRIBAL COUNCIL

CONFEDERATED TRIBES OF THE UMATILLA INDIANS
SIGNED
SEPTEMBER 26, 2016
JUDGE WILLIAM D. JOHNSON

COW CREEK BAND OF UMPQUA TRIBE INDIANS
SIGNED
NOT DATED
MICHAEL RONDEAU

CONFEDERATED TRIBES OF GRAND RONDE
SIGNED
NOT DATED
JUDGE DAVID SHAW

THE KLAMATH TRIBES
SIGNED
NOT DATED
JUDGE JEREMY BRAVE-HEART

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA, AND SIUSLAW INDIANS
SIGNED
NOT DATED
JUDGE J.D. WILLIAMS

CONFEDERATED TRIBES OF SILETZ INDIANS
SIGNED
NOT DATED
JUDGE CALVIN GANTENBEIN

Tribal/State Court Forum Members

First Name:	Last Name:	Tribe / County:	Agency
Judges:			
Daniel	Ahern	Jefferson County	Circuit Court Judge
Sally	Avera	Polk County	Circuit Court Judge
Jeremy	Brave-Heart	Klamath Tribes' Judicial Branch	Tribal Court Judge
Donald	Costello	Coquille Indian Tribe	Tribal Court Judge
William	Cramer	Grant/Harney Counties	Circuit Court Judge
Cal	Gantenbein	Confederated Tribes of Siletz Indians	Tribal Court Judge
Lynn	Hampton	Umatilla County	Circuit Court Judge
William	Johnson	Confederated Tribes of the Umatilla	Tribal Court Judge
Mark	Kemp	Burns-Paiute Tribe	Tribal Court Judge
Lisa	Lomas	Confederated Tribes of Warm Springs	Tribal Court Judge
Valeri	Love	Lane County	Circuit Court Judge
Maureen	McKnight	Multnomah County	Circuit Court Judge
Michael	Newman	Josephine County	Circuit Court Judge
Darleen	Ortega	Statewide	Appellate Court Judge
David	Shaw	Confederated Tribes of Grand Ronde	Tribal Court Judge
Martha	Walters	Statewide	Oregon Supreme Court Justice
J.D.	Williams	Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians	Tribal Court Judge
Ron	Yockim	Cow Creek Band of Umpqua Indians	Tribal Court Judge
OJD Staff:			
Leola	McKenzie	Juvenile and Family Court Programs (JFCPD)	Director, JFCPD
Amy	Benedum	Juvenile and Family Court Programs (JFCPD)	Program Analyst, JFCPD

Other Meeting Attendees			
First Name:	**Last Name:**	**Tribe / County:**	**Agency**
Craig	Dorsay	Multnomah	Dorsay & Easton LLP
David	Gallaher	Umatilla	CTUIR
Claudia	Groberg	Lane	Department of Justice
Hope	Hicks	Marion	OJD - JFCPD
Rodger	Isaacson	Klamath	OJD
Dawn	Marquardt	Marion	OR Department of Justice
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PRINCIPLES OF FEDERAL INDIAN LAW

APPLICABLE TO

FAMILY LAW ISSUES IN STATE COURTS

IAML Family Law Conference

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I. Relevant Principles of Federal Indian Law.

A. Inherent Sovereign Status of Indian Tribes.

1. Indian tribes are one of three sovereigns expressly described in the United States Constitution – states, the federal government, and tribes.

2. Indian tribes pre-dated the United States Constitution, and therefore are not included in its provisions or coverage, except as expressly noted. *Talton v. Mayes*, 163 U.S. 376, 384 (1896)(5th Amendment does not apply to Indian tribes).

3. Indian tribes have historically been recognized as "distinct, independent political communities" which exercise powers of self-government not by virtue of delegation from a superior sovereign, but rather as original, inherent sovereign authority. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *United States v. Lara*, 541 U.S. 193, 204-05 (2004). Tribal sovereignty remains until limited or ended by Congress.

4. One of the earliest Supreme Court cases described Indian tribes as "domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). This guardian ward relationship does not undermine, but does limit, the independent sovereign status of tribes. Tribes start as governments possessing the sovereign powers of independent nations, who came under the authority of the United States through treaties, agreements and through the assertion of authority by the United States.

The United States has a fiduciary obligation to protect and preserve tribal self-government and to continue their integrity as self-governing entities. *See*, ***e.g.***, *Worcester*, *supra*, 31 U.S. at 555-561.

5. Tribal sovereignty continues undiminished except as "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). This last provision – limited by necessary implication of dependent status – impacts the field of family law. The Supreme Court has held that Indian tribes retain "the power of regulating their internal and social relations," *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173 *(quoting United States v. Kagama*, 118 U.S. 375, 381 (1886)).

6. Tribes retain sovereign power over their members and their territory, subject only to federal law limitations. *Worcester v. Georgia*, *supra*, 31 U.S. at 555; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)(membership); *White Mt. Apache Tribe v. Bracker*, 448 U.S. 141-42 (1980), although the Court "long ago departed from [*Worcester v. Georgia's*] view that 'the laws of [a State] can have no force within reservation boundaries." *Id.* (quoting *Worcester v. Georgia*, *supra*, 31 U.S. at 555. "[T]here is a significant geographical component to tribal sovereignty." *White Mt. Apache Tribe v. Bracker*, *supra*, 448 U.S. at 151. *Cf. John v. Baker*, 982 P.2d 738, 761 (Alaska 1999)(tribal sovereignty over domestic relations of members extends off-reservation).

B. Constitutional Principles.

1. States generally lack authority under the Constitution over Indian tribes and Indian territory: "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996).
2. Laws separating out Indians and Indian tribes for separate treatment do not violate the United States Constitution and are based on the political status of tribes under the Constitution, rather than being racially based. *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974).

C. Recent Changes in Supreme Court Law on Tribal Authority and Jurisdiction over Non-Indians – *Montana v. U.S.* and its Progeny.

1. In 1981, the Supreme Court issued what has been subsequently referred to as a "pathmarking" decision in *Montana v. United States*, 450 U.S. 544 (1981). While previously it had been commonly understood that Indian tribes retained sovereign authority over both Indians and non-Indians within "Indian country," ***e.g.***, *Willams v. Lee*, 358 U.S. 217, 220 (1958)(tribes retain the authority "to make their own laws and be ruled by them"; state suit by on-reservation non-Indian trader to collect debt owed by reservation Indian prohibited); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985)(tribal court civil subject matter jurisdiction over non-Indians not automatically foreclosed; careful examination of various factors required); *but see Strate v. A-1 Contractors*, 520 U.S. 438, 448-53 (1996)(Court distinguishes *National Farmers* and *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9 (1987), and reaffirms the *Montana* rule), *Montana* held that the implicit divestiture of tribal sovereignty because of tribes' dependent status necessarily includes relations between an Indian tribe and nonmembers of the tribe. *Montana*, 450 U.S. at 564. *See Strate*, *supra,* 520 U.S. at 445 ("absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.").

2. The decision in *Montana* is limited to tribal regulatory and adjudicative jurisdiction over the conduct of non-members on non-Indian fee land within an Indian reservation. *Strate*, *supra*, 520 U.S. 446. There is some non-controlling language indicating that the Supreme Court could extend the *Montana* rule in the future to all Indian country, whether owned by the Tribe, individual Indians, in trust, or in fee or other status. *Nevada v. Hicks*, 533 U.S. 353 (2001).

3. The Court in *Montana* held that Indian tribes retain the following inherent sovereignty: "In addition to the power to punish tribal offenders, the Indian tribe retains their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. This principle was restated in *Duro v. Reina*, 495 U.S. 676, 685-86 (1990)(result overturned by legislation): "A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. Oliphant recognized that the tribes can no longer be described as sovereigns in this sense. Rather, as our discussion in Wheeler reveals, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own customs and social order."

4. The Court then described what authority Indian tribes can exercise over the conduct of non-Indians within a reservation: "To be sure, Indian tribes exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (citations omitted – ***Williams v. Lee*****,** ***supra***, one of the cites) . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

5. These two circumstances where a tribe may assert civil authority over non-Indians have become known as the two *Montana* exceptions – consent and essential tribal relations. Both exceptions are implicated in the family law arena.

6. Short-hand, the case law states that non-Indians cannot be named as defendants in a tribal court action unless one of the *Montana* exceptions applies, and under *Fisher v. District Court* and other precedent, tribal members who reside on-reservation generally cannot be named as a defendant in a state court action. ***E.g.***, *Hinkle v. Abeita*, 283 P.3d 877 (N.M.App. 2012)(state court lacks jurisdiction over on-reservation motor vehicle accident, brought by non-Indian against on-reservation tribal member).

D. U.S. Supreme Court cases on Indian Domestic Relations Law.

1. The most cited Indian domestic relations case is *Fisher v. District Court*, 424 U.S. 382 (1976). It is cited as the basis for the exclusive jurisdiction provision of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(a). *Fisher* was an adoption case involving two members of a tribe residing on-reservation seeking in state court to adopt a child, also a tribal member residing on-reservation, that they had been granted custody of by the tribal court. The Supreme Court ruled that the state court lacked jurisdiction over the adoption, even though the on-reservation adoptive Indians were also state citizens.

2. The Court held: "State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the . . . Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. . . . it would create a substantial risk of conflicting adjudications affecting the custody

of the child and would cause a corresponding decline in the authority of the Tribal Court. No federal statute sanctions this interference with tribal self-government." 424 U.S. at 387-88.

3. The Court noted: "Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive. The Runsaboves have not sought to defend the state court's jurisdiction by arguing that any substantial part of the conduct supporting the adoption petition took place off the reservation." 424 U.S. at 389.

4. The Court concluded: "Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible, racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. at 390-91.

5. *Fisher* is cited by the Supreme Court in *Montana* as authority for the second *Montana* exception, that Indian tribes retain inherent authority to exercise civil authority over the conduct of non-Indians when that conduct threatens or has some direct effect on the political integrity or health and welfare of the tribe. *Montana*, 450 U.S. at 566.

6. The other Supreme Court Indian domestic relations case is *United States v. Quiver*, 241 U.S. 602 (1916), involving a federal adultery prosecution against an on-reservation tribal member. The Court ruled: "At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws. . . . the relations of the Indians among themselves –the conduct of one toward another – is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise ." 241 U.S. at 603-06.

II. Factors that Must be Considered in Determining the Outcome of Family Law Cases Involving Indian Families, Parents, Children, and Tribes.

A. Tribal Status.

1. The protections and rights that attach to Indian tribes apply to what are known as "federally-recognized" Indian tribes. Some rights may apply to tribes that are only recognized on the state level. Rights possessed by tribes generally do not extend to non-recognized tribes, unrecognized tribes, or terminated tribes that have not been restored.

2. The Bureau of Indian Affairs (BIA) publishes an annual list of all federally-recognized tribes in the Federal Register. The most current list appears at 77 Federal Register 47868 (Aug. 10, 2012). This list is entitled to judicial notice.

B. Land Status.

1. Indian tribes exercise authority over their territories. The general legal term of art used for this geographic area is "Indian country," defined as the area within which Indian laws and customs and federal laws relating to Indians are generally applicable. "Generally speaking, jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998).

2. The term "Indian country" is defined in a federal criminal statute, 18 U.S.C. § 1151, but the Supreme Court has applied it also to questions of civil jurisdiction. *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 n.5 (1987).

3. The definition of Indian country includes "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation," "all dependent Indian communities," and "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

4. Lands within a reservation include lands in trust, restricted or fee status, owned by the Tribe, individual Indians, or non-Indians. Reservations include both formal and information reservations. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993).

5. Some tribes do not have reservations or other defined Indian country. Oklahoma and Alaska, for example, do not have reservations under federal law. Other tribes have defined "service areas" within which they exercise governmental authority.

C. Membership Status – Tribal Member, Non-Member Indians, and Non-Indians.

1. Under the *Montana* test and other Supreme Court precedent, tribal sovereign authority exists primarily over members of that tribe. The general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565.

2. Nonmembers of a tribe – Indians who are members of a different tribe – are generally treated the same as non-Indians under this test. *See Duro v. Reina*, *supra*; *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 161 (1980)("[N]onmembers are not constituents of the governing tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.").

3. Congress can expressly authorize tribal authority over all Indians – both members and nonmember Indians – on a reservation or within Indian country. For example, Congress re-established tribal criminal jurisdiction over nonmember Indians after *Duro*. In the Indian Child Welfare Act, Congress expressly authorizes exclusive tribal jurisdiction over <u>any Indian child</u> who is domiciled or resident on a particular reservation. *See* 25 U.S.C. § 1911(a).

4. Indian tribes have exclusive authority to determine membership status. *Santa Clara v. Martinez*, 436 U.S. 49, 72 n.32 (1978)("a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence."). A tribal determination of membership is conclusive for purposes of the Indian Child Welfare Act. *E.g.*, *In re S.M.H.*, 103 P.3d 976, 981 (Kan App), *rev. denied*, 279 Kan. 1006 (2005).; *In re Adoption of Riffle*, 902 P2d 542, 545 (Mont. 1995). Enrollment is the most common but not the only method of determining membership; a child may be a member of a tribe without being formally enrolled. *Nelson v. Hunter*, 888 P.2d 124 (Or App 1995). If it can be shown that a tribe has not followed its own membership requirements, it is possible that a tribal membership determination will not be deferred to. *See In re A.W.*, 741 N.W.2d 793, 798 (Iowa 2007).

5. Every tribe has different membership requirements, and blood quantum requirements are different for each tribe. *Angus v. Joseph*, 655 P.2d 208 (Or App 1982). The child may be a member of or eligible for membership in a different than the custodial parent. *In re Armell*, 550 NE2d 1060 (Ill App 1990). It is possible that a child may be almost full-blood Indian, but does not have enough

blood quantum derived from any one tribe to be a member of any tribe. *See In re Smith*, 731 P.2d 1149, 1151-53 (Wash App 1987).

6. State recognition of tribal authority over children extends to children who are members of a tribe. State recognition of tribal authority over children who are not members of or eligible for membership in a tribe may violate the Equal Protection Claus of the Constitution because special treatment of such children would no longer be based on a permissible political classification. *See In re A.W.*, *supra*; *State ex rel. SOSCF v. Klamath Tribe*, 11 P.3d 701, 706-07 (Or App 2000)("the status of the children in this case – by virtue of the Tribe's own definition of membership – is no different than that of any other 'non-Indian' child."). In *Klamath Tribe*, a State-Tribal Agreement extended coverage of the ICWA to Klamath children who were the children of tribal members, but who were not eligible for tribal membership themselves. The Oregon Court of Appeals concluded that the Klamath Tribes exercised complete control over this issue – it could extend membership eligibility to such children (by lowering the tribal blood quantum), at which point the children would come under the ICWA. The ICWA expressly extends its application not only to children who are members of a tribe, but also to children who are eligible for membership in a tribe and the biological child of a member of a tribe. 25 U.S.C. § 1903(4).

7. This issue can get complicated because federal law often extends benefits to Indian children who are not eligible for membership, and tribal law many times extends tribal jurisdiction to descendants of tribal members, whether eligible for membership or not. For example, members of an Indian household are eligible for Indian Health Service benefits and Indian Housing benefits even though not eligible for membership in a tribe. *See United States v. John*, 437 U.S. 634 (1978)(upholding federal criminal jurisdiction over Indian based on blood quantum, not membership).

D. Tribal Law.

1. An Indian tribe has authority to determine and limit its own authority and jurisdiction. Tribal law is expressed in written constitutions and ordinances, in tradition and custom, and sometimes is oral in nature.

2. An Indian tribe may limit its authority and jurisdiction only to tribal members, for example, in which case tribal jurisdiction under its own law will not extend to non-members of the tribe. Often, however, the tribe will set out its jurisdiction

and authority in broad terms, often in language that states something like – "to the full extent permitted by federal law and inherent tribal sovereignty."

3. The question of whether a tribe or tribal court has exceeded its jurisdiction or sovereign authority as a matter of federal law is a federal common law question that is within the subject matter jurisdiction of the federal courts to decide. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985); *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992). State courts lack authority to interfere with tribal sovereignty by determining that a tribal court or tribe lacks authority in a given case. *See Garcia v. Gutierrez*, 217 P.3d 591, 607 (N.M. 2009); *U.S. v. Lopez*, No. CE. 11-50073-JLV (Order, 12/19/12)(dismissing federal prosecution for failure to pay child support, based on state enforcement of tribal court order, where tribal court order was based on tribal court adoption to non-Indian, in violation of tribal law restricting adoption of tribal members only by tribal members).

E. Tribal sovereign immunity; Exhaustion of Tribal Court Remedies.

1. As discussed above, the federal courts have jurisdiction to determine whether an Indian tribe has exceeded its jurisdiction or sovereign authority over a non-Indian parent or child in a given case. However, federal (or state) jurisdiction is complicated by the fact that Indian tribes and tribal entities are generally immune from suit in the absence of express tribal consent or Congressional mandate. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505,509 (1991); *see Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001) (tribal chief had no actual or apparent authority to waive tribe's sovereign immunity by signing contract, where tribal ordinance provided specific procedure for waiver of tribe's immunity).. There is only one extremely limited federal statutory waiver of tribal sovereign immunity, for criminal habeas corpus proceedings. 25 U.S.C. § 1303. Courts have uniformly rejected the application of this statute to child custody proceedings.

2. Tribal sovereign immunity is a complicated subject and beyond the scope of this presentation. Cases supporting tribal sovereign immunity include: *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751(1998); *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,532 U.S. 411(2001). Tribal "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi Indian Tribe v. Cal. St. Bd. Of Equal.*, 757 F.2d 1047, 1052 n.6, *rev'd on other grounds*, 474 U.S. 9 (1985). Tribal sovereign immunity applies on and off the

reservation, in all courts – federal, state and tribal, and to commercial and governmental entities. *Kiowa*, *supra*. Indian Tribes are not immune from suits by the United States. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). Even when a tribe voluntarily waives its sovereign immunity, say by tribal ordinance, it ordinarily does so only in its own courts, and such waiver does not mean the tribe has waived its immunity with regard to state court jurisdiction. *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2d Cir. 2001). States cannot condition tribal access to state courts upon a general waiver of tribal sovereign immunity. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986).

3. When an Indian tribe brings suit in a court it necessarily consents to that court's jurisdiction to determine the claims adversely to it. *E.g.*, *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981); *but see Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1985)(*U.S. v. Oregon* tests the outer limits of implied consent to other claims). This consent does not, however, extend to counterclaims, mandatory counterclaims, or cross-claims. *U.S. v. USF&G Co.*, 309 U.S. 506, 511 (1940); *Chemehuevi Indian Tribe v. California State Bd. of Equal.*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985); *Squaxin Indian Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982); *Thompson v. Crow Tribe of Indians*, 289 Mont. 358, 962 P.2d 577 (Mont. 1998)(tribe's filing of tribal tax lien with county recording officer did not waive tribe's sovereign immunity as to suit in state court to void the liens); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987)(terms of sovereign's consent to be sued in any court define that court's jurisdiction to entertain the suit).

4. Tribal sovereign immunity is jurisdictional in nature. *Chemehuevi Indian Tribe*, *supra*, 757 F.2d at 1051; *Thompson*, *supra* (sovereign immunity can be raised at any time, even on appeal; if sovereign immunity exists, court cannot entertain action, let alone rule on the merits).

5. While a tribe may not be sued directly, the Supreme Court has determined that the *Ex Parte Young* doctrine applies to tribal officials who act beyond the sovereign authority retained by Indian tribes under federal law. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505,509, 514(1991); *Dept. of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*,

512 U.S. 61, 72 (1994)(citing *Citizen Band*); *Tamiami Partners, Ltd. V. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1225 (11th Cir. 1999); *Vann v. Dept. of Interior*, ___ F.3d ___, 2012 WL 6216614 (D.C. Cir. 12/14/12). Tribal officers and employees acting within the scope of their authority and in their official capacity are immune from suit. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983); *United States v. Oregon*, *supra*, 657 F.2d at 1012 n.8; *Great Western Casino, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828, 838-40 (Cal.App. 2d. Dist. 1999); *Redding Rancheria v. Superior Court*, 105 Cal. Rptr. 2d 773, 777-78 (Cal.App. 3rd Dist. 2001), *cert. denied sub. nom, Hansard v. Redding Rancheria*, 70 U.S.L.W. 3461 & 3463 (Jan. 22, 2002); *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 72 (Cal.App. 4th Dist. 1999).

6. Before a non-Indian can challenge tribal court authority in federal court, he or she must still exhaust all available tribal court remedies, under Supreme Court precedent. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985); *Boozer v. Wilder*, 381 F.3d 981, 984 (9th Cir. 2004). This includes exhausting available tribal appellate review. *Boozer*, *supra*; *Iowa Mut. Ins. Co.*, *supra*, 480 U.S. at 16-17. Opportunities to avoid exhaustion are limited.

F. **Full Faith & Credit vs. Comity**.

1. It is fairly well-accepted at this point that the judgments and orders of tribal courts, particularly in the field of domestic relations, are not entitled to automatic enforcement as a matter of full faith and credit. Rather, they are enforced as a matter of comity so long as the tribal court entering the judgment or order had jurisdiction to do so, and fundamental due process was accorded. *Garcia v. Gutierrez*, 217 P.3d 591, 606-07 (N.M. 2009). *See* SDCL § 1-1-25 (South Dakota statutory procedure for granting comity to tribal court judgments); *In re J.D.M.L.*, 739 N.W.2d 796 (S.D. 2007)(refusing to grant comity to tribal court order because tribal court lacked personal jurisdiction over non-Indian parent); *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990).

2. Older cases that addressed this issue sometimes classified Indian tribes as territories under the federal full faith and credit act at 28 U.S.C. § 1738. Others concluded that this classification did not apply to tribes because tribes are not expressly included. As discussed below, some federal statutes now expressly include tribes in their definitions section.

G. Public Law 280.

1. Public Law 280 is a termination-era federal statute passed in 1953. The civil portion of this statute is codified at 28 U.S.C. § 1360. The statute delegates some of the federal government's exclusive authority over Indian affairs to certain states. Public Law 280 includes six mandatory states (states that Congress mandated in the statute that Public Law 280 would apply to – Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin) and optional states (Congress allowed other states under the statute to opt into P.L. 280 coverage. There are ten states with varying degrees of PL 280 jurisdiction – Arizona, Idaho, Iowa, Washington, Florida, Nevada, Montana, South Dakota, North Dakota, Washington). Public Law 280 allows state courts to exercise concurrent jurisdiction over private civil adjudications involving Indians who reside or are domiciled within Indian country, including domestic relations matters. *See Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). Public Law 280 does not delegate jurisdiction over tribes themselves, and does not include any regulatory matters. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

2. You should check the Public Law 280 status of each state that may be involved in a custody or divorce action, in analyzing which government has jurisdiction over a case.

H. Indian Child Welfare Act.

1. Most of the Indian Child Welfare Act is inapplicable in domestic relations proceedings. The Act is primarily directed at involuntary state court dependency and neglect proceedings, but it does provide coverage of adoption proceedings, voluntary or involuntary. The Act expressly excludes from its definition of covered proceedings the award of custody to one of the parents. 25 U.S.C. § 1903(1). *DeMent v. Oglala Sioux Tribal* Court, 874 F.2d 510, 514 (8th Cir. 1989). Award of custody to someone other than the parent would be included under the Act. *See In re S.B.R.*, 719 P.2d 154 (Wash App 1986)(mother's attempt to grant guardianship to maternal grandmother covered by ICWA). Case law has also excluded custodial battles between unwed biological parents from coverage under the Act. *In re DeFender*, 435 N.W. 2d 717, 721 (S.D. 1989).

2. A parent does not include a non-Indian adoptive parent. *In re J.R.*, No. 57,934 (Okla. 2/2/82); *Carson v. Carson*, 13 P.3d 523, 525 n.4 (Or.App. 2000). If adoptive parents of an Indian child get divorced, and one parent is Indian and one

is non-Indian, awarding custody to the non-Indian adoptive parent, who is not a "parent" as defined by the ICWA, would invoke the Act. *See* 25 U.S.C. § 1916(a).

3. The ICWA applies to most adoption proceedings. 25 U.S.C. § 1903(1). It applies to both voluntary and involuntary adoptions. *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986); *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Step-parent adoptions are included under the ICWA. *Adoption of Lindsay C.*, 280 Cal. Rptr. 194 (Cal. App. 1991); *In re Crystal K*, 276 Cal.Rptr. 619 (Cal. App. 1990). The Act would arguably apply to surrogacy and in vitro arrangements. The U.S. Supreme Court has just accepted certiorari of an adoption case under the Indian Child Welfare Act. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012). Oral argument is set for April.

4. Tribal court orders and judgments (and public acts) that come under coverage of the Indian Child Welfare Act are entitled to full faith and credit by state courts to the same extent they would accord full faith and credit to any other jurisdiction. 25 U.S.C. §1911(d).

5. The U.S. Supreme Court accepted certiorari of an ICWA case on January 4, 2013, likely scheduled for oral argument in mid-April. The case is *Adoptive Couple v. Baby Girl*, 731 SE2d 550 (S.C., July 26, 2012). As the title indicates, the case involves adoption under the ICWA, and the certiorari petition raised establishment of paternity for unwed fathers under the Act and the applicability of the "existing Indian family exception" as issues. Amicus briefs address the authority of Indian tribes over Indian children in various circumstances, so the Court's opinion in this case could affect family law practice generally.

I. Discovery/Subpoenas.

1. As a component of their sovereign immunity from suit, Indian tribes generally are immune also from unconsented discovery through subpoena or other means. *United States v. James*, 982 F.2d 1314, 1319-20 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993); *Alltel Communications LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012). If a tribe voluntarily provides discovery in one area, it may be subject to additional discovery to flesh out the information provided. *James*, *supra*. Even here, the tribal officer or employee who voluntarily waives the sovereign immunity of the Tribe must have authority to do so under tribal law. *Chance v. Coquille Indian* Tribe, 963 P.2d 638 (Or. 1998). This sovereign immunity extends to tribal officers and employees acting within their official capacity and within the

scope of the Tribe's legal authority. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983); *Great Western Casino, Inc. v. Morongo Band of Mission Indians*, 88 Cal.Rptr.2d 828, 838-40 (Cal.App. 2d Dist. 1999).

2. When an Indian tribe brings suit, it necessarily consents to discovery related to claims involved in that suit. *United States v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981). This consent does not extend to other claims, however, such as counterclaims, mandatory counterclaims, or cross claims. *USF&G*, *supra*, 309 U.S. at 511. Some courts have held that limited discovery can be conducted on the issue of whether a tribe has validly waived its sovereign immunity or not, when the tribe raises sovereign immunity as a defense to suit. *See*, *e.g.*, *Seaport Loan Products LLC v. Lower Brule Community*, Index No. 651492/12 (N.Y. Sup. Ct., New York County, 1/8/13)(Order on Motion to Compel Discovery).

3. Indian tribes and tribal casinos often receive subpoenas ducas tecum looking for per capita payments, gaming activity records, income statements and the like in state family law matters. Tribes and their arms and entities are not subject to state court processes, and it is entirely voluntary whether tribes or tribal entities comply with such discovery requests.

J. Service of Process.

1. Where an Indian tribe has a procedure in place under tribal law for service of process within the reservation or Indian country for state court proceedings, that process must be complied with to obtain personal jurisdiction over an Indian defendant. *E.g.*, *State v. Surface*, 802 P.2d 100 (Or.App. 1990); *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990); *Francisco v. State*, 556 P.2d 1 (Ariz. 1976).

2. If a tribe does not have its own procedure for service of process in a state court proceeding for an Indian defendant on the reservation, the case law generally permits the state court to acquire personal jurisdiction by following its own procedures. *M.L.S. v. Wisconsin*, 458 N.W.2d 541 (Wisc. App. 1990); *State v. Railey*, 532 P.2d 204 (N.M. 1975).

3. Service of process still does not determine whether the state court has valid personal and/or subject matter jurisdiction over an Indian person who resides on a reservation and has had no contacts, or limited contacts, off the reservation.

K. Tribal Courts.

1. This is another subject that is too complicated to discuss at adequate length in this presentation or outline. Indian tribes generally have their own court systems, and the federal government has a trust obligation to preserve and protect tribal judicial authority over tribal territory and tribal members. *Fisher v. District Court*, *supra*.

2. Tribal courts vary widely in structure and sophistication. Tribes such as Cherokee and Navajo have sophisticated judicial structures with written, published laws, procedures and decisions, multiple appeals courts and judicial divisions, bar exams, and formal court, Anglo style court procedure in most instances. The Pueblos in New Mexico and Arizona have courts composed of religious leaders. Many tribes have an informal tribal customary judicial structure that exists alongside the more formal court, and other tribes have "Peacemaker" or other customary court systems that exercise judicial authority in certain circumstances. Other smaller tribes have small courts that meet infrequently, or share resources with other tribes. The Northwest Inter-Tribal Court System in Washington, for example, consists of fourteen tribes and includes courts of appeal. The court sits as the court of a particular tribe in a specific case, and applies the laws of that tribe in the case. Information about tribal courts is generally available on each Tribe's website.

3. The structure of tribal courts also varies widely. Many tribes have constitutions that establish the tribal court as an independent branch of the tribal government. Other tribal constitutions or laws place the tribal court system under either the executive or legislative branch. A number of tribes do not have constitutions or other formal governing documents, and their courts or judicial forums act pursuant to inherent tribal sovereign authority, with no formal structure. The ICWA, 25 U.S.C. § 1903(12), states that a tribal court means "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses (*see* 25 C.F.R. Part 11 – mostly Oklahoma), a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings."

4. Tribal judges also vary widely in qualifications and requirements. Many are law trained, and a number of tribes require that judges be practicing members of a state bar. Many tribes have Indian preference or tribal preference for judges. A number of tribal courts do not require law trained judges; the Warm Springs Tribe Court of Appeals, for example, is composed of appointed tribal elders. The Resources Section below includes sources to learn more about tribal courts.

5. The Indian Civil Rights Act, 25 U.S.C. § 1302 applies to actions of the tribal court. This Act applies some but not all of the Bill of Rights to the public actions of Indian tribes, since as discussed above Indian tribes are not subject to the United States Constitution. For example, there is no right to a jury trial in civil proceedings. 25 U.S.C. § 1302(10).

L. UCCJEA.

1. The UCCJEA by its terms does not apply to Indian tribes. Some tribes have adopted the UCCJEA or its predecessor, the UCCJA into tribal law, providing for cooperation with state courts in family law matters under specified conditions. The model UCCJEA contains an optional provision allowing a state to treat tribes as states under the Act. Several states, including Minnesota and New Mexico, have enacted this provision into state law. ***E.g.***, N.M.S.A. 40-10A-101-403. ***See Garcia v. Gutierrez***, 217 P.3d 591 (N.M. 2009)(applying the *Montana* test rather than the UCCJEA to determine "home state" under the UCCJEA).

2. Under the older UCCJA, states were split on whether tribes qualified as other "states" under their version of the UCCJA. Doesn't apply: ***Desjarlait v. Desjarlait***, 379 N.W.2d 139 (Minn.App. 1987); ***Malaterre v. Malaterre***, 293 N.W.2d 139 (N.D. 1980); ***Matter of Adoption of T.R.M.***, 525 N.E.2d 298 (Ind. 1988). Does apply: ***Martinez v. Superior Court***, 731 P.2d 1244 (Ariz. App. 1987); ***Alegria v. Redcherries***, 812 P.2d 1085 (Ariz.App. 1991).

3. In a very recent case (attached), the Navajo Nation Supreme Court applied the analysis under the UCCJEA to defer to a New Mexico state court custody, paternity and child support action despite the fact that under Navajo law, the Navajo courts had exclusive jurisdiction over the proceeding. ***Bahe v. Platero***, Nav. Sup. Crt, 1/8/13)

M. Parental Kidnapping Prevention Act (PKPA, 28 U.S.C. § 1738A).

1. The prevailing view is that the PKPA does not apply to Indian tribes, although the case law is split. *Garcia v. Gutierrez*, *supra* (does not apply); *John v. Baker*, 982 P.2d 738, 762 (Alaska 1999)(does not apply); *Desjarlait*, *supra* (does not apply); *Malaterre*, *supra* (does not apply); *Platero v. Platero*, 10 Indian Law Reporter 3108 (D.N.M. 1983)(PKPA does not apply to inter-tribal custody disputes); *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989)(does apply); *Martinez v. Superior Court*, *supra*.

2. Some tribes have a version equivalent to the PKPA in tribal law, where the tribe will grant full faith and credit to state court custody orders if that state grants full faith and credit to tribal court custody orders.

N. Full Faith and Credit for Child Support Orders, 28 U.S.C. § 1738B.

1. Section 1738B by its terms defines "states" under the statute to include "Indian country," so the statute applies to Indian tribes. *See Smith v. Hall*, 707 N.W.2d 247 (N.D. 2006). Courts can modify the child support orders of other jurisdictions only under limited circumstances. The Siletz Tribal Code, for example, allows the Siletz Tribal Court to review the parent's ability to pay and to modify the payment amount in appropriate circumstances.

2. A number of tribes and states have entered into agreements setting out how this statutory provision will be enforced. It is also a requirement of receiving federal child welfare funding and is often a provision in Title IV-E Agreements between tribes and states, or entered into directly by tribes with the federal government.

3. Even where a state has validly issued a child support order against an Indian father who resides on a reservation, a garnishment order implementing that order can only be enforced through a tribal court proceeding. *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980). The State has no jurisdiction to enforce child support orders directly on the reservation against and Indian who resides on the reservation and has no off-reservation contacts. *State ex rel. Flammond v. Flammond*, 621 P.2d 471 (Mont. 1980); *Nenna v. Moreno*, 647 P.2d 1163 (Ariz. App. 1982); *McKenzie County Social Services Board v. V.G.*, 392 N.W.2d 399 (N.D. 1986), *cert. denied*, 480 U.S. 930 (1987).

O. Interstate Compact on Placement of Children (ICPC).

1. The ICPC does not apply to Indian tribes. Memorandum, March 29, 1982, Association of Administrators of the Interstate Compact on the Placement of Children.

2. In *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007), the Court held that the ICPC required that the State ICPC administrator verify that a proposed adoptive placement of an Indian child in Florida complied with the Indian Child Welfare Act before approving the proposed adoptive placement and allowing the child to leave Oklahoma.

3. In *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, the South Carolina Supreme Court denied application of the ICPC to invalidate an adoptive placement of an Indian child from Oklahoma to South Carolina. The court held that the purpose of the ICPC was to ensure that placement of children across state lines was safe, and does not protect the rights of birth parents. 739 P.3d at 559. The birth mother, a non-Indian, reported the child's ethnic heritage on ICPC forms as "Hispanic" rather than "Native American" to avoid application of the ICWA. *Id.* At 554-55.

4. Practice varies from state to state about whether a tribal home study in the receiving state qualifies as a valid home study for purposes of the ICPC.

III. Application of Federal Indian Law Principles to Family Law.

A. Applying the *Montana* test.

1. The two *Montana* exceptions allow tribal court jurisdiction over the actions of non-members within Indian country when 1. the non-member consents to tribal jurisdiction, or 2. the actions of the non-member threaten the political integrity, the economic security, or the health and welfare of the tribe.

2. Consent to tribal jurisdiction by a non-member can occur by one of two methods. First, a non-member consents to tribal jurisdiction by initiating a lawsuit in tribal court. *Smith v. Salish & Kootenai College*, 434 F.3d 1127 (9th Cir. 2006); *John v. Baker*, 982 P.2d 738 (Alaska 1999), 30 P.3d 68 (2001). Second, while the general *Montana* rule is that non-members cannot be made defendants against their will in a tribal court action, a non-member consents to tribal court jurisdiction by participating in a tribal court action initiated by a tribal member. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341-42 (2008)(use by bank of tribal court to serve process for state court action does not constitute consent to tribal court jurisdiction for action by tribal members against bank). Consent to tribal court jurisdiction is narrowly construed; consent in one area is not consent to tribal court jurisdiction for other matters. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)(tribal contract did not constitute consent to tribal jurisdiction for tort action involving car accident); *Atkinson Trading Co. v. Shirley*, 531 U.S. 645, 656 (2001)(receipt of tribal services by non-Indian business located on fee land within reservation is not consent to tribal taxation unrelated to those services – "it is not 'in for a penny, in for a Pound.'"); *Jones v. Lummi Tribal Court*, No. CR-1915-JLR, Order, W.D.Wash. 12-10-12 (consent to

tribal jurisdiction regarding order of protection is not consent to adjudication of custody in tribal court).

3. Domestic relations involving tribal members and tribal member children have been held to be a matter essential to the political integrity, the economic security, and health and welfare of the tribe. *See In re Marriage of Skillen*, 956 P.2d 1, 11-12 ("[The ICWA] accentuates that custody matters that involve Indian children implicate a broader range of concerns than custody matters that do not involve Indian children, and furthermore, that those interests are of great importance to the United States, and of course, to the integrity of Indian tribes. Despite the ICWA's nonapplication to dissolution-based custody disputes, we also recognize that the tribal court's experience and abilities in these areas are inherent advantages over state courts and remain as such when the custody matter before a tribal court happens to occur pursuant to a marriage dissolution."), 15 ("We further assert that in any matter so essential to tribal relations as a custody matter involving an Indian parent and Indian child who reside on Indian land, we must presume that the tribal court has jurisdiction and consider the potential state exercise of jurisdiction in terms of its infringement on tribal sovereignty."), 16 ("Especially when Indian children reside on the reservation, they represent the single most critical resource to the tribe's ability to maintain its identity and to determine its future as a self-governing entity. As such, we cannot think of a more legitimate and necessary manifestation of tribal self-government than the tribe's right to have a role in a custody determination of its member children who reside on the reservation with an enrolled parent.")(Mont. 1998)(" Based on these . . . criteria, we conclude as a matter of law that a more reasoned approach for the courts of this state is to recognize exclusive tribal jurisdiction in child custody proceedings between parents where at least one parent is an Indian and that parent resides on the reservation with an Indian child," even where the non-Indian parent resides off-reservation and has filed a divorce action in state court.).

4. This essential tribal interest in its children is reflected in the ICWA. *See* 25 U.S.C. § 1901(3)("There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee in protecting Indian children"); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52-53 (1989)("The protection of [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the [Indian] child which is distinct from but on a parity with the interests of the parents. . . . the interests of the tribe in custodial decision with respect to Indian children are as entitled to respect as the interests of the parents." (*quoting In re Adoption of Halloway*, 732 P.2d 962, 969-

70 (Utah 1986)), 34 ("Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."); *Wakefield v. Little Light*, 347 A.2d 228, 234, 237-38(Md. App. 1975)("there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children."; "[W]e think it plain that child-rearing is an 'essential tribal relation'"); H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 15 (July 24, 1978)(House Report in support of ICWA: "Even this State court (in *Wakefield*) recognized that a tribe's children are vital to its integrity and future.").

5. This essential tribal interest over Indian children extends everywhere, even off-reservation. *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999)("We hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess [inherent , non-territorial sovereignty allowing them to resolve domestic disputes between their own members." (*John* involved Alaska villages, which have no Indian country territory under federal law; father was a member of a different Alaska Native Village than mother and child; Alaska Native Villages are recognized Indian tribes)); *Johnson v. Jones*, Order on Motion to Dismiss, No. 6:05-cv-1256-Orl-22KRS, p. 3, D.M.D. Fla., 11/3/05)(tibe's "sovereign authority extends beyond a tribe's territorial boundaries," citing *John v. Baker* and quoting *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980)(domestic relations)); *Bahe v. Platero*, *supra*, Navajo Supreme Court – Navajo exclusive jurisdiction over member children under tribal law extends to all such children, without regard to location).

6. The territorial component of the *Montana* test - that Indian tribes generally lack jurisdiction over the activities of non-members on non-Indian fee land within a reservation - also plays a part in determining domestic relations jurisdiction. *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009)(Non-Indian mother resides with Indian child within Indian reservation but on non-Indian fee land, giving state court concurrent jurisdiction over her divorce action).

7. The converse of the *Montana* test is also true – Indians residing on a reservation cannot be made defendants in a state court custody or divorce proceeding without their consent, where the tribal member has no relevant contacts off-reservation. *See Hinkle v. Abeita*, 283 P.2d 877 (N.M.App. 2012) .

B. Concurrent Jurisdiction: State vs. Tribal Jurisdiction over Family Law matters involving Indian parents and children.

1. While the legal principles discussed above are relatively straightforward, the reality of family structure on the ground makes these principles difficult to apply in a given fact situation. Indian tribes and tribal members have greatly increased their interaction with non-Indian society in the last 50 years. Tribal members travel off-reservation for a variety of reasons – school, work, marriage, etc., and non-Indians commonly reside on reservations and become involved with tribal members. It is an uncommon case today where all the contact and activity in a given divorce or custody case occurs on a reservation, or all off the reservation. Most cases involve a mix of on and off-reservation residence, and on and off reservation activity that is relevant to a determination of court jurisdiction.

2. Because of the mix of on and off-reservation activity, most cases result in concurrent jurisdiction. Both the relevant state court and tribal court can exercise valid jurisdiction over a domestic relations case. In many of the cases listed below, both courts have exercised their jurisdiction – the Indian parent has filed in tribal court and the non-Indian parent has filed in state court – and the question then becomes whether and under what conditions one court should defer as a matter of comity or judicial efficiency, or as a matter of law, to the other court. In addition, the question of whether a court can exercise jurisdiction over all aspects of the case must be addressed. For example, if the children are tribal members and reside on the reservation, the off-reservation non-Indian parent can validly file a divorce action in state court, but the state court will likely lack jurisdiction to decide custody of the children in such action. Likewise, if the children are non-members of the tribe and perhaps ineligible for enrollment in the tribe (i.e., their tribal blood quantum is too low), the tribal court may lack jurisdiction over the children as a matter of tribal law.

3. In some cases, there is no court that can exercise complete jurisdiction over all aspects of a domestic relations proceeding. This is an outcome of the various federal policies and federal Indian law principles that protect the integrity of Indian tribes and governments. In most cases, the tribal and state courts must decide as a matter of comity whether to defer to the other court. The good news is that there is much greater cooperation among and communication between state and tribal courts, generally and in specific cases. In some cases, such as Minnesota and Wisconsin (the Teague Protocol), the state and tribal courts have formed judicial consortiums to address how to determine jurisdiction in domestic relations cases in orderly fashion and in a way that promotes the best interests of the children and parties.

4. As a general matter, state courts lack jurisdiction to determine some incidents of divorce when an Indian is involved. The federal government has exclusive authority over land held in trust by an individual Indian, usually as an allotment, or over trust funds that might have been awarded to individual Indians in a claims case brought by a tribe against the United States for violation of the federal government's fiduciary obligation to tribes. *See*, *e.g. In re Marriage of Wellman*, 852 P.2d 559 (Mont. 1993); *Sheppard v. Sheppard*, 655 P.2d 895, 921 (Idaho 1982); *Landauer v. Landauer*, 975 P.2d 577 (Wash.App. 1999); *In re Estate of Big Spring*, 255 P.3d 121 (Mont. 2011).

5. The issue of concurrent jurisdiction over child custody matters and comity also applies to inter-tribal custody disputes. There is no overriding federal statute that requires Indian tribes to give full faith and credit or even comity to the domestic relations orders of other tribes. The ICWA requires tribes to give full faith and credit to child custody proceeding (as defined by the ICWA) orders of other tribes, 25 U.S.C. § 1911(d), but there is no enforcement mechanism and no waiver of tribal sovereign immunity. These cases involve children who are eligible for membership in more than one tribe. *See Platero v. Platero*, 10 Indian Law Reporter 3108 (D.N.M. 1983); *Navajo Nation v. Confederated Tribes of the Warm Springs Reservation of Oregon*, No. 87-915-DA (D.Or. 1988), 15 Indian Law Reporter 3058, 3060 (dismissed on sovereign immunity grounds). The *Ex parte Young* doctrine has since been applied to tribes and could be used to test whether one tribal court has valid jurisdiction over a child, as opposed to another tribe.

6. The following is a non-inclusive list of state and federal cases that have addressed the issue of concurrent state versus tribal child custody jurisdiction, in addition to the cases cited above. Each case is highly fact-dependent:

    a. *Marriage of Limpy*, 636 P.2d 266 (Mont. 1981).
    b. *Wildcatt v. Smith*, 321 S.E.2d 909 (N.C.App. 1984).
    c. *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950).
    d. *Lonewolf v. Lonewolf*, 657 P.2d 627 (N.M. 1982).
    e. *In re Custody of Zier*, 750 P.2d 1083 (Mont. 1988).
    f. *Fisher v. Fisher*, 656 P.2d 129 (Idaho 1982).
    g. *Martinez v. Superior Court*, 731 P.2d 1244 (Ariz.App. 1984).
    h. *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1984).
    i. *Red Fox and Red Fox*, 542 P.2d 918 (Or.App. 1975).
    j. *Thomas v. Thomas*, 453 N.W.2d 752 (Neb. 1990).
    k. *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn.App. 1985).

l. *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988).
m. *Joseph v. Redwing*, 429 N.W.2d 49 (S.D. 1988).
n. *Jackson County v. Swayney*, 331 S.E.2d 145 (N.C.App. 1985), *aff'd in part, rev'd in part*, 352 S.E.2d 413 (N.C. 1987).
o. *State ex rel. Dept. of Human Services v. White*, 660 P.2d 590 (N.M. 1983).
p. *In re the Matter of J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007).
q. *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989)
r. *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980).
s. *Wisconsin Band of Potowatomies of the Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (W.D.Mich., N.D. 1973).
t. *Gerber v. Eastman*, 673 N.W.2d 854 (Minn.App. 2004).
u. *IN re Lelah-Puc-Ka-Chee*, 98 F. 429 (D.Iowa 1899).

IV. Resources.

A. There are many sources of information about Indian law generally. They include:

1. Cohen's Handbook of Federal Indian Law (Lexus Nexus 2012).

2. American Indian Law in a Nutshell, Canby Jr., Willam C. . West Publishing, 5th ed. 2009.
3. The Rights of Indians and Tribes, Pevar, Stephen L., 4th ed 2012, Oxford University Press.

B. Websites with information about tribal courts and tribal laws include:

1. The Native American Rights Fund is the largest public interest law firm representing tribes and individual Indians on a broad range of issues. Their website, www.narf.org, contains an online manual on the Indian Child Welfare Act, and many other Indian law topics. In addition, NARF operates the National Indian Law Library, which contains an extensive set of tribal laws and constitutions in addition to other Indian law materials. www.narf.org/NILL.

2. The National Indian Justice Center in Santa Rosa, California, conducts extensive training for tribal court personnel and other tribal government personnel on a broad range of issues. www.nijc.org.

3. The National American Indian Court Judges Association is an organization representing tribal court judges across the country. They also operate a tribal court

resource center and conduct trainings for tribal court judges and court personnel. http://naicja.org.

4. West Publishing Co. recently began publishing a tribal court reporter that reports tribal court decisions. In addition, they are assembling and publishing tribal court laws and ordinances – I do not know how extensive their collection is.

5. Finally, most tribes have their own websites now that contain tribal laws and policies, and usually have a description of the tribal court and tribal government, in addition to a tribal history. These sites are readily available on the web.

TRIBAL AND STATE JURISDICTION

TO

ESTABLISH AND ENFORCE CHILD SUPPORT

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The information in this publication is current as of December 2005.

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PREFACE

In 1991, the Federal Office of Child Support Enforcement (OCSE) published Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support. In addition to legal research, the publication identified barriers to, and possible solutions for, Tribal and State court reciprocity in child support. The publication included information from interviews conducted by the American Bar Association with attorneys, judges, and child support caseworkers who daily worked in State and Tribal courts. Organizations such as the National Child Support Enforcement Association, the Institute for Court Management, the Bureau of Indian Affairs, and the American Indian Law Center also provided input.

Since 1991, there has been increased interaction between States and Tribes in the area of child support. There are now nine Tribes receiving Federal funding to operate Title IV-D child support programs. OCSE has established a Tribal/State Cooperation Workgroup. The U.S. Supreme Court has also issued several decisions regarding Tribal and State jurisdiction. As a result of this activity, OCSE issued a task order to revise its 1991 publication.

Unlike the first publication, the focus of this revised publication is on legal research rather than identification of best practices. Researchers used on-line internet resources , identified in the Appendix, as well as traditional “law library” resources, in order to identify Tribal and State case law, law review articles, and other publications. The goal of this revised publication is to provide a comprehensive legal resource for child support lawyers and decision-makers, although Tribal and State caseworkers may also benefit from the jurisdictional discussions and explanation of Federal regulations regarding child support establishment and enforcement.

Historical information about Federal legislation affecting Tribes provides a context for the discussion of jurisdictional issues in child support cases. The publication is not intended to be a statement of Federal/Tribal policy. For comprehensive information about the relationship between Tribes, States, and the Federal government, readers should consult the Handbook of Federal Indian Law by Felix Cohen, which is updated on a regular basis. The most recent update is Nell Newton et al., eds., Cohen’s Handbook of Federal Indian Law (2005 ed.).

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Table of Contents

CHAPTER ONE
INTRODUCTION

OVERVIEW

According to data submitted to the Federal Office of Child Support Enforcement, State child support agencies reported 15.9 million child support cases in FY 2004.[1] These cases resulted in the establishment or acknowledgment of 1.6 million paternities, the establishment of 1.2 million new child support orders, and the collection and distribution of $21.9 billion in child support payments.[2] Such data do not include child support cases handled outside of the IV-D program. Nor do they include Tribal cases. The collections represented about 59% of the total current amount due and a collection in about 60% of arrears cases.[3] Such data do not include child support cases handled outside of the IV-D program. Nor do they include Tribal cases.

During the same period, nine Tribes operating Federally funded IV-D child support programs reported 26,425 child support cases.[4] These cases resulted in the establishment of 2,773 paternities, the establishment of 10,211 support orders, and the collection and distribution of $12.4 million in child support payments.[5] Such data do not include child support cases heard within the legal system of those nine Tribes that were not processed through the Tribal IV-D program. Nor do they include child support cases arising within the other 553 Federally recognized Tribal governments.

Although there are information gaps, it is clear from the above statistics that there are large numbers of children entitled to child support for whom enforcement remains a problem. To date, most of the focus has been on improving interState enforcement between States. However, many of the same issues that arose in years past in the interState arena – lack of reciprocity in enforcement, service of process problems, poor communication – are present today when there is interaction between a State and an American Indian Tribe. [6]

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[1] Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Child Support Enforcement (CSE) FY 2004, Preliminary Report to Congress.
[2] *Id*.
[3] *Ibid*.
[4] Office of Child Support Enforcement, *supra* note 1. The reporting Tribes were the Chickasaw, Lac du Flambeau, Lummi, Menominee, Navajo, Forest County Potawatomi, Puyallup, Sisseton-Wahpeton, and Port Gamble S'Klallam.
[5] *Id*.
[6] As noted by the Native American Training Institute, "[t]he dilemma over whether to use the term Indian, Native American, American Indian, or some other term, when referring to the collective group has been a long-running debate. The only agreement seems to be that there is no agreement on any one term. . . . [T]he issue often comes down to a matter of personal preference. . . . It is also important to note that some people may have definite preferences for the term used while others will not have a particular preference as long as any term is used respectively." North Dakota Department of Human Services, Journey to Understanding: An Introduction to North Dakota Tribes (2003) (written under contract by the Native American Training Institute) [hereinafter referred to as Journey to Understanding]. According to a 1995 U.S. Census Bureau survey of people within the group that the term was meant to represent, 49.76% of the respondents preferred the term "American Indian," 37.35% preferred the term "Native

In 1989, a project funded by the State Justice Institute surveyed various individuals in the 32 States with Federally recognized Indian Tribes. The second most frequently cited area of disputed jurisdiction cases was that of domestic relations cases--divorce, child custody, and support.[7] Specifically, in the area of child support enforcement, the following problems were cited: "a non-Indian spouse may challenge a Tribal court child support order accompanying a divorce; a reservation Indian may seek to reject a State court's jurisdiction with child support; a Tribe member may seek to reject a State court process served on the reservation."[8] Tribal court judges have raised similar concerns. In a 1999 survey of Tribal court judges in the lower 48 States, 80% of the respondents indicated that they had encountered problems having their Tribal court judgments enforced in State forums – even when the States are required to do so by Federal law.[9]

Over 40% of the difficulties with State court recognition of Tribal court orders related to subject matters covered by the Federal full faith and credit mandates of the Violence Against Women Act[10] and the Full Faith and Credit for Child Support Orders Act.[11] In hearings before the U.S. Commission on InterState Child Support, American Indians also cited the need for State courts to be more sensitive to Tribal custom and collection procedures, and the need for expedited modification or review procedures when a State support order is based on imputed wages, which may be unrealistic for obligors living on Indian reservations.[12]

In 1991, the Federal Office of Child Support Enforcement published the first edition of Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support. The publication documented efforts by States and Tribes to address these issues through intergovernmental efforts. Innovations included intergovernmental forums addressing jurisdiction issues, intergovernmental agreements regarding support enforcement, specially drafted court rules, and uniform registration statutes addressing mutual recognition of State and Tribal support orders. This second edition updates the 1991 publication, with an emphasis on changes in law. The most dramatic change since 1991 is the advent of Federally funded Tribal child support programs.

DEFINITIONS

Indian According to the 2002 U.S. Census, there are about 4 million people who identified themselves as American Indian, Alaska Native, or a combination of Indian and other races. There are many legal definitions of "Indian." For example, under some

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American," 3.66 % preferred some other term, 3.51% preferred the term "Alaska native," and 5.72% expressed no preference. For purposes of this monograph, the term American Indian or Indian is used.

[7] Rubin, *Tribal Courts and State Courts: Disputed Civil Jurisdiction Concerns and Steps Toward Resolution*, State Ct. J. 9 (Spring 1990).

[8] *Id.* at 11.

[9] *See* Reeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311 (2000).

[10] 18 U.S.C. § 2265 (2002).

[11] 28 U.S.C. § 1738B (2002).

[12] U.S. Commission on InterState Child Support, Supporting Our Children: A Blueprint for Reform (U.S. Gov't Printing Office: Washington, DC 1992).

Federal laws, an Indian is anyone of Indian descent.[13] Other Federal laws define "Indian" as a member of a "Federally recognized" Indian Tribe.[14] Federal regulations governing the Tribal IV-D program (45 C.F.R. § 309.05) define “Indian” as “a person who is a member of an Indian Tribe.” They then define “Indian Tribe” as “any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe and includes in the list of Federally-recognized Indian Tribal governments as published in the Federal Register pursuant to 25 U.S.C. 479a-1.” Still other Federal laws use the word "Indian" without defining it.[15] Additionally, each Indian Tribe has its own enrollment requirements. Enrollment is usually based on either descent or blood quantum. Therefore, a person who is not considered a member of a Tribe because he or she lacks the requisite percentage of Tribal blood may nevertheless be considered an Indian under Federal law. Similarly, a non-Indian adopted into Tribal membership may not be considered an Indian under Federal law.[16]

Indian Country "Indian country" is defined in a Federal statute addressing criminal jurisdiction:

> "Indian country" . . . means (a) all land within the limits of an Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[17]

Presumably, this definition would also apply to civil jurisdiction (for which there is no comparable Federal statute). The definition is significant because it means that land owned by a non-Indian that is located within an Indian reservation is still considered Indian country. Also, trust and restricted Indian allotments that are located outside of a reservation are considered Indian country.

"Indian country" and "Indian reservation" are often used synonymously but they are not identical. As noted above, Indian country can include trust and restricted Indian allotments that are outside of the reservation. Proper identification of Indian country is crucial in any discussion of Tribal court jurisdiction. If there is a dispute, proof is an issue of law to be decided by a judge rather than a jury.[18]

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[13] *See, e.g.*, 25 U.S.C. § 479.
[14] *Id*.
[15] *See, e.g.*, 25 U.S.C. §§ 451, 452, 456.
[16] *See United States v. Rogers*, 45 U.S. 567 (1846); *State v. Atteberry*, 519 P.2d 53 (Ariz. 1974).
[17] 18 U.S.C. § 1151.
[18] *See, e.g.*, *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied* 477 U.S. 906 (1986); *United States v. Levesque*, 681 F.2d 75, 78 (1st Cir. 1982), *cert. denied* 459 U.S. 1089 (1982).

Reservation A reservation is land under the jurisdiction of Indian Tribes, bands, or communities, and the Federal government, as opposed to the States in which they are located. It covers territory over which a Tribe(s) has primary governmental authority. Its boundary is defined by Tribal treaty, agreement, executive or secretariat order, Federal statute, or judicial determination.[19]

Tribe A Tribe is a group of Indians that has had a certain autonomous political status since the time of its first contact with European settlers. They have a government-to-government relationship with the United States, which finds its basis in the Constitution. In discussing jurisdictional issues, the term "Tribe" refers to a group of American Indians protected by a trust relationship with the Federal government.[20]

This special relationship with the United States only applies to Tribes that are "recognized" by the Federal government. Such recognition has its origins in treaties, Acts of Congress, Executive Orders, rulings by Federal courts, or the modern Federal acknowledgment process at the Department of the Interior.[21] As of 2005, there are about 1.5 million Indians who are enrolled in 562 Federally recognized Tribes. These Tribes are located in 32 of the contiguous States and Alaska.

Each Tribe establishes its own criteria for enrollment. These criteria are set forth in Tribal constitutions, articles of incorporation, or ordinances. Usually, to enroll as a Tribal member, a person must meet Tribal requirements regarding descent or blood quantum. Tribal membership is not contingent on residency. Each Tribe maintains its own enrollment records. As a general rule, a person cannot have dual enrollment status.

Trust Land "Trust lands" are lands owned either by a Tribe or by an individual Indian, and the United States acts as trustee to the Tribe or the individual Indian. The land cannot be sold, transferred, leased or used by someone else unless approved by the Federal government. It is not subject to most State jurisdiction, including taxation and condemnation, but it is subject to rules and administration of the Federal government.

[19] According to the Native American Training Institute, a common misperception is that "reservations" are parcels of land given to Indian Tribes by the U.S. government. To the contrary, a reservation is land that Indian Tribes have always owned; it is land that was "reserved" by the Tribes and never given over to the United States. Journey to Understanding, *supra* note 6.
[20] F. Cohen, Handbook of Federal Indian Law (ed. 1982).
[21] Information from the website of the U.S. House Committee on Resources, Office of Native American and Insular Affairs Subcommittee, http://resourcescommittee.house.gov/subcommittees/naia.htm.

CHAPTER ONE
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

18 U.S.C. § 1151

18 U.S.C. § 2265

25 U.S.C. § 451

25 U.S.C. § 452

25 U.S.C. § 456

25 U.S.C. § 479

28 U.S.C. § 1738B

Case Law

United States v. Rogers, 45 U.S. 567 (1846)

United States v. Levesque, 681 F.2d 75 (1st Cir. 1982), *cert. denied* 459 U.S. 1089 (1982)

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CHAPTER TWO
HISTORY OF TRIBAL POWERS

PRIOR TO EUROPEAN CONTACT

Most Indian Tribes had developed their own forms of self-government long before contact with European nations. Although the forms of government varied, the traditional decision-making body was the Tribal council. Council leaders were usually consensus-oriented, achieving "control over members by persuasion and inspiration, rather than by peremptory commands."[22] Historically, Indian Tribes had no written laws. Conduct was governed by custom. Sanctions for violation of the norm of conduct included mockery, ostracism, and religious sanctions. Tribal justice also often included restitution or compensation to the injured party.

Contact with European nations – and increasing interaction with American society – forever changed Tribal government. However, Tribal sovereignty was recognized even then; various foreign governments negotiated treaties with American Indian Tribes, obtaining land in exchange for small goods, money, or promises.

POST FORMATION OF UNITED STATES

A Tribe's presence within the territorial boundaries of the United States subjects the Tribe to Federal legislative power. Tribes can no longer exercise external powers of a sovereign, such as entering into treaties with foreign countries.[23] However, that does not mean that all preexisting Tribal powers are abolished. The guiding principle is that Tribal powers are exclusive in matters of internal self-government, except to the extent that such powers have been limited by Federal treaties or statutes.

The Eighteenth Century

In 1775, the Continental Congress created three departments of Indian affairs, which had responsibility for maintaining relations with Indian Tribes in order to assure their neutrality during the Revolutionary War.[24]

In 1789 – the first year of the first U.S. Congress – there were three statutes passed that affected Indians. The Act of August 7, 1789 created the Department of War. In addition to handling military affairs, the Department was required to handle "such other matters . . . as the President of the United States shall assign . . . relative to Indian affairs." The second statute required respect for Indian rights in the governance of the Northwest Territory. The third law also recognized the sovereign status of Indian Tribes by appropriating a sum not exceeding $20,000 to defray "the expense of negotiating and treating with the Indian Tribes."

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[22] Cohen, *supra* note 20, at 230.
[23] *See Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 574 (1823). *See also* Cohen, *supra* note 20.
[24] Journey to Understanding, *supra* note 6, at 27.

The Nineteenth Century The first major Federal act impacting on Tribal jurisdiction was the General Crimes Act of 1817.[25] It gave the Federal government jurisdiction over crimes committed by Indians against non-Indians within Indian country, so long as the Indian involved had not been punished under the law of the Tribe. The General Crimes Act also gave the Federal government exclusive jurisdiction over crimes committed by non-Indians against Indians. Significantly, Indian nations retained exclusive jurisdiction over crimes committed by Indians against other Indians.[26]

There were also three U.S. Supreme court decisions between 1823 and 1832 that addressed Tribal self-government: *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Cherokee Nation v. Georgia*, the Cherokee Nation filed in the Supreme Court a motion for injunction against the State of Georgia to restrain the State from executing and enforcing the laws of Georgia within the Cherokee nation. The Court first addressed whether it had jurisdiction under Article 3 of the Constitution, which gives the Court jurisdiction over disputes between a State or the citizens thereof and a foreign State. Although the Court concluded that the Supreme Court lacked jurisdiction because an Indian Tribe within the United States is not a foreign State in the sense of the Constitution, Chief Justice Marshall highlighted the unique sovereign status of Tribes. He introduced the phrase "domestic dependent nations" as a way to describe the status of American Indian Tribes, stating that the relationship between Tribes and the United States resembled that of "a ward to his guardian."

Worcester v. Georgia was particularly supportive of Tribal sovereignty. In 1829, Georgia had passed a law to add Cherokee territory to certain Georgia counties and to extend Georgia laws over the same. In 1830, Georgia passed another law making it unlawful for anyone, "under the pretext" of authority from the Cherokee Tribe, to meet or assemble as a council for the purpose of making laws for the Tribe, or to hold court or serve process for the Cherokee Tribe. It also made it unlawful for a white person to live within the Cherokee nation without a license from the Georgia governor, in which the person swore to uphold Georgia laws while within the Cherokee nation. Worcester, a Vermont resident who resided in the Cherokee nation in order to preach Christianity, was convicted of violating the law. The Supreme Court issued a writ of error, ordering Georgia to appear before the Court to show why its act was not unconstitutional. In *Worcester*, the Court acknowledged that war and conquest give certain rights to the conquering State. However, the relation between the Cherokee Nation and the United States was "that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character." Specifically, the Court held that the Cherokee Nation was a distinct community over which the Cherokee Nation had exclusive authority and in which State laws had no force.

[25] Codified at 18 U.S.C. § 1152. Further discussion of the General Crimes Act is found within Chapter Three.
[26] *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 9.02[c] (2005 ed.).

Despite the Supreme Court's recognition of Tribal sovereignty, the period from 1815 to 1845 was also the height of the Removal Era. President Andrew Jackson advised the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes to move west of the Mississippi River or be subject to the laws of the States of Georgia and Alabama. From 1845 to 1887, thousands of settlers seeking gold, land, and adventure took over this "promised" land west of the Mississippi. From 1817 to the late 1880s, approximately 42 different Tribes were forcibly relocated to "Indian country."

The Removal Era also gave rise to what are known as assimilationist policies – attempts to "civilize" Native Americans by indoctrinating them into "Western" religion, views on land ownership, and trade. The end of the nineteenth century marked a shift from the earlier recognition of Tribal self-government to legislative curtailment of the powers of Indian Tribes.

In 1883 the U.S. Supreme Court decided the case of *Ex parte Crow Dog*, 109 U.S. 556 (1883). Crow Dog had killed a fellow Sioux, Spotted Tail. Tribal law required that Crow Dog support the family of Spotted Tail; it did not provide for other punishment such as imprisonment. The family of Spotted Tail accepted the Tribal punishment. However, due to a public outcry in the States, the Federal government prosecuted Crow Dog in Federal court where he was convicted and sentenced to death. The Supreme Court reversed, concluding that the "pledge to secure to these people . . . an orderly government . . . necessarily implies . . . the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." The Court recognized the possibility of Congress' placing limits on Tribal self-government but only if Congress did so in clear language.

Two years later, Congress responded with passage of the Major Crimes Act. The Act only applies to Indian defendants. It makes it a Federal crime for an Indian to commit certain major crimes -- such as murder, rape, and arson -- against either an Indian or a non-Indian in Indian country. According to several commentators, it is unclear whether such Federal jurisdiction is exclusive or whether Tribal courts have concurrent jurisdiction over the crimes listed.[27]

[27] *See, e.g*., Stoner and Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders,* 34 N.M.L. Rev. 381 (2004); Department of Justice, Criminal Resource Manual, The Major Crimes Act – 18 U.S.C.§ 1153 (Oct. 1997). Although the Supreme Court has alluded to the possibility that federal jurisdiction under the Major Crimes Act may be exclusive of the Tribes (*see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14 (1978)), at least one federal circuit has found Tribal jurisdiction to be concurrent (*see Wetsit v. Stafne*, 44 F.23d 823, 825-26 (9th Cir. 1995)). Reading the statute such that Tribal concurrent jurisdiction remains is also consistent with subsequent Congressional action. In reaction to the Supreme Court case of *Duro v. Reina*, Congress amended the Indian Civil Rights Act. The 1991 amendment defines "powers of self-government" to include the inherent power of Indian Tribes to exercise criminal jurisdiction over all Indians; there is no express exception for crimes enunciated in the Major Crimes Act. *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 9.04 (2005 ed.).

Two years later, in 1887, Congress passed the General Allotment Act. This Act provided for the division of Tribal lands into 160-acre parcels allotted to individual Indians and for the sale of "surplus" Tribal lands to non-Indians. The allotment system was designed to break up reservations and dilute the powers of Tribal governments. By 1934, Indians had lost two-thirds of their land: from 148 million acres in 1887 to 48 million acres in 1934.

It was during this "assimilation era" that the Bureau of Indian Affairs instituted Courts of Indian Offenses (referred to as BIA or CFR courts). These courts were run by the BIA Indian agent for each reservation pursuant to legal codes and procedures established by the BIA. Indian judges were hired and fired by the BIA. Even the police were chosen by the BIA. The courts had the power to resolve Tribal civil disputes and minor criminal offenses. However, the structure imposed by the BIA undermined the authority of Indian chiefs and traditional Tribal self-government.

The Twentieth Century President Roosevelt renounced this policy of autocratic rule over Indians in signing the Indian Reorganization Act of 1934.[28] The Act reflected conflicting philosophies toward Tribal self-government. On the one hand, the Act abolished the allotment policy. It also guaranteed the right of any Indian Tribe to "organize for its common welfare," including the adoption of an "appropriate constitution and bylaws." On the other hand, it gave the Secretary of the Interior the authority to provide technical advice and assistance as the Secretary determined was needed. It replaced the traditional consensus decision-making approach of Tribes with a requirement that the constitution and by-laws would become effective when ratified "by a majority vote of the adult members of the Tribe" in a special election. Finally, it required the Secretary to "review the final draft of the constitution and bylaws . . . to determine if any provision" was contrary to applicable laws. Historically, Indian Tribes had governed through custom rather than formal written laws.[29] The Indian Reorganization Act resulted in Tribes ratifying constitutions and laws that, in large part, copied BIA codes.[30]

Congressional attitude toward Indian Tribes, as reflected in legislation, has varied in the years since the Indian Reorganization Act. In the 1950's Congress passed several termination acts that resulted in the termination of 109 Tribes as Federally recognized, self-governing entities.[31] In 1953, Congress also enacted Public Law 280. Discussed in greater detail later, Public Law 280 authorized States to impose State civil and criminal jurisdiction over reservations, with or without Tribal consent.

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[28] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).

[29] Cohen, *supra* note 20.

[30] Most Tribes have now replaced BIA codes with codes that address diverse issues.

[31] Nearly all of these tribes were later successful in regaining Tribal status, although many recovered only a small portion of their former lands. See Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev. 53, nn. 8-9 (1995); Walch, *Terminating the Indian Termination Policy*, 35 Stan. L. Rev. 1181 (1983).

The 1960's saw passage of the Indian Civil Rights Act.[32] As noted by the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), there were two "distinct and competing" purposes in the Act. One objective was to promote Indian self-government and protect Tribal sovereignty from undue interference. For example, the Act narrowed the reach of Public Law 280 by requiring Tribal consent in order for Public Law 280 jurisdiction to be extended over reservations in the future. A second objective was to strengthen the position of individual Tribal members vis-à-vis the Tribe. Thus, the Act legislatively applied nearly all of the Bill of Rights to Tribal courts and governments. Another aspect of the Act that affected Tribal self-government was its limitation on Tribal court criminal punishment to six months and $500. Congress later raised those limits to one year and $5000.[33]

Since 1970, there have been a number of Congressional acts affirming Tribal self-government. The Indian Financing Act of 1974 provides financial assistance to Tribal governments. The Indian Self-Determination and Education Assistance Act of 1975[34] authorizes Federal grants to Tribes specifically to improve Tribal governments. It also authorizes Indian Tribes to enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs or services that otherwise would be administered by the Federal government. The Indian Child Welfare Act of 1978 (ILWA) recognizes the importance of Tribal control over custody and adoption proceedings. In 1991, Congress amended the Indian Civil Rights Act to define the "powers of self-government" to include "the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[35] In 1994 Congress enacted the Federal Full Faith and Credit for Child Support Orders Act.[36] The Act requires a State to recognize and enforce another State's child support order. "State" is defined as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18)." Therefore, States and Tribes are required to recognize and enforce valid Tribal child support orders, without regard to whether such orders were issued by a State or Tribal court or agency.

Finally, amendments to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorize Federal funding to an Indian Tribe or Tribal organization that demonstrates the capacity to operate a child support enforcement program that meets the objectives of Title IV-D, "including the establishment of paternity, establish, modification, and enforcement of support orders, and location of

[32] P.L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301 – 41).
[33] P.L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302(7)).
[34] P.L. No. 93-638. The Act was amended in 1988, 1990, and 1994.
[35] The amendment in 1991 was a Congressional "fix" to the Supreme court decision in *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* held that Tribal courts do not have criminal jurisdiction over non-member Indians. The language overturns *Duro* by defining powers of Tribal self-government to include the "inherent power of Indian Tribes" to "exercise jurisdiction over all Indians."
[36] 28 U.S.C. § 1738(B).

absent parents."[37] The Act also provides that State IV-D agencies may enter into cooperative agreements with an Indian Tribe, Tribal organization, or Alaska Native Village, group, regional or village corporation so long as it "has an established Tribal court system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such Tribal entity."[38]

United States Presidents have also been vocal in supporting Tribal sovereignty. President Johnson recognized "the right of the first Americans . . . to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government" for Indian Tribes and reaffirmed "the government-to-government basis" for dealing with Indian Tribes. President George H.W. Bush recognized that the Federal government's "efforts to increase Tribal self-governance have brought a renewed sense of pride and empowerment to this country's native peoples." At a 1994 meeting with the heads of Tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American Tribal governments" and issued a directive to all executive departments and Federal agencies that, as they undertook activities affecting Native American Tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of Tribal sovereignty. The directive also required the executive branch to consult, to the greatest extent practicable and permitted by law, with Indian Tribal governments before taking actions that affect Federally recognized Indian tribes. Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was issued in 2000.

More recently, President George W. Bush, Jr. reaffirmed the principles of Tribal sovereignty and self-determination for Tribal governments in the United States. On April 30, 2004, he signed Executive Order 13336, entitled American Indian and Alaska Native Education, which devotes greater assistance to American Indian and Alaska Native students in meeting the academic standards of the No Child Left Behind Act in a manner that is consistent with Tribal traditions, languages, and cultures. On September 23, 2004, he issued an Executive Memorandum that reinforces the unique government-to-government relationship with Indian Tribes and Alaska natives. Recognizing the existence and durability of the unique government-to-government relationship between the United States and Indian tribes and Alaska Native entities, President Bush stated that "it is critical that all departments and agencies adhere to these principles and work with Tribal governments in a manner that cultivates mutual respect and fosters greater understanding to reinforce these principles."

[37] See Section 5546 of the Balanced Budget Act of 1997, P.L. No. 105-33 (codified as amended at 42 U.S.C. § 655(f)).

[38] P.L. No. 104-193, 110 Stat. 2166 at 2256 (codified as amended at 42 U.S.C. § 654(33)). According to OCSE-AT-98-21 (July 28, 1998), it is not necessary that the Tribe comply with every federal IV-D regulation in order to qualify for a cooperative agreement with a State IV-D agency.

The United States Supreme Court also has held repeatedly that Indian Tribes retain "attributes of sovereignty over both their members and their territory."[39] However, in the last quarter of the century, its decisions increasingly pointed out the limits of Tribal jurisdiction over non-Indians or nonmember Indians: *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Duro v. Reina*, 495 U.S. 676 (1990); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Three of the cases involved Tribal jurisdiction in criminal cases. In *Oliphant*, the Court held that, by submitting to the overriding sovereignty of the United States, Indian Tribes necessarily gave up their power to try non-Indian citizens of the United States except as authorized by Congress. In *Wheeler,*[40] the Court upheld the power of a Tribe to punish Tribal members who violate Tribal criminal laws. It found that Tribal sovereignty over an Indian offender had not been divested as a result of the dependent status of Tribes. However, the Court noted that the powers of self-government involve only the relations among members of a Tribe, such as the power to punish Tribal offenders, and the inherent powers to determine Tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[41] In *Duro*, the Court directly addressed the issue of jurisdiction over nonmember Indians, i.e., Indians who are not enrolled members of the Tribe whose jurisdiction is invoked. It extended the ruling in *Oliphant* to deny Tribal courts criminal jurisdiction over nonmember Indians.[42]

Another Supreme Court case focused on Tribal regulatory authority. *Montana v. United States* involved a Tribal regulation of the Crow Tribe of Montana, which prohibited hunting and fishing within the reservation by any nonmember of the Tribe, including on lands within the reservation owned by nonIndians. The State of Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians

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[39] *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee,* 358 U.S. 217 (1959).

[40] *Wheeler* involved an Indian defendant who had been convicted and punished in a Navajo Tribal court for contributing to the delinquency of a minor and was subsequently prosecuted in federal court for statutory rape rising out of the same incident. The Court concluded that the subsequent federal prosecution of an offender already prosecuted and punished in Tribal courts did not violate double jeopardy because the Tribal and federal prosecutions were brought by separate sovereigns and therefore were not "for the same offense."

[41] 435 U.S. 313, 326.

[42] Congress subsequently passed a statute expressly granting Tribal courts such jurisdiction. *See* 105 Stat. 646 (codified at 25 U.S.C. § 1301(2)), amending the Indian Civil Rights Act. In *United States v. Lara*, 541 U.S. 193 (2004), the Court held that the amendment was a Constitutionally permissible reinstatement by Congress of a tribe's inherent power to prosecute nonmember Indians for misdemeanors. Therefore, because the Double Jeopardy Clause does not bar successive prosecutions brought by separate sovereigns, there was no bar to federal prosecution of a defendant nonmember Indian for assaulting a federal officer after he had been convicted under a Tribal criminal misdemeanor statute for violence to a policeman.

within the reservation. The United States filed an action in the Supreme Court seeking a declaratory judgment establishing that the Tribe and the United States had sole authority to regulate hunting and fishing within the reservation, and an injunction requiring Montana to obtain the Tribe's permission before issuing licenses for use within the reservation. The Supreme Court concluded that, while the Tribe may regulate hunting or fishing by nonmembers on land belonging to the Tribe or held in trust for the Tribe, it had no power to regulate non-Indian fishing and hunting on reservation land owned by nonmembers of the Tribe. The court cited *Oliphant* in stating that "exercise of Tribal power beyond what is necessary to protect Tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation." The Court found that regulation of hunting and fishing by nonmembers of a Tribe on land no longer owned by the Tribe did not bear a clear relationship to Tribal self-government or to internal relations.

There is language in *Montana* that became especially important in the later case of *Nevada v. Hicks*. Writing for the majority, Justice Stewart stated:

> Though *Oliphant* only determined inherent Tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the Tribe. To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealing, contacts, leases, or other arrangement. . . . A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conducts threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. . . .No such circumstances, however, are involved in this case.[43]

The last case, *Strate v. A-1 Contractors*, involved Tribal adjudicatory authority in a civil action. There was a car accident, involving non-Indians, which occurred on a North Dakota public highway that ran through the Fort Berthold Indian Reservation. One of the drivers was a widow of a deceased Tribal member whose adult children were also Tribal members. She filed a personal injury action in Tribal Court, which ruled that it had jurisdiction over the claim. The respondent, who was the employer of the other driver, filed an action in Federal district court, seeking a declaratory judgment that, as a matter of Federal law, the Tribal Court lacked jurisdiction to adjudicate the personal injury action. The District Court dismissed the action, determining that the Tribal Court had civil jurisdiction. The Eighth Circuit reversed. Relying on *Montana*, it concluded that the Tribal court lacked subject matter jurisdiction over the dispute. The Supreme Court agreed, and affirmed the decision of the Eighth Circuit.

[43] 450 U.S. 544, 566-7.

Justice Ginsburg delivered the opinion for a unanimous Court. She began by stating, "Our case law establishes that, absent express authorization by Federal statute or treaty, Tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." After citing *Oliphant*, she declared that *Montana* "is the pathmarking case concerning Tribal civil authority over nonmembers." *Montana* described "a general rule that, absent a different congressional direction, Indian Tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the Tribe or its members; the second concerns activity that directly affects the Tribe's political integrity, economic security, health or welfare." The Court concluded that neither exception was present in the case. There was no consensual relationship. Nor was regulatory or adjudicatory authority over the State highway accident needed to preserve the right of reservation Indians to make their own laws. Therefore, the State forum was the proper place for the driver to pursue her case.

The Twenty-First Century Some commentators have noted that *Montana* marked a shift away from a strict territorial conception of Tribal power, as evident in the recent Supreme Court decision of *Nevada v. Hicks*, 533 U.S. 353 (2001).[44] Respondent Hicks was a member of the Fallon Paiute-Shoshone Tribes who lived on the reservation. He was suspected of killing protected game life. On two occasions, State game wardens obtained State court search warrants. They then obtained Tribal court warrants, and -- accompanied by a Tribal police officer -- searched the respondent's property. The respondent alleged that during the second search, two mounted sheep heads (of an unprotected species) were damaged. He brought suit in Tribal Court against the State officials in their individual capacities, alleging trespass, abuse of process, and violation of civil rights. The Tribal Court held that it had jurisdiction over the claims. The State officials then filed an action in Federal district court seeking a declaratory judgment that the Tribal Court lacked jurisdiction. The District Court ruled that the Tribal Court did have jurisdiction. The Ninth Circuit affirmed, concluding that although the game wardens were non-Indians, their conduct occurred in the respondent's home, which was located on Tribe-owned land within the reservation. The Supreme Court reversed.

Justice Scalia, writing for the majority, characterized the issue as that of determining whether the Tribal Court had jurisdiction to adjudicate the alleged tortious conduct of State wardens executing a search warrant for evidence of an off-reservation crime. Citing *Strate*, the Court noted that the Tribe's adjudicative jurisdiction over a nonmember cannot exceed its legislative jurisdiction. The Court, therefore, first examined whether the Tribe – either as an exercise of its inherent sovereignty, or under grant of Federal authority – could regulate State wardens executing a search warrant for evidence of an off-reservation crime. The Court acknowledged that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*. However, the majority concluded that the general rule of *Montana* applied to both Indian and non-Indian land: "The ownership status of land, in other words, is only one factor to

[44] *See* Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 (2003).

consider in determining whether regulation of the activities of nonmembers is 'necessary to protect Tribal self-government or to control internal relations.'" The Court noted that sometimes land ownership would be a dispositive factor. In fact, in prior Supreme Court decisions, the fact that the cause of action arose on land not owned by the tribe had been virtually conclusive of the lack of Tribal civil jurisdiction. However, "the existence of Tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."

The Court then characterized the issue in the present case as that of determining whether regulatory jurisdiction over State officers was necessary to protect Tribal self-government or to control internal relations. It concluded that it was not. The Court noted that the Indians' right to make their own laws did not exclude all State regulatory authority on the reservation: "Though Tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'The Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet 515, 561 (1832)" [citing *White Mountain Apache Tribe v. Backer*, 448 U.S. 136, 141 (1980)]. The Court concluded that Tribal authority to regulate State officers in executing process related to the violation, off reservation, of State laws was not essential to Tribal self-government or internal relations, and that the State's interest in execution of process was considerable.

In a concurring opinion, Justice Souter, joined by Justices Kennedy and Thomas, opined that the principal determination of jurisdiction over civil matters on a reservation should be the membership status of the nonconsenting party, not the status of the underlying real estate,[45] i.e., whether the action arose in Indian country: "The path marked best is the rule that, at least as a presumptive matter, Tribal courts lack civil jurisdiction over nonmembers."[46] Justice O'Connor wrote a separate concurring opinion, which Justice Scalia noted, "is in large part a dissent from the views expressed in this opinion." Her opinion, joined by Justices Stevens and Breyer, characterized the majority's "sweeping opinion" as one that, "without cause, undermines the authority of Tribes to make their own laws and be ruled by them" in a case that involved Tribal power to regulate the activities of nonmembers on land owned and controlled by the Tribe.

Another opinion, *United States v. Lara,*[47] interpreting the "*Duro*-fix" amendment to the Civil Rights Act of 1968, is a must-read on the issue of inherent Tribal sovereignty versus delegated Federal authority, as well as on the Constitutional authority given to Congress to legislate regarding Tribal sovereignty. In a 7-2 decision, there were three concurring opinions. As noted by Justice Thomas in his concurring opinion, "As this case should make clear, the time has come to reexamine the premises and logic of our

[45] *Id.*
[46] 533 U.S. 353, 376-7.
[47] *See supra* note 42.

Tribal sovereignty cases.[48] Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse Federal Indian law and our cases."[49]

[48] 541 U.S. 193, 214.
[49] 541 U.S. 193, 219.

CHAPTER TWO
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

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Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

General Allotment Act, 24 Stat. 388, ch. 119, codified at 25 U.S.C. § 331

General Crimes Act, codified at 18 U.S.C. § 1152

Indian Child Welfare Act of 1978, P.L. No. 95-608 (1978)

Indian Civil Rights Act, P.L. No. 90-284, 82 Stat. 77 (1968), codified at 25 U.S.C. §§ 1301 – 41

Indian Financing Act of 1974, P.L. No. 93-262, 88 Stat. 77 (1974)

Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934), codified as amended at 25 U.S.C. §§ 461-479

Indian Self-Determination and Education Assistance Act of 1975, P.L. No. 93-638 (1975)

Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385, codified at 18 U.S.C. § 1153

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

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18 U.S.C. § 1152

25 U.S.C. § 331

25 U.S.C. §§ 461-479

25 U.S.C. § 1301(2)

25 U.S.C. §§ 1301 – 41

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Johnson v. McIntosh, 21 U.S. (8 Wheat) 543, 574 (1823)

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

Montana v. United States, 450 U.S. 544 (1981)

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985)

Nevada v. Hicks, 533 U.S. 353 (2001)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

United States v. Lara, 541 U.S. 193 (2004)

United States v. Wheeler, 435 U.S. 313 (1978)

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)

Williams v. Lee, 358 U.S. 217 (1959)

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)

Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995)

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F. Cohen, Handbook of Federal Indian Law (ed. 1982).

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Dept. of Justice, Criminal Resource Manual, The Major Crimes Act – 18 U.S.C.§ 1153 (Oct. 1997).

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CHAPTER THREE
AN OVERVIEW OF TRIBAL COURT JURISDICTION

TRIBAL COURTS

According to the Bureau of Indian Affairs, there are now 562 Federally recognized Tribal governments within the United States.[50] Among the Federally recognized Indian Tribes and Alaska Native villages, there are approximately 275 Tribal courts and 23 CFR courts.[51]

Tribal courts have similar authority as State courts. They take sworn testimony and provide parties procedural rights.[52] However, there is greater diversity among Tribal courts than among State courts. Some Tribes operate both trial and appellate courts, and have detailed rules governing appellate review. For example, the Navajo Nation, which has the largest and most populous reservation in the United States, has a long-standing Tribal court system. It consists of seven district courts, including a children's court and a peacemaker court, within each district, as well as an appellate court, the Navajo Supreme Court.[53] In other Tribes, the Tribal council provides appellate review, while in others there is no appellate review at all. Among various Northwest and Plains Tribes, there are inter-Tribal courts of appeals.[54]

Tribal legal systems often include forums that focus on dispute resolution. "One example is the family forum for domestic relations disputes among the Pueblo communities where intra-familial matters are resolved through family gatherings or talking circles facilitated by family elders. . . . Another noted example is the Navajo Peacemaker Court, created in 1982 as a way of fostering and encouraging use of traditional Navajo justice methods. . . . It employs non-adversary methods of community participation in achieving conflict resolution through, for example, 'talking out,' apology, and restitution. The Navajos provide a peacemaker forum for each of the Nation's judicial districts to handle a wide variety of cases, including criminal actions, dissolution of marriage, child custody, and property disputes. . . . As one Tribal judge put it, '[t]he Peacemaker Court, which emphasizes the involvement of family and friends in dispute resolution, promotes Tribal traditions and community harmony for a Tribe that is reconstituting after a century of dislocation.'"[55]

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[50] *See* www.doi.gov/bureau-indian-affairs.html (2005).

[51] For the development of Tribal courts, *see* Hagan, Indian Police and Judges: Experiments in Acculturation and Control (1966); National American Indian Court Judges Association, Indian Courts and the Future (1978). In 1900, two-thirds of reservations had CFR courts. According to the Bureau of Indian Affairs, there are now 562 federally recognized Tribes in the contiguous United States and Alaska. Among these Tribes, there are approximately 275 Tribal courts and 23 CFR courts. www.Tribalresourcecenter.org.

[52] Although Tribes are not subject to the Bill of Rights within the U.S. Constitution, the Indian Civil Rights Act of 1968 made applicable many of the Constitutional rights to Tribes. The exceptions include the right to appointed counsel to indigent defendants in certain criminal cases.

[53] Atwood, *Tribal Jurisdiction and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577, 592 (2000).

[54] *Id*.

[55] Atwood, *supra* note 53, at 596-597.

Eligibility requirements to be a Tribal judge vary among Tribes. Some Tribes require their judges to be members who are fluent in the Tribe's language while others allow non-Indians to serve as Tribal court judges. State-licensed attorneys are not automatically admitted to practice in Tribal courts. Many Tribes have a requirement that the attorney be admitted to practice in Tribal court, according to local Tribal ordinances.

TRIBAL LAW

As a result of the Indian Reorganization Act, most Tribes now have written laws and constitutions. Although early laws often copied BIA codes, current Tribal codes address such diverse issues as divorce, custody and support, adoption, and health.

Tribal law includes treaties, the Tribal constitution, codes, decisional law, and custom (seldom codified).[56] The Federal government has recognized that many Tribal customs and traditions have the force and effect of law: "We have determined that such Tribal customs are equivalent to 'common law' as described by William Blackstone: '[t]he *lex nonscripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions' (Blackstone, 1 Commentaries on the Law of England 62)."[57]

Excellent collections of Tribal codes exist at the University of Washington, and the Native American Rights Fund in Boulder, Colorado. There are also several on-line resources for accessing selected Tribal codes. Such resources are listed in Appendix A.

Applicable Law in Civil Cases Many Tribal codes state that in all civil matters, the Tribal court shall apply the ordinances, customs, and usages of the Tribe not prohibited by the laws of the United States. In any matter not covered by Tribal ordinance, custom, or usage, such codes provide that the Tribal court may use relevant Federal or State laws as a guide. An example is found in the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indian Tribal Code:

> TITLE 2 - RULES OF PROCEDURE
> CHAPTER 2-2 CIVIL ACTIONS, LIMITATIONS AND LIABILITY
>
> 2-2-4 Laws Applicable in Civil Actions
>
> (a) In all civil actions, the Tribal Court shall first apply the applicable laws, Ordinances, customs and usages of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (Tribes) and then shall apply any applicable laws of the United States and authorized regulations of the Department of the Interior. Where doubt arises as to customs and usages of the Tribes, the Tribal Court may request the advice of the appropriate committee which is recognized in the community as being familiar with

[56] Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 Am. Indian L. Rev. No. 2, n. 158 (Fall 1991).
[57] Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309).

> such customs and usages. Any matter not covered by Ordinances, customs and usages of the Tribes or by applicable Federal laws and regulations may be decided by the Court according to the laws of the State of Oregon.

Regulations governing Courts of Indian Offenses provide that in all civil cases the Tribal court shall apply any applicable laws of the United States, any authorized regulation of the Interior Department, and any ordinance or custom of the Tribe not prohibited by such Federal laws. Where there is doubt about custom or usage of the Tribe, the court may request the advice of counselors familiar with these customs and usages. Any matters not addressed by such laws, regulations, ordinances or custom must be decided by the Court of Indian Offenses according to the law of the State in which the disputed matter lies.[58]

TRIBAL TERRITORIAL JURISDICTION

Indians that commit offenses outside reservation boundaries, or outside trust land that was within the original borders of a now diminished reservation, are usually subject to State laws.[59] Tribal courts usually only have jurisdiction over causes of action that arise in Indian country. Domestic law cases are an exception to that general rule because a Tribal court may have jurisdiction over a paternity action even if conception occurred off the reservation.

TRIBAL SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is the authority of a tribunal to hear a particular case. For example, a probate court typically has subject matter jurisdiction to hear cases related to estate matters but not to divorce. Many Tribal courts are courts of general jurisdiction (e.g., jurisdiction over matters ranging over a number of subject areas).

In order to understand the extent of Tribal subject matter jurisdiction over civil and criminal matters, it is important to understand these three principles:

(1) an Indian Tribe possesses, in the first instance, all the inherent powers of any sovereign State;

(2) a Tribe's presence within the territorial boundaries of the United States subjects the Tribe to Federal legislative power and precludes the exercise of external powers of sovereignty of the Tribe, such as its power to enter into treaties with foreign nations, that are inconsistent with the territorial sovereignty of the United States. However, the Tribe's presence within the territorial boundaries of the United States does not by itself affect the internal sovereignty of the Tribe;

[58] 25 C.F.R. § 11.500 (2004).
[59] *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

(3) inherent Tribal powers are subject to qualification by treaties and by express legislation of Congress. Absent such qualification, full powers of internal sovereignty are vested in the Indian Tribes and in their duly constituted bodies of government.[60]

FEDERAL LIMITATION ON TRIBAL JURISDICTION

Overview Through several enactments, Congress has asserted the Federal government's jurisdiction over criminal matters in Indian country,[61] thereby lessening the control of Tribal courts. In addition, in some States and for some individual Tribes, Congress has limited Tribal control by authorizing State criminal jurisdiction in Indian country. Finally, the United States Supreme Court has prevented Indian nations from exercising criminal jurisdiction over non-Indians and non-member Indians by determining that such jurisdiction is no longer within the Tribes' inherent authority.[62]

Congress has not enacted any general statute authorizing Federal courts to supplant Tribal courts in hearing civil matters arising in Indian country. However, Indian country cases will sometimes be within concurrent Federal jurisdiction under the general Federal question statute[63] or through the statute authorizing Federal courts to hear suits between citizens of different States (referred to as "diversity jurisdiction").[64] Thus, for example, Federal courts sometimes hear civil actions challenging the jurisdiction of Tribal courts to hear certain disputes involving non-Tribal members that arise in Indian country. In such cases, however, the Supreme Court has determined that Federal courts should require litigants to first exhaust their remedies in Tribal court.[65] In addition, in some States and for some individual Tribes, Congress has limited Tribal control by authorizing State jurisdiction over civil causes of actions between Indians or to which Indians are parties, which arise in those areas of listed Indian country.[66] This jurisdiction is limited to private causes of action, and does not encompass State regulation.

Federal Indian Country Criminal Laws The first major Federal act affecting Tribal jurisdiction over criminal activity was the General Crimes Act,[67] enacted in 1817. It gave the Federal government jurisdiction over crimes, committed by Indians against non-Indians, within Indian country, so long as the Indian involved had not been punished under the law of the Tribe. Because of the exception for cases in which the Indian defendant has already been punished under Tribal law, there is the understanding that the Federal jurisdiction under the General Crimes Act is concurrent with Tribal jurisdiction. However, the Federal criminal jurisdiction over crimes

[60] N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 4.01[1] (2005 ed.). The Handbook notes that there have been some recent judicial departures from these principles.
[61] Indian country is defined in 18 U.S.C. § 1151.
[62] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[63] 28 U.S.C. § 1331.
[64] 28 U.S.C. § 1332.
[65] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).
[66] 28 U.S.C. § 1360.
[67] 18 U.S.C. § 1152.

committed by Indians against non-Indians is exclusive of the States. Importantly, under the General Crimes Act, Indian nations retain exclusive jurisdiction over crimes committed by one Indian against another. The General Crimes Act also gave the Federal government exclusive jurisdiction over crimes committed by non-Indians against Indians. Wherever the Federal government has jurisdiction under the General Crimes Act, offenses are defined by Federal criminal law, or are borrowed from State law through the Assimilative Crimes Act.[68]

The next significant Federal act was the Major Crimes Act of 1885.[69] Enacted in response to the Supreme Court's decision in *Ex parte Crow Dog,*[70] it originally granted Federal jurisdiction, exclusive of the States, over seven crimes committed by an Indian within Indian country. The number has steadily increased to include: "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact], incest, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery and a felony under section 661 of Title 18 [within special maritime and territorial jurisdiction of the United States, the taking away with the intent to steal the personal property of another]."[71] It is unclear whether jurisdiction over these major crimes is exclusive with Federal courts or whether Tribal courts have concurrent jurisdiction.[72] As a practical matter, the severe limitations on Tribal criminal punishments introduced by the Indian Civil Rights Act of 1986[73] make Tribal prosecution of major crimes relatively rare.

Other Federal Legislation The Indian Civil Rights Act, mentioned above, initially limited Tribal court criminal punishment to six months and a $500 fine. These limits were later raised to one year and a $5000 fine.[74]

Public Law 280 In 1953, at the height of the termination and assimilation era,[75] Congress passed Public Law 280, which significantly affected Tribal jurisdiction by introducing State criminal authority into Indian country.[76] Historically, State courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and

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[68] *See* N. Newton *et al.*,eds., Cohen's Handbook of Federal Indian Law § 9.02[c] (2005 ed.).
[69] 18 U.S.C. § 1153.
[70] 109 U.S. 556 (1883).
[71] 18 U.S.C. § 1153.
[72] *Supra* note 27.
[73] 25 U.S.C. § 1302(7) (limiting punishment for any one offense to one year in jail and a $5000 fine).
[74] *Supra* note 33.
[75] The Termination Era ran from approximately 1945 to 1961. The Court in *Bryan v Itasca County*, 426 U.S. 373 (1976), emphasized that Public Law 280 was not a termination measure. Rather it reflected an assimilationist philosophy: "That Congress intended to facilitate assimilation when it authorized a transfer of jurisdiction from the Federal Government to the States does not necessarily mean, however, that it intended in P. L. No. 280 to terminate Tribal self-government." *Washington v. Yakima*, 439 U.S. 463, 488 n. 32 (1979).
[76] Public Law 280 is codified in various sections of 18 U.S.C., 25 U.S.C., and 28 U.S.C. For detailed discussions of the statute, *see, e.g.*, Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975); Foerster, *Comment: Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999). *See also* the dissent of Chief Justice Matthews in *John v. Baker*, 982 P.2d 738 (Alaska 1999).

non-Indians. Jurisdiction was limited to the Tribes or Federal government.[77] Public Law 280[78] initially provided for the mandatory transfer to five States[79] of jurisdiction over criminal offenses committed by or against Indians in the area of Indian country listed opposite the named States or territory.[80] It also gave those States jurisdiction over civil causes of actions between Indians or to which Indians were parties, which arose in those areas of listed Indian country.[81] In 1958 Congress added Alaska as a sixth mandatory State.[82] There was no requirement that the Tribes consent to such transfer of jurisdiction to the listed States. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court declined to answer whether Public Law 280 conferred exclusive or concurrent jurisdiction on States. However, the consensus of lower Federal courts, many State courts, and the Solicitor's Office within the Department of the Interior is that Indian nations retain concurrent jurisdiction under Public Law 280.[83] A major consequence of Public Law 280 is that Indian nations lose exclusive jurisdiction over non-major offenses committed by one Indian against another Indian.

Other States not listed among the mandatory States had the option of assuming Public Law 280 jurisdiction. Congress granted permission for such States to assume civil or criminal jurisdiction "at such time and in such manner" as the people of the State by affirmative legislative action, should decide to assume.[84] If such a State had a constitution or statutes disclaiming jurisdiction in Indian country, Public Law 280 authorized the State to amend those laws, if necessary, in order to remove any legal impediment to the assumption of civil or criminal jurisdiction.[85]

An overall goal of Congress, in numerous pieces of legislation introduced during the session in which Public Law 280 was introduced, was "withdrawal of Federal responsibility for Indian affairs wherever practical, and . . . termination of the subjection of Indians to Federal laws applicable to Indians as such."[86] The legislative history of Public Law 280 suggests that Congress's main goal was to address the lack of law

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[77] *See* Gould, *supra* note 44.
[78] The text of Public Law 280 is set forth in Appendix B.
[79] California, Minnesota (except for Red Lake Reservation), Nebraska, Oregon (except for Warm Springs Reservation), and Wisconsin (except for Menominee Reservation).
[80] Codified at 18 U.S.C. § 1162. *See* Comment, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999).
[81] Codified at 28 U.S.C. § 1360.
[82] An exception within Alaska is the Metlakatla Reservation.
[83] *See* Jimenez & Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 AU L. Rev. 1627 (1998).
[84] 25 U.S.C. §§ 1321-1322.
[85] 25 U.S.C. § 1324. According to a report accompanying the House version of Public Law 280 in 1953, there were eight States, which – in response to Enabling Acts -- had Constitutions disclaiming all right and title to lands owned by Indians and declaring that such lands remained under the absolute jurisdiction and control of the Congress of the United States. *See* H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953). These States were Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.
[86] S.Rep. No. 699, 83rd Cong., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409.

enforcement on Indian reservations.[87] The Report of the House Committee on Interior and Insular Affairs, which was subsequently incorporated into the Senate Report, stated: "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, Tribes are not adequately organized to perform that function; consequently there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility."[88] The Tribes exempted from the State assumption of jurisdiction were Tribes that had legal systems and organizations perceived as functioning in a "satisfactory manner."[89]

According to the Supreme Court in *Washington v. Yakima*, the jurisdictional bill also reflected Congressional concern over "the financial burdens of continued Federal jurisdictional responsibilities on Indian lands." There is less background as to why civil jurisdiction was also transferred to States. However, as noted by the Court in *Washington v. Yakima*, the legislation was "without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's. [omitting citations] The failure of Congress to write a Tribal-consent provision in the transfer provision applicable to option States as well as its failure to consult with the Tribes during the final deliberations on Pub. L. 280 provide ample evidence of this." 439 US.463, 490.

By 1958, as a result of amendments to Public Law 280 and implementing State legislation, 16 States had acquired Public Law 280 jurisdiction.[90] However, said jurisdiction in most of these States was limited to (1) less than all of the Indian reservations in the State, (2) less than all of the geographic areas within an Indian reservation, or (3) less than all subject matters of the law.

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which limited the extension of Public Law 280 jurisdiction.[91] No State can now acquire Public Law 280 jurisdiction over Indian country unless the Tribe consents by a majority vote of the adult Indians voting at a special election.[92] The amendments also provide explicitly for partial assumption of jurisdiction. It is therefore possible for a State to have Public Law 280 jurisdiction but not with every Tribe located in the State or not over every subject area. The ICRA also authorized the United States to accept a "retrocession" or return of

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[87] *Id.* at 5.
[88] S.Rep. No. 699, 83rd Cong., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409, 2411-12.
[89] *Id*.
[90] Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. Disclaimer States have responded in diverse ways to the Public Law 280 offer of jurisdiction. Only North Dakota actually amended its constitution. *See Washington v Yakima*, 439 U.S. 463, 486 n. 29 (1979). Many of these States have repealed their statutes assuming jurisdiction (e.g., Arizona), returned their jurisdiction to the federal government (e.g., Nevada), or had their statutes assuming jurisdiction invalidated by the courts (e.g., North Dakota and South Dakota).
[91] P.L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-41). For a full discussion of Public Law 280, *see* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3] (2005 ed.).
[92] Codified at 25 U.S.C. §§ 1321 and 1322. *See Kennerly v. District Ct. of Montana*, 400 U.S. 423 (1971).

jurisdiction, full or partial, previously acquired by a State under Public Law 280,[93] but only at the request of the State. Tribes could not insist upon retrocession. Several States, such as Nebraska, Washington, Wisconsin, and Minnesota, have retroceded their Public Law 280 jurisdiction over various Tribes.

The chart[94] below summarizes the States that currently have some form of civil and/or criminal jurisdiction under Public Law 280:

[93] Codified at 25 U.S.C. § 1323(a). The Indian Civil Rights Act also repealed Section 7 of Public Law 280 with the proviso that the repeal did not affect any cession made prior to the repeal. 25 U.S.C. § 1323(b). Section 6 of Public Law 280 was re-enacted without change. 25 U.S.C. § 1324.

[94] The sources of information for the chart are N. Newton *et al*., eds., Cohen's Handbook of Federal Indian Law (2005 ed.) and Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280 (UCLA American Indian Studies Center 1997), pages 9 - 10.

State	Extent of Jurisdiction
Alaska	All Indian country within the State[95]
California	All Indian country within the State
Florida	All Indian country within the State
Idaho	All Indian country within the State, limited to the following subject matters: compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; mental illness; domestic relations; and operation of motor vehicles on public roads
Iowa	Only over the Sac and Fox Indian community in Tama County, limited to civil and some criminal jurisdiction
Minnesota	All Indian country within the State, except the Red Lake and the Nett Lake reservations[96]
Montana	Only over felonies on the Salish and Kootenai reservation.[97]
Nebraska	All Indian country within the State, except the Omaha and Winnebago reservations.
Oregon	All Indian country within the State, except the Burns Paiute and Warm Springs reservations. With regard to the Umatilla Reservation, jurisdiction is limited to civil jurisdiction.[98]

[95] In *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), the United States Supreme Court removed the Indian country status of most lands held by Alaskan Natives. Since Public Law 280 applies within "Indian country," that decision left Public Law 280 irrelevant to much of Alaska. However, there are still Native allotments and Native townsites that likely qualify as Indian country, leaving some room -- in addition to the Metlakatla Indian Reservation -- for the continued operation of Public Law 280. *See* Strommer & Osborne,"'Indian Country' and the Nature and Scope of Tribal Self-Government in Alaska," 22 Alaska L. Rev. 1 (2005).

[96] When Minnesota was listed as a mandatory Public Law 280 State, Red Lake Reservation was excepted from its jurisdiction. In 1975, Minnesota retroceded, its jurisdiction over the Nett Lake Reservation.

[97] *See* Public Law 280 discussion in *Balyeat Law, PC v. Pettit*, 291 Mont. 196, 967 P.2d 398 (1998).

[98] When Oregon was named as a mandatory Public Law 280 State, Warm Springs Reservation was excepted from its jurisdiction. In 1981, Oregon retroceded its criminal jurisdiction over the Umatilla Reservation.

Washington	Only fee patent (deeded) land within Indian country. Jurisdiction on trust land is limited to the following subjects, unless the Tribe consents to full State jurisdiction:[99] compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoptions; dependent children; and operation of motor vehicles on public roads.
Wisconsin	All Indian country within the State, except the Menominee reservation[100]

There have been several Supreme Court decisions interpreting Public Law 280.[101] In *Washington v. Yakima*, the Court held that Public Law 280 authorized a State to assert only partial jurisdiction within a selected area of an Indian reservation; in the case, the State of Washington had enacted legislation obligating the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, but – with the exception of eight subject matter areas, which included domestic relations – not to extend such jurisdiction over Indians on trust or restricted lands without the request of the affected Indian Tribe.[102] In *Bryan v. Itasca County*, the Court interpreted Public Law 280 to grant States jurisdiction over criminal matters and private civil litigation involving reservation Indians, but not to grant civil regulatory authority such as a State personal property tax within the reservation. Discussing the holding in *Bryan*, the Court in *California v. Cabazon Band* stated that "when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation, or civil in nature, and applicable only as it may be relevant to private civil litigation in State court." In *California v. Cabazon Band*, the Court set forth a test for distinguishing between criminal and civil laws: "[I]f the intent of a State law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the State law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian

[99] For a complete list of Tribes that consented to full Washington Public Law 280 jurisdiction (some of which have later retroceded), *see* National American Indian Court Judges Association, Justice and the American Indian, Vol. 1, The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations (1974).

[100] When Wisconsin was named as a mandatory Public Law 280 State, the Menominee Reservation was exempted from its jurisdiction. In 1976, when Congress terminated the Tribe, Wisconsin reacquired jurisdiction over that territory. When Congress restored the Menominee Tribe to federal status in 1976, Wisconsin retroceded the jurisdiction it had acquired by the termination.

[101] *See Washington v. Yakima*, 439 U.S. 463, 486 n. 30, citing *Williams v. Lee,* 358 U.S. 217 (1959); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); and *Bryan v. Itasco County*, 426 U.S. 373 (1976). *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[102] Partial Public Law 280 jurisdiction was explicitly authorized by the Indian Civil Rights Act of 1968. *See supra* note 91.

Reservation. The shorthand test is whether the conduct at issue violates the State's public policy." Applying such a test to the facts of the case, the Court concluded that Public Law 280's grant of criminal jurisdiction did not include a regulatory statute such as California's statute governing the operation of bingo games.[103]

TRIBAL, FEDERAL, OR STATE JURISDICTION IN CRIMINAL ACTIONS

As noted earlier, the General Crimes Act gives Federal courts jurisdiction over crimes committed by Indians against non-Indians or by non-Indians against Indians in Indian country. The Major Crimes Act is Federal legislation that gives Federal courts jurisdiction over certain serious crimes committed by Indians in Indian country, whether the victim is Indian or non-Indian.[104] It is unclear whether the Federal government's jurisdiction in such cases is exclusive or concurrent with the Tribe.[105]

Public Law 280 gives certain State courts jurisdiction over criminal offenses involving Indians in Indian country. In the mandatory Public Law 280 States, Federal jurisdiction under the General Crimes Act and Major Crimes Act is eliminated by statute.[106] In the optional Public Law 280 States, the impact on Federal jurisdiction is less certain, with courts differing on whether the Federal government retains criminal jurisdiction.[107]

Both in the non-Public Law 280 jurisdictions and those jurisdictions affected by Public Law 280, concurrent Tribal criminal jurisdiction likely exists. From the perspective of Tribal criminal jurisdiction, the main difference between these two arrangements is that in the non-Public Law 280 situation, Tribes have *exclusive* jurisdiction over non-major crimes committed by one Indian against another. In the Public Law 280 situation, Tribes share jurisdiction over such crimes with the States, at least in mandatory States and in optional States that have assumed full jurisdiction. If a State has assumed only partial jurisdiction under Public Law 280, then the Federal government and the Tribe will share jurisdiction over remaining matters.

The Supreme Court has also had occasion to review the criminal jurisdiction of Tribal courts in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990). Relying not on specific Federal legislation but on the dependent status of Indian Tribes in relation to the sovereignty of the United States, the Court in these cases held that Indian Tribes have no criminal jurisdiction over non-Indians or nonmember Indians for offenses

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[103] For a further discussion of the distinction between criminal and regulatory action, *see* Foerster, *supra* note 76.
[104] The constitutionality of the Major Crimes Act was upheld in *United States v. Kagama*, 118 U.S. 375 (1886). *See also United States v. Antelope*, 430 U.S. 641 (1977).
[105] Although the Supreme Court has alluded to the possibility that federal jurisdiction under the Major Crimes Act may be exclusive of the Tribes (*see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14 (1978)), at least one federal circuit has found Tribal jurisdiction to be concurrent (*see Wetsit v. Stafne*, 44 F.3d 823, 825-826 (9th Cir. 1995)).
[106] 18 U.S.C. § 1162(c).
[107] *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3][d] (2005 ed.).

committed in Indian country. Tribes do have Tribal jurisdiction over Indians who have committed crimes on the reservation.

Indian Tribal leaders viewed *Duro v. Reina* (exempting nonmember Indians from criminal misdemeanor laws of local Tribal governments) as a major assault on the ability of Tribal governments to administer justice in Indian country.[108] In reaction to the decision, Congress amended the Indian Civil Rights Act to define "powers of self-government" to include "the *inherent* power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians"[109] [emphasis added]. The Supreme Court examined the so-called "*Duro* fix" in the case of *United States v. Lara*, 541 U.S. 193 (2004). Lara, a nonmember Indian, was convicted in Tribal court of a misdemeanor offense of violence to a policeman. He was later charged with the Federal crime of assaulting a Federal officer. Lara claimed that the Federal prosecution was barred by the Double Jeopardy Clause. The Supreme Court ruled that it was not. In reaching that conclusion, the Court concluded that the Congressional amendment to the Indian Civil Rights Act had eliminated restrictions that the political branches had placed, over time, on the exercise of a tribe's inherent legal authority over nonmember Indians: "That new statute, in permitting a tribe to bring certain Tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own *Federal* power. Rather, it enlarges the *tribes'* own 'powers of self-government.'"[110] Therefore, since the Tribe had been acting as a separate sovereign in its prosecution of Lara, the subsequent Federal prosecution was not barred by the Double Jeopardy Clause.

One can summarize jurisdiction over criminal offenses according to the following chart. Wherever Federal and State court jurisdiction is not exclusive, Tribal jurisdiction is concurrent.

[108] Forum Summary, Tribal Leaders Forum on *Duro v. Reina*, held January 11, 1991. Sponsored by the American Indian Resources Institute in conjunction with the National Indian Justice Center and the Native American Rights Fund.
[109] The amendment in 1991 was a Congressional "fix" to the Supreme court decision in *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* held that Tribal courts do not have criminal jurisdiction over non-member Indians. The language overturns *Duro* by defining powers of Tribal self-government to include the "inherent power of Indian Tribes" to "exercise jurisdiction over all Indians." For an analysis of the "Duro fix," especially its language recognizing the "inherent power" of Tribes to recognize criminal jurisdiction over all Indians, *see* Gould, *supra* note 44.
[110] 541 U.S. at 198.

	Location	Type of Offense	Status of Defendant	Status of Victim
Exclusive Tribal Court	Indian Country in State without PL 280 criminal jurisdiction	Felony not listed in Major Crimes Act or Misdemeanor	Indian (either member or nonmember)	Indian or non-Indian
Exclusive State Court	Indian Country in State without PL 280 criminal jurisdiction	Felony	Non-Indian	Non-Indian
Exclusive State Court	Outside Indian Country	Felony or Misdemeanor, except in which Federal law makes crime one of national applicability	Indian or non-Indian	Indian or non-Indian
Exclusive State Court	Indian Country in State with complete mandatory PL 280 criminal jurisdiction	Felony or Misdemeanor (no Major Crime exception)	Non-Indian	Indian or non-Indian
Federal Court	Indian Country in State without complete PL 280 criminal jurisdiction	Major Crime* Felonies and Misdemeanors in which Indian has not been punished under Tribal law** Felonies and Misdemeanors***	Indian Indian Non-Indian	Indian or non-Indian Non-Indian Indian

*Unclear whether jurisdiction over Major Crimes is exclusive or concurrent with Tribal court jurisdiction; jurisdiction is exclusive of State courts.

**Jurisdiction is concurrent with Tribal courts, but exclusive of State courts.

***Jurisdiction is exclusive of Tribal and State courts.

Sometimes Federal crimes relating to Indian country are defined outside the framework of the General Crimes Act, the Major Crimes Act, and Public Law 280. The jurisdictional analysis for such offenses is entirely different, because the limitations and exceptions in the General Crimes Act and Major Crimes Act will not apply, and Public Law 280 does not eliminate Federal criminal jurisdiction under such special laws. Thus, for example, nonsupport is a Federal offense under some circumstances, and includes a failure to meet a support obligation established by a Tribal court. This crime is punishable under Federal law regardless of whether the support obligation was established in a Public Law 280 State or a non-Public Law 280 State.

Tribes may also have jurisdiction over the crime of nonsupport committed by Indians in Indian country, assuming their Tribal code sanctions such an offense.[111] In complete Public Law 280 jurisdictions, where the Tribal code establishes a criminal offense for nonsupport, the State will have concurrent criminal jurisdiction over a criminal nonsupport offense committed by an Indian in Indian country. When the offense is committed by a non-Indian in Indian country, only the State or the Federal government has subject matter jurisdiction to prosecute the defendant for criminal nonsupport.[112]

TRIBAL OR STATE JURISDICTION IN CIVIL ACTIONS

The United States Supreme Court has broadly affirmed Tribal civil jurisdiction within Indian country.[113] In non-Public Law 280 jurisdictions, a Tribe has exclusive jurisdiction over civil causes of action against member Indians that arise in Indian country: "Tribes have the power to make their own substantive laws in internal matters, and to enforce that law in their own forums."[114] When the suit is brought by an Indian against a non-Indian, and the claim arises on Indian land in Indian country, jurisdiction over civil causes of action is typically concurrent or shared by Tribal and State courts.[115] A State normally has exclusive jurisdiction over civil causes of action that arise outside Indian country and involve off-reservation residents, Indian or non-Indian.[116] In non-Public Law 280 jurisdictions, the issue of Tribal versus State jurisdiction typically arises

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[111] For example, criminal nonsupport is a misdemeanor offense in Tribes operating under CFR codes. 25 C.F.R. § 11.425 governing Courts of Indians Offenses provides the following: "A person commits a misdemeanor if he or she persistently fails to provide support which he or she can provide and which he or she knows he or she is legally obligated to provide to the spouse, child, or other dependent."

[112] *See State v. Zaman*, 252 Ariz. Adv. Rep. 49 (Ariz. App. Div. 1, cr 960349, decided 09/23/1997). Indian Tribes have no jurisdiction to prosecute non-Indians for crimes committed on an Indian reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

[113] *See*, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Williams v. Lee*, 358 U.S. 217 (1959); *but see Nevada v. Hicks*, 533 U.S. 353 (2001) (denying Tribal jurisdiction to hear claim against State official).

[114] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[115] *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148 (1984). For Tribal courts operating under authority from the Code of Federal Regulations, it is clear that civil jurisdiction encompasses nonmember Indians. 25 C.F.R. § 11.103(a).

[116] A notable exception is established by the Indian Child Welfare Act, 25 U.S.C. § 1911(b), which provides for the transfer of many off-reservation child welfare proceedings involving Indian children to Tribal court. Based on State case law, paternity cases involving an Indian party are also exceptions to the general rule.

in cases where the cause of action arose on non-Indian fee land or a State right-of-way in Indian country, and the defendant is a non-Indian. It also often arises in cases where the cause of action arose off the reservation, but one of the parties is an Indian living on the reservation. When jurisdiction is at issue, the practitioner must look to legislation and case law for guidance.

In Public Law 280 jurisdictions, the question of State jurisdiction over civil causes of action in Indian country is simplified. When the claim is against an Indian respondent, Tribal jurisdiction is often concurrent or shared with State jurisdiction. A mandatory Public Law 280 State has jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[117] An optional Public Law 280 State may also have civil jurisdiction,[118] but it may be partial (i.e., only certain specified subject areas or jurisdiction over a limited part of Indian country). Therefore, even if the case involves two member Indians, a State with full Public Law 280 civil jurisdiction will generally have authority to adjudicate the matter. The Supreme Court has declined to rule on whether Public Law 280 jurisdiction is exclusive or concurrent with Tribal jurisdiction.[119] However, other Federal and State courts have held that Tribes have concurrent jurisdiction.[120]

A challenge to jurisdiction arises when one of the parties believes that the forum selected by the petitioner lacks subject matter jurisdiction, and that the action should be heard by a different forum. When a petitioner files an action against an Indian respondent in State court rather than Tribal court, and the Indian respondent argues that the State court lacks jurisdiction, the Supreme Court decision that historically has been most relevant to the issue of State assertion of jurisdiction is *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, a non-Indian had brought suit in State court against a Navajo Indian for a debt arising out of a transaction that took place on the Navajo Reservation. The Arizona Supreme Court had upheld the exercise of State court jurisdiction. In reversing, the Supreme Court enunciated the following rule: "Essentially, absent governing Acts of Congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them." [121]

The test was rephrased as a preemption and infringement analysis in *White Mountain Apache Tribe v. Bracker*.[122] Under the preemption test, the question is whether the exercise of State authority is pre-empted by Federal law. Under the

[117] 28 U.S.C. § 1360(a).
[118] 28 U.S.C. § 1322(a).
[119] The Supreme Court in *Washington v. Yakima,* 439 U.S. 463, 488 n. 32, and 501 n.48 (1979), refused to address whether such jurisdiction was concurrent or exclusive.
[120] *See* Jimenez & Song, *supra* note 83.
[121] *Williams v. Lee*, 358 U.S. 217, 220 (1979).
[122] 448 U.S. 136 (1980).

infringement test, the question is whether the State action will "infringe on the right of reservation Indians to make their own laws and be ruled by them." Areas that the Supreme Court has identified as essential self-government matters include determination of Tribal membership, regulation of domestic relations among members, and rules of inheritance for members.[123] In conducting an infringement analysis, State court decisions tend to examine whether one or both parties are enrolled members of an Indian tribe, whether the cause of action arose on or off the reservation,[124] and what are the Tribal and State interests at stake.

When a petitioner files an action against a non-Indian or nonmember respondent in Tribal court rather than State court, and the non-Indian respondent argues that the Tribal court lacks jurisdiction, the Supreme Court decision that is most relevant on the issue of Tribal civil jurisdiction is *Montana v. United States*.[125] As noted earlier, *Montana* addressed a Tribal court's exercise of civil subject matter jurisdiction over a non-member of the Tribe on non-Indian fee land. While noting a Tribe's inherent sovereign power over its members, the Supreme Court also pointed out the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." If the action involves a nonmember or a non-Indian, the question is whether "the exercise of Tribal power is necessary to protect Tribal self-government or to control internal relations."[126] Any exercise of Tribal power beyond that is "inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation."[127] In the case at hand, the Court concluded that Tribal regulation of hunting and fishing by nonmembers of a Tribe on lands no longer owned by the Tribe bore no clear relationship to Tribal self-government or internal relations. The Court identified two circumstances, or exceptions, where Tribal civil jurisdiction could exist over non-Indians on non-Indian fee land: when there is a "consensual relationship" between the non-Indian or nonmember Indian and the

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[123] *See United States v. Wheeler,* 435 U.S. 313, 322, n. 18 (1978). *See also, e.g., Fisher v. District* Court, 424 U.S. 382 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).

[124] A review of case law suggests that there is inconsistency in defining where the cause of action arose in paternity establishment and child support cases. Some courts look at conception as the defining event. Other courts focus on where the custodial parent applied for public assistance.

[125] 450 U.S. 544 (1981).

[126] *Montana v. United States*, 450 U.S. 544, at 565 (1981). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Citing the two exceptions in *Montana*, the *Strate* Court concluded that the Tribal court lacked subject matter jurisdiction over a civil action against allegedly negligent non-Indians, involving a traffic accident on a public highway running through Indian reservation land. *See also Nevada v. Hicks*, 533 U.S. 353 (2001). In *Nevada,* the Supreme Court concluded that the Tribal court lacked jurisdiction in a civil law suit brought by a Tribal member against State game wardens who had executed State court and Tribal court search warrants to search his on-reservation home for an off-reservation crime. The Court stated that the fact that the nonmember's activity occurred on Tribal land was not dispositive. Citing *Montana*, the Court concluded that the "Tribal authority to regulate State officers in executing process related to the violation, off reservation, of State laws is not essential to Tribal self-government or internal relations." In contrast, the Court found that the State's interest in execution of process was considerable. For a discussion of the impact of *Montana*, *see* Gould, *supra* note 44.

[127] *Montana v. United States* , 450 U.S. 544 at 564 (1981). *See also Nevada v. Hicks*, 533 U.S. 353 (2001).

Tribe or a Tribal member, "through commercial dealings, contracts, leases, or other arrangements"; and when exercise of jurisdiction is necessary to protect "the political integrity, the economic security, or the health or welfare of the Tribe."[128]

The Court has interpreted these *Montana* exceptions narrowly, out of concern that the exceptions might swallow the rule.[129] In *Atkinson Trading Co., Inc. v. Shirley*, 523 U.S. 645 (2001), the Supreme Court stated that the consensual relationship exception requires a nexus between the nonmember's conduct and the Tribe's regulation. The fact that a nonmember has received or may receive Tribal services, such as police and fire protection, does not create the necessary connection. It also stated that the second exception is "only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government."[130]

When a State has concurrent jurisdiction with a Tribe, the State court may nevertheless decline to exercise such jurisdiction if it feels such an exercise would infringe on a Tribe's self-governance.[131] Rules respecting deference to Tribal courts are currently under development for concurrent Tribal and State jurisdiction, especially in Public Law 280 States.[132] In the event of concurrent jurisdiction, the case may be adjudicated by the first tribunal to validly exercise jurisdiction.[133]

STATE JURISDICTION TO SERVE PROCESS IN INDIAN COUNTRY

If the State court has subject matter jurisdiction over a civil or criminal action involving an Indian who resides on a reservation, service of the pleadings or arrest warrant on the Indian must also be proper. Some States and Tribes have entered into cross-deputizing agreements to address service of process and service of arrest warrants. For example, pursuant to the Fort Peck Comprehensive Code of Justice, Title XII, § 208, a procedure exists to cross-deputize certain Montana law enforcement officers with authority to detain and arrest Indians on the Fort Peck Indian Reservation. The procedure requires that the Montana law enforcement agency submit the name of the officer to the Tribal Executive Board for a resolution approving that particular officer.

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[128] *Montana v. United States* , 450 U.S. 544 at 566 (1981). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Citing the two exceptions in *Montana*, the *Strate* Court concluded that the Tribal Court lacked subject matter jurisdiction over a civil action against allegedly negligent non-Indians, involving a traffic accident on a public highway running through Indian reservation land.

[129] *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[130] 532 U.S. at 657, n. 12. As noted by federal courts, "the tribe's interest in the political, economic, health, or welfare effects of a particular action is not enough, by itself, to meet this exception. . . . Otherwise, the exception would swallow the rule." *See, e.g., County of Lewis v. Nez Perce Tribe*, 163 F.3d ___ (9th Cir. 1998).

[131] *See, e.g., Lemke v. Brooks*, 614 N.W.2d 242 (Minn. 2000).

[132] *See*, *e.g.*, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 265 Wis.2d 64, 665 N.W.2d 899 (Wis. 2003); *see also* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2005 ed.).

[133] *See, e.g., South Dakota ex rel. Jealous of Him v. Mills,* 627 N.W.2d 790 (S.D. 2001); *Harris v. Young*, 473 N.W.2d 141, 145 (S.D. 1991).

If there are no such agreements, cases have split on whether State process may be served on the Indian respondent or defendant while he or she is on the reservation.[134] In a case involving action that arose off the reservation, the Supreme Court addressed the related issue of State service of a search warrant. In *Nevada v. Hicks*, 533 U.S. 353 (2001), respondent Hicks was a member of the Fallon Paiute-Shoshone Tribe of western Nevada, who lived on the Tribe's reservation. He was suspected of having killed, off the reservation, a California bighorn sheep, which was a gross misdemeanor under Nevada law. Twice, State game wardens obtained State-court and Tribal-court search warrants. Both times, in executing the warrants on the home of Hicks, the State sheriffs were accompanied by Tribal officers. After the second search, Hicks filed suit in the Tribal Court alleging, in part, that the wardens had trespassed and abused process. The Tribal Court held that it had jurisdiction, which was upheld by the Tribal Appeal Court. The petitioners then sought in Federal District Court a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The Federal court concluded that the fact that Hicks's home was on Tribe-owned reservation land was sufficient to support Tribal jurisdiction over the civil claims against nonmembers arising from their activities on that land.

The Supreme Court reversed. It concluded that the Tribal Court did not have jurisdiction to adjudicate the wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime because the Tribe did not have regulatory authority over the State officers.[135] The Court pointed out that the fact that Indians have the right to make their own laws and be governed by them "does not exclude all State regulatory authority on the reservation." A State may not be able to exercise the same degree of regulatory authority within a reservation as it may do off the reservation. However, using the *Montana* test,[136] the Court concluded that Tribal authority to regulate State officers in executing process related to the off-reservation violation of State laws was not essential to Tribal self-government or internal relations. Moreover, it concluded, the State's interest in executing process was considerable, and did not impair the Tribe's self-government.

Most of the reported State court decisions regarding State service of process within Indian country pre-date *Nevada v. Hicks*. Courts have used the *Williams* test to review State service of process on an Indian residing on a reservation. With regard to the preemption prong, courts have uniformly held that there is no Federal statute preempting State service of process. Conclusions regarding whether the State action infringes on Tribal sovereignty vary.

Montana courts have concluded that State service of process does not infringe on Tribal sovereignty: "Indian country is not a Federal enclave off limits to State process servers. Service of process extends to Indian defendants served within the reservation."[137] The Wisconsin Supreme Court has recognized that service of process

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[134] *See* W. Canby, American Indian Law in a Nutshell 192-194 (4th ed. 2004).
[135] In *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1977), the Court had stated: "As to nonmembers . . . a Tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. . . ."
[136] *Montana v. United States*, 450 U.S. 544 (1981).
[137] *Bad Horse v. Bad Horse,* 163 Mont. 445, 517 P.2d 893 (1974), *cert. denied* 419 U.S. 847 (1984).

is an attempt to apply State law on the reservation.[138] However, the court also found that applying State service of process statutes had little if any effect on Tribal sovereignty. The case involved a juvenile delinquency proceeding against an enrolled member of the Menominee Indian Tribe for acts that had occurred off the reservation. The New Mexico Supreme Court has also upheld State service of process on an Indian while on the reservation for off-reservation acts.[139] In contrast, the Arizona court in *Francisco v. State*, 556 P.2d 1 (Ariz. 1976) held that State service on an Indian while on the reservation was invalid. *Francisco* involved a mother and alleged father who were both Papago Indians; the mother and child had lived in Tucson, Arizona since the child's birth, and the father lived on the reservation. Action was brought in State court to establish paternity. The Pima County Deputy Sheriff served the alleged father while he was on reservation, and the alleged father subsequently challenged the State court's personal jurisdiction over him. The Arizona Supreme Court pointed out that Arizona lacked Public Law 280 jurisdiction. The court concluded, therefore, that the State could not extend its laws to Indian reservations such that a deputy sheriff could validly serve an Indian on the reservation.[140] In another case, Arizona attempted to accommodate concerns about interference with Tribal sovereignty by authorizing service of process within Indian country only when process is served by mail, as in the case of long-arm jurisdiction over out-of-State defendants.[141]

When State service is made on a non-Indian on the reservation, the court is less likely to find interference with Tribal sovereignty. In the later case of *State v. Zaman*,[142] the Arizona Court of Appeals emphasized the distinction between State service on an Indian within the boundaries of a reservation (not allowed under prior State case law) and State service on a non-Indian on the reservation. Citing prior U.S. Supreme Court decisions, it upheld the State service of process on a non-Indian on the reservation. It also commented that Public Law 280 was irrelevant because the law was a method whereby a State may assume jurisdiction over reservation Indians: "Arizona does not need Public Law 280 to extend its laws to non-Indians within the boundaries of a reservation."[143]

A comprehensive analysis of service of process in Indian country is found in Letter Opinion 94-L-245, written by the then Attorney General of North Dakota. The Attorney General was responding to an inquiry as to whether a county sheriff could enter the reservation to serve a notice of levy upon an Indian residing on the reservation. The Letter Opinion begins by stating that the response assumes that the State court had jurisdiction over the matter and the parties. Although it also predates *Nevada v. Hicks*, the Letter Opinion makes the following points, which are still valid:

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[138] *In Interest of M.L.S.,* 157 Wis. 2d 26, 458 N.W.2d 541 (1990).
[139] *See State Securities, Inc. v. Anderson,* 84 N.M. 629, 506 P.2d 786 (1973).
[140] *Accord Martin v. Denver Juvenile Court*, 493 P.2d 1093 (Colo. 1972). Note that both of these cases were decided before the Supreme Court's ruling in *Nevada v. Hicks*, 533 U.S. 353 (2001).
[141] *See Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989).
[142] 194 Ariz. 442, 984 P.2d 528 (1999). Note that there are several Arizona appellate opinions arising from the original trial case.
[143] 194 Ariz. at 443-4, 984 P.2d at 529-30.

1. On a reservation, State authority over a nonmember Indian or non-Indian is more extensive than that over Tribal members.[144]

2. Prior to *Nevada v. Hicks*, State courts had split in their decisions regarding the service of process by a sheriff upon an Indian in Indian country.[145]

3. If Tribal law does not allow Tribal authorities to aid a sheriff in the service of process, service by the State sheriff is more likely to be held valid; the court is less likely to find infringement of Tribal sovereignty if the Tribe chose not to exercise its right of self-government in this area.[146]

4. If State law requires personal service of process, notice should be served in cooperation with Tribal authorities.[147]

5. State law may provide for a less intrusive form of service of process, such as service by mail.

6. Another way to avoid the jurisdictional problem is to have service conducted by Tribal law enforcement officers, assuming State law does not restrict service to State officers.[148]

Service on a defendant will not remedy an invalid exercise of subject matter jurisdiction. For example, when a State trial court lacks subject matter or personal jurisdiction over an Indian defendant, service on the individual while he or she is on the reservation is insufficient to give the State court jurisdiction over the defendant**.**[149]

TRIBAL PERSONAL JURISDICTION

Bases for Personal Jurisdiction Assuming subject matter jurisdiction, Tribal codes typically assert personal jurisdiction in a civil action over any person who is a

[144] *See, e.g., State v. Zaman*, 194 Ariz. 442, 984 P.2d 528 (1999).
[145] *Compare, e.g., State Sec., Inc. v. Anderson*, 506 P.2d 786 (N.M. 1973); *Little Horn Bank*, 555 P.2d 211 (Mont. 1976); *LeClair v. Powers*, 632 P.2d 370 (Okla. 1981)(upholding State service of process on Indians while they are within the boundaries of the reservation) *with Francisco v. State*, 556 P.2d 1 (Ariz. 1976); *Tracy v. Superior Ct.,* 810 P.2d 1030 (Ariz. 1991) (disapproving of State service upon Indians in Indian country).
[146] *But see* Comment, *A World without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country,* 61 U. Chi. L. Rev. 707, 725 (1994), positing that application of State law impinges on Tribal sovereignty even when the Tribe has not explicitly addressed the issue.
[147] In *Nevada v. Hicks*, the State game warden had obtained a Tribal warrant, in addition to his State court warrant, and had asked Tribal authorities to accompany him when he served the process on Hicks in his home on the reservation.
[148] The Letter Opinion notes dicta in *Francisco v. State* in which the court noted that an otherwise invalid sheriff's service upon an Indian in Indian country "could have validly been effected through the Papago Indian authorities who are vested with power to serve process pursuant to Tribal law. 556 P.2d 1 at 2, n. 1 (1976).
[149] *See, e.g., Nenna v. Moreno,* 132 Ariz. 565, 647 P.2d 1163 (1982); *State ex. rel. Flammond v. Flammond,* 190 Mont. 350, 621 P.2d 471 (1980).

member of the Tribe.[150] There may be limits to the exercise of civil jurisdiction over a nonmember Indian or non-Indian. For example, the Civil and Criminal Law and Order Code of the Hualapai Tribe (Arizona) provides that the Tribal court:

> shall have jurisdiction of all suits wherein the defendant is a member of the Tribe and between members and non-members which are brought before the Court, provided that the Tribal court shall not have jurisdiction over non-Indian defendants in civil matters, unless said non-Indian shall have submitted himself to said jurisdiction. Submission of jurisdiction shall be by written stipulation or oral stipulation in open court or by filing an action in Tribal court against an Indian.

Ch. 2, § 2.1 (1975). The Three Affiliated Tribes of Fort Berthold Reservation (North Dakota) limit civil jurisdiction in domestic relations cases to actions involving enrolled members of the Tribe. Section 2(a)(3).

Regulations governing Courts of Indian Offenses authorize jurisdiction over "all suits wherein the defendant is a member of the Tribe or Tribes within their [CFR court's] jurisdiction, and of all other suits between members and nonmembers which are brought before the [CFR] courts by stipulation of both parties." 25 C.F.R. § 11.22.

Tribal codes usually also assert personal jurisdiction over persons who are present, domiciled, or resident on the Tribal reservation or other Tribal lands.[151] Some codes specifically address non-Indians in that context. For example, the Tribal Code of Keweenaw Bay Indian Community of L'Anse Indian Reservation (Michigan) States the following:

> Any person, whether Indian or non-Indian, and whether natural or created by law, who is found within the territorial jurisdiction of this Court as defined by Section 1.501 . . . shall be subject to the jurisdiction of this Court. Non-Indian persons, by their residence, employment, or by their participation in any other activity within the territorial jurisdiction of this Court impliedly consent and submit to the provisions of this Code and the jurisdiction of this Court.

Ch. 1.5, § 1.502.

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[150] *See, e.g.*, Law and Order Code of the Fort McDowell Yavapai Community, Arizona, Section 1-7.Civil Jurisdiction, B (1)(b) (2000); Coquille Tribal Code, Tribal Court Ordinance 610.200(c)(1). The Coquille Tribal Code also asserts personal jurisdiction over persons who are eligible for Tribal enrollment, or who have consented to the court's jurisdiction by marriage to a Tribal member.

[151] *See, e.g.*, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Tribal Laws, 1-2-104(2)(a); Law and Order Code of the Fort McDowell Yavapai Community, Arizona, Section 1-7.Civil Jurisdiction, B (1)(a) (2000); Coquille Tribal Code, Chapter 610.200(c)(3).

The Law and Order Code of the Coeur d'Alena Tribe of Indians (Idaho) asserts that "[a]ny non-Indian who voluntarily comes onto or lives within the exterior boundaries of the Reservation hereby . . . consents to jurisdiction." 1-2.01.

The Hualapai Tribe (Arizona) ensures that nonresidents are aware of the significance of their presence on the reservation. Pursuant to the Tribal code, a sign must be erected at all entrances to the Reservation informing the general public that they have consented to Tribal jurisdiction upon entering the Reservation.[152]

If the respondent is a nonresident, many Tribal codes have long-arm statutes authorizing the assertion of personal jurisdiction under circumstances similar to State long-arm statutes.[153]

The definition of "residence" was raised in the case of *Father v. Mother*, No. 3 Mash. 204 (Mashantucket Pequot Tribal Court 1999). Denying the defendant's Motion for Relief, the Tribal court found that the court possessed exclusive subject matter jurisdiction over a paternity and custody action brought by the member father if the child was residing on the reservation at the time the original action was begun. The mother, a non-member Indian who lived in the State of Virginia, had argued that the child did not reside on the reservation; she characterized the child's 10-month stay there as a visit. In ruling that the child was a resident of the reservation, the court rejected "the historically gendered and sexist rules of the western common law" that presumed the child's residence was that of the mother's. Rather, it looked to Tribal law with its focus on the well-being of the Tribal member children:

> The Family Relations Law and Child Protection Law does not require a Tribal member child to have resided on Nation lands for any minimum amount of time before this Court may exercise its jurisdiction over him or her. In Tribal law, this is not an unusual omission. The lack of a requirement that residency be of a minimum duration reflects the special ties of native Americans to their ancestral homelands and reservations, and to the Tribal history, culture and extended family relations that are alive there. . . .. Thus for the Native American, the reservation is unlike any other place on the face of the earth.

Service of Process Finally, a valid exercise of Tribal court jurisdiction requires valid service of process. When the civil action is being heard by a Tribal court, service should comply with the relevant Tribal code. Most Tribal codes allow personal service; service by registered mail, return receipt requested; or, in certain circumstances, service by publication.[154]

[152] Civil and Criminal Law and Order Code of Hualapai Tribe Ch. 1, § 1.1 (1975).
[153] *See, e.g.*, Sisseton-Wahpeton Sioux Tribe, Chapter 45 Act of Non-Domiciliaries, Section 45-01-01 Personal Jurisdiction by Act of Non-Domiciliaries.
[154] *See, e.g.*, Crow Law and Order Code, 1-153, 1-154.

The Tribal code may also specify who may serve process.[155] For example, the Nez Perce Tribal Code authorizes service by any person who is not a party and who is at least 18 years old. At the plaintiff's request, the court may require service of process by a Tribal police officer or other person specially appointed by the court.[156]

[155] *See, e.g.*, Law and Order Code of the Kalispel Tribe of Indians, Ch. 3, 3-401.
[156] Nez Perce Tribal Code, Chapter 2-2, Rule 4(c).

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CHAPTER THREE
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28 U.S.C. § 1331

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CHAPTER FOUR
JURISDICTION IN DOMESTIC LAW CASES

The myriad Congressional acts and Supreme Court cases -- often reflecting inconsistent policies, philosophies, and interpretations -- have resulted in complex jurisdictional issues.[157] This is true in the domestic relations area.

Congress has recognized that a Tribe has a strong interest in "preserving and protecting the Indian family as the wellspring of its future."[158] The Supreme Court has also stressed the importance of Tribal power to regulate internal domestic relations.[159] But inherent jurisdiction is not conclusive in family law disputes in which one of the parents is a non-Indian or nonmember Indian.

In 1989, a committee of the Conference of Chief Justices mailed a survey to various individuals in the 32 States with Federally recognized Indian country. Twenty-one States reported disputed jurisdiction cases.[160] The most frequently cited case problems arose under the Indian Child Welfare Act. However, domestic relations disputes – divorce, child custody and support – were next in frequency. Disputes arose over which court system had jurisdiction over the establishment of paternity and support, and over enforcement of existing orders. In a more recent survey of Tribal courts, 83% of responding Tribal judges cited trouble enforcing their decisions in State courts.[161]

Although cooperation among Tribes and States has greatly improved since then, including an increase in the use of intergovernmental and cooperative agreements, issues still arise. The next section of this monograph will focus on jurisdictional and operational issues arising in paternity and child support cases in which at least one of the parties is an American Indian.

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[157] *Yakima v. Washington*, 439 U.S. 463, 470 n.7 (1979).
[158] H.R. Rep. No. 95-1386 at 19.
[159] *See Montana v. United States*, 450 U.S. 544 (1981). *See also Fisher v. District* Court, 424 U.S. 382 (1976).
[160] Rubin, *supra* note 7.
[161] Stoner and Orona, *supra* note 27.

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CHAPTER FOUR
TABLE OF STATUTES AND AUTHORITIES

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CHAPTER FIVE
PATERNITY ESTABLISHMENT

Parentage is at the heart of the determination of a duty to pay support. When children are born outside of marriage, the first step in a support establishment action is usually determination of paternity. A State IV-D agency does not pursue paternity establishment in public assistance cases where *good cause* exists.[162] "Good cause" is an exception to the public assistance recipient's obligation to cooperate with the State IV-D office in its efforts to establish paternity. A finding of good cause means that State IV-D efforts to establish paternity, or to establish and enforce a child support obligation, cannot proceed without a risk of harm to the custodial parent (or caretaker relative) and child. Nor must a State IV-D agency establish paternity when the IV-D agency has determined that it would not be in the best interest of the child in a case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending.[163] Federal regulations provide that the Tribal IV–D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the Tribal IV–D agency, it would not be in the best interests of the child to establish paternity.[164]

DETERMINATION OF PATERNITY

Voluntary Acknowledgment To be eligible to receive Federal IV-D funding, States and Tribes must operate a child support program that provides for the establishment of paternity. Federal regulations setting the paternity establishment requirements for a State IV-D program appear at 45 C.F.R. § 303.5. Federal regulations setting paternity establishment procedures that must be part of a Tribal IV-D program appear at 45 C.F.R. § 309.100.

One of the paternity establishment methods that State and Tribal IV-D programs must provide is a voluntary acknowledgment of paternity. There are no Federal regulations prescribing the voluntary acknowledgment process for Tribes. However, State child support programs must ensure that the civil process for acknowledging paternity is available at hospitals and birthing centers.[165] This process is often called "in-hospital acknowledgment." Unmarried parents are not required to sign a paternity acknowledgment but they must be given the opportunity to do so at each hospital and birthing center in the State. As part of this process, the putative father can consult with an attorney and may request genetic tests prior to signing the acknowledgment. Once the acknowledgment is signed, it is filed with the State registry of birth records. State law must provide that the signed paternity acknowledgment creates a rebuttable, or – at State option – a conclusive presumption of paternity and can be the basis for a support order without further paternity proceedings.[166] Either parent has 60 days, from the date an acknowledgment of paternity is signed, to revoke it for any reason. The Rescission Form must be in writing. After this 60-day period has expired, a parent must go to court

[162] 45 C.F.R. § 302.70.
[163] 45 C.F.R. § 302.70.
[164] 45 C.F.R. § 309.100.
[165] 45 C.F.R. § 303.5(g)(2).
[166] 45 C.F.R. §§ 302.70(a)(5)(iv), (vii).

to challenge it. If a parent does bring an action in court after the 60-day time frame, the bases for challenging the acknowledgment are limited to fraud, duress, or a material mistake of fact.

States must give full faith and credit to a determination of paternity made in another State through the paternity acknowledgment process.[167] There is no such requirement on Tribes, which are not subject to the Federal Full Faith and Credit clause of the Constitution in the absence of express legislation. Tribal courts may recognize such determinations pursuant to comity. See the discussion herein.

Genetic Testing States must have laws requiring a child and all other parties in a contested paternity case to submit to genetic tests upon the request of any such party.[168] They must also have procedures which provide that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence; if no objection is made, a written report of the test results is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. Finally, States must have laws that create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability of the alleged father being the father of the child.[169]

Tribal IV-D programs must have procedures requiring that, in a contested paternity case (unless otherwise barred by Tribal law), the child and all other parties must submit to genetic tests upon the request of any such party.[170] The phrase "otherwise barred by Tribal law" is intended to cover situations in which, either by action of one or both of the parties or the application of Tribal law, or both, paternity has already been conclusively determined and may not be reconsidered. In such cases, genetic testing to challenge the paternity determination would not be authorized.[171]

Judicial or Administrative Proceeding In the absence of an acknowledgment, a State IV-D plan must provide for the establishment of paternity by bringing a legal action (before a court or administrative forum) in accordance with State law.[172] A Tribal IV-D plan must provide for the establishment of paternity "by the process established under Tribal law, code, and/or custom." [173] Federal regulations expressly state that establishment of paternity pursuant to a Tribal IV-D program requirement has no effect

[167] 45 C.F.R. § 302.70(a)(11).
[168] 45 C.F.R. § 302.70(a)(5) and § 303.5(d) and (e).
[169] 45 C.F.R. §§ 302.70(a)(5)(v), (vi).
[170] 45 C.F.R. § 309.100(a)(3).
[171] 69 Fed. Reg. 16,638 at 16,658 (2004): "Examples of such a paternity determination would include a voluntary admission of paternity or circumstances under which the Tribe has other means of recognizing paternity under Tribal law. A Tribe, through its own custom, tradition or procedure, may recognize a man as the father or may preclude a man who holds himself out to be the father from challenging paternity. Similarly, a Tribe may have a conclusive presumption of paternity when a child is born to married parents or if a noncustodial parent has been validly served in a paternity proceeding and failed to contest paternity in such proceeding."
[172] 45 C.F.R. § 302.31.
[173] 45 C.F.R. § 309.100(a)(1).

on Tribal enrollment or membership.[174] However, in reality, paternity establishment can affect enrollment if a tribe's enrollment process requires a birth certificate and/or descent line. In such circumstances, if a man's name is on the birth certificate, the child can be enrolled into the tribe -- regardless of whether the name is on the certificate due to a paternity adjudication, a default paternity order, or a paternity acknowledgment, and regardless of whether the man is the child's biological father. Therefore, State and Tribal child support workers need to remember the importance of paternity establishment for potential Tribal children.

In a purely judicial setting before a State or Tribal court, a petition or complaint is filed requesting the establishment of parentage. Notice of the action is served, usually by certified mail or personal service, upon the alleged father. If the alleged father does not admit paternity, a trial is scheduled at which time both parties present evidence, including relevant testimony or facts meeting any presumptions recognized by the jurisdiction, and any genetic test results. Based on an evaluation of the evidence, the judicial officer decides the issue of paternity.

If the defendant has failed to respond after being served with the appropriate case paperwork (i.e., summons and pleading seeking paternity establishment), Federal regulations governing State IV-D programs require the IV-D agency to seek entry of a default order.[175] There is no such requirement on Tribal IV-D programs.

Judicial proceedings are available in both private cases and cases brought by a child support agency. In States using an administrative process to determine paternity, the administrative proceedings are only available in cases brought by a child support agency. In a typical administrative process, the alleged father is notified of the allegation of paternity and of a scheduled conference time. At the appointed time, he has the opportunity to acknowledge paternity. If he does not acknowledge paternity, an administrative hearing before an administrative hearing officer is scheduled. At the hearing, both parties present evidence, including relevant testimony of facts meeting any presumptions recognized in the jurisdiction, and any genetic test results. Based on an evaluation of the evidence, the administrative hearing officer decides the issue of paternity. Some Tribes, such as the Navajo Nation, have also established an administrative process for child support cases.

Tribes that do not receive Federal IV-D funding may also provide forums for the establishment of paternity. They do not need to meet Federal IV-D regulatory requirements.

Paternity establishment after the death of the alleged father is an issue that may arise among Indian children – not for support purposes, but because of the need to establish paternity to become enrolled with the Tribe. In some circumstances the Department of Interior may also determine the issue in a probate proceeding involving Indian trust land.

[174] 45 C.F.R. § 309.100(d).
[175] 45 C.F.R. § 302.70(a)(5)(viii).

Pursuant to the Full Faith and Credit for Child Support Orders Act,[176] States and Tribes are required to recognize and enforce valid child support orders. If such orders are premised on a finding of paternity, the State or Tribe must honor such paternity findings.[177] States are also required by Federal law to give full faith and credit to "stand alone" paternity determinations made in another State, whether through an administrative process or a judicial process.[178] Tribes are not subject to this requirement.

Custom Reuniting Indian fathers and their children is important for a number of reasons. Knowing who and where the father is obviously affects the children and other family members who want to reclaim kinship ties. In Native American culture, fathers are expected to provide food and shelter for their families. They are also traditionally viewed as teachers, guides, role models, leaders, and nurturers. Determination of paternity may also be a step toward Tribal enrollment. "Tribal membership is directly related to Federal benefits. Membership also has implications for legal jurisdiction, inheritance or restricted or trust lands, and voting rights."[179]

In developing regulations that govern Tribal IV-D programs, the Federal government has recognized that Tribes may provide for the legal determination of paternity pursuant to custom and religious practice. Such regulations define "Tribal custom" to make it clear that the term means unwritten law that has the force and effect of law.[180]

TRIBAL OR STATE SUBJECT MATTER JURISDICTION

The decision of whether a Tribal court or State court has exclusive or concurrent jurisdiction in a paternity case is influenced by a number of factors: whether the State is a Public Law 280 State with civil jurisdiction over domestic matters, whether the mother and alleged father are members of the same Tribe, whether one party is an Indian and the other is not, whether a party resides on a reservation or Tribal land, whether conception occurred on or off the reservation, whether the mother applied for public assistance from the State and the State IV-D agency is bringing the paternity action, whether there is a Tribal forum for a paternity action, and which court is making the initial decision regarding jurisdiction. It is impossible to draw many "bright lines" because the court rulings often conflict. For the purpose of the following discussion, we will initially focus on whether the parents in a particular case are American Indian. We will then note other factors that seemed decisive for the court. State child support agencies should keep in mind that if paternity has already been determined under Tribal

[176] 28 U.S.C. § 1738B.
[177] *See* 69 Fed. Reg. 16,658 (March 30, 2004).
[178] 45 C.F.R. § 302.70(a)(11).
[179] Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children at 40 [hereinafter referred to as Strengthening the Circle].
[180] 45 C.F.R. § 309.05.

law, which usually includes custom, a State must give full faith and credit to that determination and should not attempt to initiate a State action for paternity establishment.

Member Indian Mother and Member Indian Alleged Father/Reside on Reservation

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 civil jurisdiction has jurisdiction over domestic relations actions, to which Indians are parties, and which arise in Indian country.[181] A case in point is *Becker County Welfare Department vs. Bellcourt*, 453 N.W.2d 543 (Minn.1990). In this case, the mother, alleged father, and child were enrolled Tribal members who lived on White Earth Reservation in Minnesota. As a result of the mother's receipt of public assistance, Becker County initiated a paternity action against Bellcourt in a State court. The court adjudicated paternity and ordered support. Bellcourt appealed on the issue of subject matter jurisdiction. Becker County pointed out that Public Law 280 conferred jurisdiction over civil causes of action in Minnesota to which Indians are parties. The father argued that the county's action was not based on a civil law of "general application to private persons," but rather was regulatory in nature and therefore outside of Public Law 280.

The Minnesota Court of Appeals disagreed. It concluded that, in seeking reimbursement of public assistance, the county was not acting in a regulatory capacity but was "only acting on behalf of a private party who has assigned her rights to establish paternity and recover child support."[182] Because the action was a civil action of "general application to private persons," the State trial court had properly exercised its Public Law 280 jurisdiction. Noting that "the legislative history of Pub. L. 280 indicates that the statute was intended to redress the lack of adequate Indian forums,"[183] the Court of Appeals noted that the constitution of the Minnesota Chippewa Tribe did not authorize creation of Tribal courts to deal with domestic relations matters: "Thus, even though the tribe has a strong interest in self-governance and in determining the parentage of Indian children, Congress cannot have intended that there be no forum to execute the AFDC reimbursement program it mandates."[184] Where conception occurred appeared to be an irrelevant factor in the court's analysis since it was not discussed.[185]

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[181] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[182] 453 N.W.2d 543, 544.
[183] *Id.*
[184] 453 N.W.2d 543, 544.
[185] *State v. W.M.B.*, 159 Wis. 2d 662, 465 N.W.2d 221 (1990) reached a similar conclusion, ruling that a State court may have concurrent jurisdiction to establish paternity. In *State v. W.M.B.*, the parties and child were all members of the same tribe, who lived on the reservation. The action was a contempt proceeding in which the father attacked the underlying paternity order as void. Using a federal preemption and infringement analysis, the court first concluded that federal regulations cited by the respondent as establishing federal preemption of State court jurisdiction did not do so. It then examined whether State jurisdiction to establish paternity would infringe on the right of tribes to establish and maintain their Tribal government. It concluded that it would not. The court found that when paternity and child support were first established by a State trial court in 1977, there was no Tribal code that focused on paternity and child support and no Tribal court existed at the time. In a later Tribal court proceeding

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, if both parents are enrolled members of the same Tribe, who live in Indian country, State courts have held that the Tribal court has exclusive jurisdiction. The decision in *Jackson County Child Support Enforcement Agency v. Swayney*[186] is illustrative.

In *Jackson County,* the mother, alleged father, and child were all enrolled members of the Eastern Band of Cherokee Indians living on the reservation. The mother had applied for public assistance from the State of North Carolina, and had assigned her right to establish paternity and collect child support to the State. The State agency filed a paternity action in State court; the alleged father challenged State court jurisdiction. On appeal, the North Carolina Supreme Court held that the State court lacked subject matter jurisdiction over the paternity matter. Using the *Williams v. Lee* test, the court stated:

> The determination of the paternity of an Indian child is of special interest to Tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations. Thus, exclusive Tribal court jurisdiction over the determination of paternity, where the defendant is an Indian living on the reservation, is especially important to Tribal self-governance. The State's interest in having this matter litigated in its own courts Is less compelling . . . [and] the State may resort to the Court of Indian Offenses to secure a judgment or order determining the paternity of the child, thus meeting [the Federal AFDC] requirement.[187]

The Supreme Court of North Dakota also held that a Tribal court had exclusive jurisdiction to determine paternity when both parents and the children were enrolled members of the same tribe, conception occurred on the reservation, and the alleged father lived on the reservation. In *M.L.M. v. L.P.M*., 529 N.W.2d 184 (N.D. 1995), the court concluded that the mother's period of residency off the reservation and the alleged father's off-reservation employment were not significant enough to overcome the danger that "the exercise of such jurisdiction would undermine the authority of the Tribal courts over reservation affairs and thereby infringe on the right of the Indians to govern themselves."[188] In other cases, the North Dakota Supreme Court has held that the State's provision of public assistance[189] and a defendant's delay of eight years in raising

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involving custody, the court noted that the Tribal court had not questioned the State's jurisdiction in the paternity and support proceeding. NOTE: The court mentions a 1976 Governor proclamation retroceding jurisdiction over the Menominee Indian Reservation "pursuant to federal law," but does not identify Public Law 280 by name. Wisconsin currently has Public Law 280 civil jurisdiction over all Indian country within the State, with the exception of the Menominee Reservation. See *supra* note 101.

[186] 352 S.E.2d 413 (N.C. 1987).

[187] 352 S.E.2d at 418-9. *Accord Jackson County Smoker v. Smoker, Jr.*, 341 N.C. 182, 459 S.E.2d 789 (1995).

[188] 592 N.W.2d 184, 186, citing *McKenzie County Social Serv. Bd. v. V.G*., 392 N.W.2d 399, 402 (N.D. 1986).

[189] *See McKenzie County Social Servs. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986); *McKenzie County Social Serv. Bd. v. C.G.,* 633 N.W.2d 157 (N.D. 2001).

subject matter jurisdiction[190] are each insufficient to outweigh the Tribe's significant interest in Tribal determination of parentage of children of Tribal members when conduct occurred on the reservation.

South Dakota courts have also concluded that there is exclusive Tribal court jurisdiction in a paternity action in which both parents are enrolled Tribal members domiciled on the reservation.[191]

In *Davis v. Means,*[192] the Navajo Tribal court emphasized how interwoven a child's Indian heritage is with paternity establishment and why the Tribal court has jurisdiction to resolve paternity, including the authority to order genetic testing: "The Navajo maxim is this: 'It must be known precisely from where one has originated.' The maxim focuses on the identity of a person (here the child) and his or her place in the world, and is a crucial component of the tenet of family cohesion."[193] The court noted that establishing paternity with reasonable certainty was essential for the family to achieve stability and harmony.

In contrast to the above decisions is the Wisconsin case of *State v. W.M.B*.[194] The parties and child were all members of the Menominee Tribe, who lived on the Menominee reservation. The action was a contempt proceeding in which the father attacked the underlying State paternity order as void. He argued that the Tribal court had exclusive jurisdiction over any paternity action between Tribal members living on the reservation because in 1976 Wisconsin had retroceded its jurisdiction over the Menominee Indian Reservation, prior to initiation of the State action in 1977. In its analysis, the Court of Appeals noted that there were two barriers to a State's exercise of jurisdiction relating to Indian matters. First, was there Federal law preempting a State's authority to act? Second, did the State action infringe upon the rights of tribes to establish and maintain Tribal government? The court noted that "Wisconsin has recognized a trend toward reliance on Federal preemption and away from the idea of inherent Indian sovereignty as an independent bar to State jurisdiction."[195]

The court first concluded that the two Federal regulations cited by W.M.B as establishing Federal preemption – 25 CFR 11.22 and 11.30 – were enabling legislation of the Court of Indian Offenses and, as such, were not Federal statutes establishing Federal preemption of the exercise of subject matter jurisdiction by State courts over paternity and child support actions involving members of Indian Tribes. The court then examined whether State court jurisdiction unduly infringed on Tribal self-governance. The court was influenced by the fact that, despite Wisconsin's retrocession of

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[190] *Id.*
[191] *See, e.g., South Dakota ex rel. Jealous of Him v. Mills*, 627 N.W.2d 790 (2001); *Harris v. Young*, 473 N.W.2d 141, 144 (S.D. 1991) (citing *Fisher v. Dist. Court of Sixteenth Jud. Dist*., 424 U.S. 382 (1976); *Wells v. Wells*, 451 N.W.2d 402, 405 (S.D. 1990)).
[192] 21 Indian L. Rptr. 6125 (Navajo 1994).
[193] 21 Indian L. Reptr. 6125, 6127.
[194] *State v. W.M.B.*, 159 Wis. 2d 662, 465 N.W.2d 221 (1990). At the time of the State court action, Wisconsin had retroceded its Public Law 280 jurisdiction over the Menominee Tribe. See *supra* notes 101 and 185.
[195] 465 N.W.2d 221, 223.

jurisdiction, the Menominee Tribe had not "exercised its sovereign governmental authority in the resolution of paternity issues" in 1977. At the time of the State court paternity hearing, there was no Tribal court and the record was silent about the existence of any Tribal code dealing with paternity "that could demonstrate Tribal interest in an assertion of jurisdiction." In fact, the court noted, the Tribal court had subsequently determined custody issues in the case, without questioning the State's jurisdiction to adjudicate paternity. It held that the State court's judgment of paternity and support was not void for lack of subject matter jurisdiction.

It therefore appears that, at least for one State court, the availability of a Tribal forum or statute for paternity establishment is an important factor the court will consider in deciding whether State jurisdiction infringes upon Tribal self-government.

Member Indian Mother and Member Indian Alleged Father/One Member Resides off Reservation

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action involving Indians has jurisdiction over domestic relations matters if the cause of action occurred in Indian country.[196] None of the researched paternity cases discussed Public Law 280 jurisdiction under facts in which one of the Tribal members resided outside of Indian country.

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when both parents are enrolled members of the same Tribe but one member lives off the reservation, State courts will conduct a *Williams* preemption-infringement analysis. If one of the parties files a paternity action in State court and jurisdiction is challenged, the State court will likely focus on where the cause of action arose. If conception occurred in Tribal territory, the State court will most likely find that the Tribal court has exclusive jurisdiction. A case in point is *McKenzie County Social Service Board v. C.G.*, 633 N.W.2d 157 (N.D. 2001). The case involved an Indian mother and alleged father from the same Tribe. Conception occurred on the reservation. The mother received public assistance from the State of North Dakota, which filed the paternity and support action in State court on her behalf. The alleged father lived off the reservation at the time the lawsuit was filed. When the alleged father failed to appear at the hearing, the State court entered a default order establishing paternity and support and ordering reimbursement of public assistance. Eight years later, the father moved to set aside the judgment for lack of subject matter jurisdiction. The court treated the motion as a Rule 60b motion for relief from a final judgment because the judgment was void.

The North Dakota appellate court used the infringement test to determine whether State court jurisdiction was proper: Would State court jurisdiction undermine the authority of Tribal courts over reservation affairs and infringe on the right of Indians to govern themselves? The court concluded that determination of the parentage of a child of Indian Tribal members was intimately connected with the right of reservation Indians to make their own laws and be ruled by them. The State provision of public

[196] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).

assistance, Title IV-D's requirements to recover support with the possibility of Federal financial sanctions for nonperformance, and the father's residency off the reservation were not enough to override that Tribal interest. The court concluded that the State district court had lacked jurisdiction to determine paternity in this case and the order was void. Based on the facts, the appellate court ruled that the Tribal court had exclusive jurisdiction.[197]

In contrast is the case of *Anderson v. Beaulieu*, 555 N.W.2d 537 (Minn. 1996). In *Anderson,* the mother, alleged father, and child were all members of the same Tribe. The mother and child lived off the reservation; the mother received public assistance from the county. At the time of the paternity and support action, which had been brought in State court, the alleged father worked off the reservation. His motion to dismiss for lack of subject matter jurisdiction was denied. After he obtained employment on the reservation, he brought a motion for reconsideration. The Minnesota appellate court asked whether the State action would undermine the tribe's right of self-government. Citing the case of *Jackson County CSEA v. Swayney*, but distinguishing the present facts, the court concluded that State court jurisdiction had not impinged on the tribe's self-governance.[198] Although the mother, father, and child were all members of the same Tribe, the mother and child lived off the reservation. Second, the action arose off the reservation because the mother had applied for AFDC through the county.[199] Finally, the court concluded that the "tribe's interest [in paternity establishment] is outweighed by the State interest in securing child support payments as required by the AFDC program." NOTE: When the paternity action began, the father was employed off the reservation. The court pointed out that by working off the reservation and voluntarily agreeing to genetic testing, he had voluntarily submitted himself to State jurisdiction. It is unclear to what extent those factors were the main basis for the court's holding versus the results of its infringement analysis.

South Dakota ex rel. Jealous of Him v. Mills, 627 N.W.2d 790 (S.D. 2001) also involved two member Indians, one of whom was an alleged father domiciled off the reservation. The court upheld the State trial court's jurisdiction in a paternity action between Tribal members: "When one party becomes domiciled off the reservation, State and Tribal courts enjoy concurrent jurisdiction, and the case may be adjudicated by whichever court first obtains valid personal jurisdiction." The court emphasized that it would have ruled differently if both members had been domiciled on the reservation.

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[197] *Accord In re M.L.M.*, 529 N.W.2d 184 (N.D. 1995) (where both parents were Tribal members and conception occurred on the reservation, the fact that the child was born off the reservation, that the mother lived off the reservation for a period of time, and that the alleged father lived off the reservation and was employed off reservation did not outweigh the right of Indians to govern themselves).

[198] Unlike the facts in *Swayney*, upon which the appellate court had concluded that the Tribe's interest would be infringed if the State court asserted jurisdiction over paternity, the court in *Anderson* concluded that the Tribe's interest would not be infringed if the State court asserted jurisdiction in this case. Here the mother and child lived off the reservation, the father worked off the reservation, and the father had submitted to State administered genetic testing.

[199] It is interesting that the court considered the cause of action to have arisen where the mother applied for public assistance as opposed to where conception occurred. Because the court determined that the cause of action arose outside of Indian country, Minnesota's Public Law 280 jurisdiction did not come into play. The court did not mention Public Law 280 in its analysis.

If the plaintiff files the paternity action in Tribal court and the defendant challenges subject matter jurisdiction, the Tribal court will most likely reject the challenge. When both parties are enrolled members of the same Tribe, the Tribal court will most likely conclude that it has jurisdiction, regardless of the residence of the parties, because of the importance of paternity establishment to Tribal interests. If conception occurred on the reservation, there is a strong argument for exclusive Tribal jurisdiction.

In summary, when both parties are members of the same Tribe but one of the Tribal members lives off the reservation, the facts of the specific case – where conception occurred, whether public assistance was provided by the State, whether there are consensual contacts between the defendant and the forum -- may be dispositive regarding jurisdiction.

Member Indian Mother and Member Indian Alleged Father/Both Parents Reside off Reservation No cases were found with this fact pattern. Although all parties lived off the reservation in *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), the parties were not both member Indians. See discussion below. In Attorney General's Opinion 2000-F-07, the North Dakota Attorney General discusses hypothetical fact patterns regarding paternity actions involving enrolled Tribal members. Noting that there is no bright-line test for determining jurisdiction, she concluded that under North Dakota law, which is respectful of Tribal interests, it would be appropriate for a county attorney to invoke State court jurisdiction when conception and the application for public assistance take place off the reservation, and all parties live off the reservation; in her opinion, State court jurisdiction in such a case would not unduly infringe upon Tribal sovereignty. A Tribal court may reach a different conclusion if it finds that such action does constitute an undue infringement.

Member Indian Mother and Non-Member/Non-Indian Alleged Father

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action, has jurisdiction over domestic relations matters that occur in Indian country located within that State, involving Indians or to which Indians are parties.[200] None of the researched paternity cases discussed Public Law 280 jurisdiction under facts involving one party who was a nonmember Indian or non-Indian.

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when the alleged father is a non-Indian, and the action is filed in State court, State courts have usually engaged in a *Williams* preemption-infringement analysis. The analysis is the same, regardless of whether the party is a non-member Indian or a non-Indian.[201] A State decision that emphasizes that point is *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002). The case involved parents from different Tribes, who lived off the reservation. When the mother initiated a State action to establish paternity and support,

[200] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[201] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353, 377 n. 2 (2001).

the father challenged State court jurisdiction. Upholding the trial court's exercise of jurisdiction, the North Dakota court stated that, as a nonmember of the mother's Tribe, the father had the same standing as a non-Indian, and thus could not assert the Tribe's right of self-government against the Tribe's own member. In other words, the "infringement test" could not be used offensively by a non-member Indian against a member Indian who had chosen to file her paternity action in State court.[202]

The court further held that when two Tribes were involved, each Tribe needed to conduct the *Williams* infringement test separately in the context of its own Tribe and Tribal member. Here, the court balanced the Tribe's "significant interest in determining the parentage of one of its members" against the facts of this case. The court concluded that State court jurisdiction did not infringe upon the Tribe's right to govern itself. In fact, given that the parents' relationship occurred off any reservation, the place of conception was unknown but most likely took place off the reservation, the parents signed a paternity acknowledgment off the reservation, the parents lived off the reservation, and the mother and child were receiving public assistance from the State, "the existence of any Tribal court jurisdiction, much less exclusive Tribal court jurisdiction, is questionable."[203]

The Arizona Supreme Court has also upheld State court jurisdiction in an action brought by the State against a non-Indian father to determine paternity.[204] The facts that conception occurred on the reservation and that all parties resided on the reservation were not dispositive.

Placing emphasis on the Tribal interest in paternity establishment are two Tribal court decisions: *Solomon v. Jantz*, 25 Indian L. Rptr. 6251 (Lummi Court 1998) and *Tafaya v. Ghashghaee*, 25 Indian L. Rptr. 6193 (Pueblo of Pojoaque Court 1998). In both cases, the Tribal courts concluded that the Tribal court had properly exercised jurisdiction against a non-Indian in a paternity/support action. The courts did not discuss the Supreme Court holdings in *Montana v. United States* or *Nevada v. Hicks*.[205]

No cases were found post *Nevada* in which a nonmember Indian or non-Indian challenged Tribal court jurisdiction in a paternity action, and the Indian plaintiff argued

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[202] *Accord State v. Zaman*, 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998) ("As long as the Indian party selects the State forum, there is nothing for the infringement test to protect against." 946 P.2d at 461. The putative father was a non-Indian who had argued that the Indian mother's State paternity action infringed upon the tribe's interest in self-government.)

[203] 649 N.W.2d at 576.

[204] *State v. Zaman,* 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998). In so holding, the Supreme Court reversed the Court of Appeals decision in *State v. Zaman*, 187 Ariz. 81, 927 P.2d 347 (1996) (*Zaman I*).

[205] *Montana v. United States*, 450 U.S. 544 (1981), *Nevada v. Hicks*, 533 U.S. 353 (2001). *Montana* had held that, absent federal legislation, Indian Tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation, subject to two exceptions: (1) the nonmember entered into a consensual relationship with the Tribe or its members, or (2) the nonmember's activity directly affects the Tribe's political integrity, economic security, health, or welfare. In *Nevada*, the Court applied the *Montana* test in a case involving conduct by a nonmember on Indian land within the reservation.

that where conception occurred on the reservation, the facts met one or both prongs of the *Montana* test.

Most Tribal participants in a 1991 ABA telephone survey responded that intertribal paternity situations usually are not troublesome. The opinion expressed, especially among Tribal judges, was that there exists a high level of cooperation between most Tribal court systems. Tribal judges stated that they were much more likely in intertribal matters to telephone one another, or otherwise agree upon a forum, than they were in Tribal/State matters. Most State and Tribal judges also remarked, however, that they desired more frequent interaction between States and Tribes as a way to quickly resolve many of the difficulties associated with determining the paternity of Indian children.

Non-Indian/Non-Member Mother and Indian Alleged Father When the non-Indian or non-member Indian mother files a paternity action against an Indian alleged father in State court, the Indian alleged father may raise a jurisdictional challenge. See above for a discussion regarding the role of Public Law 280 jurisdiction.

If conception occurred off the reservation or if the non-member Indian or non-Indian mother applied for public assistance from the State, and the State court views that action as the date the cause of action arose, Public Law 280 will not apply because the cause of action did not arise within Indian country.

Where Public Law 280 is not applicable, the State court will conduct a *Williams* preemption-infringement test. Using such a test in the case of *State ex rel. Vega v. Medina,*[206] the Iowa Supreme Court ruled that the State trial court had properly exercised subject matter jurisdiction over the State's action to establish paternity, current child support, and reimbursement of public assistance, when the State, child and mother were non-Indians; the child's conception arose off reservation; and the State has a strong interest in protecting its assistance program as well as ensuring the well-being of its citizens. The court also noted that the defendant's Tribe did not have a Tribal court to handle paternity and support cases.

If the non-Indian or non-member mother files a paternity action in the court of the Tribe in which the alleged father is enrolled, the non-Indian or non-member Indian is deemed to have consented to Tribal jurisdiction. The issue then becomes one of determining whether Tribal law authorizes jurisdiction in such a case.[207] If it does, and if the Tribal court has personal jurisdiction over the Indian alleged father, the Tribal court will most likely uphold Tribal court jurisdiction. In *Dallas v. Curley*, (No. AP-005-94 - Appellate Court of the Hopi Tribe), the Appellate Court held that the Hopi Tribal court

[206] 549 N.W.2d 507 (Iowa 1996).

[207] The question in this case was not whether the State court had jurisdiction, but whether jurisdiction was with the Hopi Tribal Court or the Hopi Village of Upper Moenkopi, which was the residence of the alleged father. However, the holding of the court is relevant because of its examination of how the law treated disputes involving nonmember Indians.

properly exercised jurisdiction over a paternity action brought by a nonmember Indian mother against a member of the Hopi Tribe.

Non-Indian Mother and Non-Indian Alleged Father If neither parent is an Indian, Public Law 280 jurisdiction is inapplicable. If the parties live off the reservation and conception occurred off the reservation, the State court has exclusive subject matter jurisdiction. If the parties live on the reservation and conception occurred on the reservation, it is still likely that a State court will find it has jurisdiction on the basis that there is no infringement of Tribal interest. If the parties live on the reservation, the non-Indian mother filed the paternity action in Tribal court, and the non-Indian father challenges subject matter jurisdiction, the Tribal court will likely focus on where the cause of action arose and whether exercise of jurisdiction is necessary to protect the political integrity, economic security, or health or welfare of the Tribe.[208]

[208] *See Montana v. United States*, 450 U.S. 544 (1981), which identifies two exceptions where Tribal civil jurisdiction can exist over non-Indians on non-Indian land.

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CHAPTER FIVE
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

Full Faith and Credit Clause of Constitution

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Public Law 280 (enacted in 18 U.S.C., 25 U.S.C. and 28 U.S.C.)

28 U.S.C. § 1738B

45 C.F.R. § 302.31

45 C.F.R. § 302.70

45 C.F.R. § 303.5

45 C.F.R. § 309.05

45 C.F.R. § 309.100

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

State Attorney General Opinion

North Dakota Attorney General's Opinion 2000-F-07

Case Law

Fisher v. District Ct., 424 U.S. 382 (1976)

Montana v. United States, 450 U.S. 544 (1981)

Nevada v. Hicks, 533 U.S. 353 (2001)

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Dallas v. Curley, (No. AP-005-94 - Appellate Court of the Hopi Tribe)

Davis v. Means, 21 Indian L. Rptr. 6125 (Navajo 1994)

Solomon v. Jantz, 25 Indian L. Rptr. 6251 (Lummi Court 1998)

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Anderson v. Beaulieu, 555 N.W.2d 537 (Minn. 1996)

Becker County Welfare Department vs. Bellcourt, 453 N.W.2d 543 (Minn.1990)

Harris v. Young, 473 N.W.2d 141 (S.D. 1991)

Jackson County Child Support Enforcement Agency v. Swayney, 352 S.E. 2d 413 (N.C. 1987)

Jackson County Smoker v. Smoker, Jr., 341 N.C. 182, 459 S.E.2d 789 (1995)

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CHAPTER SIX
SUPPORT ESTABLISHMENT

DETERMINATION OF SUPPORT OBLIGATION

Judicial or Administrative Proceeding When paternity is not an issue, the next stage of case processing is the establishment of a support order. Federal regulations governing both State and Tribal IV-D programs require the use of local law and procedures in establishing the support order.[209] The action may be brought before a judicial or an administrative forum.

When a State IV-D agency brings an action to establish a support order, it must meet certain Federal timeframes.[210] The Federal regulations require the establishment of a support order or, at a minimum, the service of process needed to begin the order establishment process, within 90 calendar days of locating the alleged father or non-custodial parent. If service of process cannot be obtained within this timeframe, the State IV-D agency must document that it has made a diligent effort to serve process. According to these regulations, if a State's tribunal dismisses a petition to establish a support order without prejudice, the child support office must review the case and examine the tribunal's reasons for dismissing the establishment action. If, after reviewing the reasons, the child support office determines that it would be appropriate to pursue the order establishment action again in the future, the office must bring the establishment action at that time. Finally, in a case whose parties acknowledge paternity, the regulations require the State IV-D agency to obtain a support order based upon that acknowledgment. Tribal IV-D agencies are also required to provide for the establishment of a support order, but are not subject to Federal timeframes.

Within both State and Tribal IV-D agencies, the establishment process typically involves the following steps:

1. Contact parents
2. Interview parents
3. Apply guidelines
4. Obtain order by consent or adjudication
5. Create fiscal account(s).

Especially among Tribal cultures, there is often an emphasis on working with the parties to reach an agreement short of full litigation.

Determination of Support Amount Pursuant to the Family Support Act of 1988, States, as a condition of receiving Federal IV-D funding, must have support guidelines that constitute rebuttable presumptions of the correct amount of support to be awarded by courts or administrative agencies when setting or modifying child support

[209] 45 C.F.R. § 303.4(b).
[210] 45 C.F.R. § 303.4(d).

orders.[211] Federal regulations establishing requirements for Tribal IV-D programs also require support guidelines. Both State and Tribal IV-D plans must establish one set of guidelines that are based on a specific descriptive and numeric criteria and result in a computation of the support obligation.[212] The support amount calculated pursuant to the guidelines is presumed to be correct. The presumptive amount is subject to rebuttal but, if a tribunal deviates from the presumptive amount, it must provide written findings on the record as to why the presumptive amount would be unjust or inappropriate in the specific case.[213] Tribes and States receiving IV-D funding must also review and revise, if appropriate, their support guidelines at least once every four years.[214]

The Federal regulations governing State child support guidelines also require the following:

- The guidelines must consider all earnings and income of the noncustodial parent.

  In the case of *Marriage of Purnel v. Purnel*,[215] the California Court of Appeal, Fourth District, was asked to determine whether the trial court impermissibly considered the noncustodial parent's receipt of funds from Indian trust allotment lands. Following a divorce proceeding, in which the non-Indian husband was awarded custody of the children, the State trial court ordered the noncustodial parent, who was a member of the Auga Caliente Band of the Cahuilla Indians, to pay support of $1063 per month per child for three children. The wife did not challenge the amount of the support order itself. Rather on appeal she argued that the State of California had no jurisdiction "to tax Indian reservation lands or the income earned by Indians from activities carried on within the boundaries of the reservation."

  The California Court of Appeals upheld the State trial court's jurisdiction as well as the award of support. The court concluded that the support award did not constitute an assignment of Indian trust property or monies, which is prohibited by Federal law. The support order did not require that the support be paid from any particular income source. The wife had "very substantial assets quite apart from the lucrative leases of her trust allotment lands, assets which are in no way related to her being a Native American."[216] The court also noted that once the wife received payment of the rental income from the lease of her Indian Trust Allotment lands, it lost its "Indian" character and became fungible money, which could be used to pay support as any other money could.

- The guidelines must provide for the health care needs of the child, through health insurance or other means.

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[211] 42 U.S.C. § 667(b)(2).
[212] 45 C.F.R. § 302.56 (guideline requirements that a State must meet); 45 C.F.R. § 309.105 (guideline requirements that a Tribe or Tribal organization must meet)
[213] 45 C.F.R. § 302.56(g).
[214] 45 C.F.R. § 302.56(e) (requirement governing State IV-D programs); 45 C.F.R. § 309.105(4) (requirement governing Tribal IV-D program).
[215] 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997).
[216] 52 Cal. App. 4th at 539, 60 Cal. Rptr. 2d at 675.

Federal regulations governing Tribal child support guidelines allow a Tribal IV-D plan to indicate whether non-cash payments will be permitted to satisfy support obligations.[217] Comments on the proposed final rule governing Tribal child support enforcement programs pointed out that many reservations and Indian communities are located in remote areas with little or no industry or business; thus, there are limited opportunities for cash employment. In drafting the final rule, OCSE was persuaded "to accommodate the long-standing recognition among Indian Tribes that all resources that contribute to the support of children should be recognized and valued by the IV-D programs.[218] Federal regulations define "non-cash support" as "support provided to a family in the nature of goods and/or services, rather than in cash, but which, nonetheless, has a certain and specific dollar value.[219] The non-cash support must directly contribute to the needs of a child, such as "making repairs to automobiles or a home, the clearing or upkeep of property, providing a means for travel, or providing needed resources for a child's participation in Tribal customs and practices."[220] If non-cash payments will be permitted to satisfy support obligations, Federal regulations[221] require the following:

- The Tribal support order allowing non-cash payments must State the specific dollar amount of the support obligation;
- The non-cash payments are not permitted to satisfy assigned support obligations.[222]

In the comments and responses to the proposed final rules, OCSE stresses that States should be able to process Tribal orders allowing non-cash payments through their automated systems because of the requirement that the orders also clearly include a specific dollar amount reflecting the support obligation.[223] For example, a Tribal support order could provide that an obligor owes $200 a month in current support, which may be satisfied with the provision of firewood suitable for home heating and cooling to the custodial parent and child. The order could provide that a cord of firewood has a specific dollar value of $100 based on the prevailing market. Therefore, the obligor would satisfy his support obligation by providing two cords of firewood every month. The valuation of non-cash resources is the responsibility of the Tribe.[224]

In a case decided by the Northern Plains Intertribal Court of Appeals, *Attikai v. Thompson, Sr.*,[225] the Court of Appeals emphasized the cultural differences between the "non-Native American population of the State of South Dakota and the Native American population of the Crow Creek Sioux Tribe." Because of those differences, the

[217] 45 C.F.R. § 309.105(a)(3).
[218] 69 Fed. Reg. 16,638 at 16,658 (March 30, 2004).
[219] 45 C.F.R. § 309.05.
[220] 69 Fed. Reg. 16,638 at 16,659 (March 30, 2004).
[221] 45 C.F.R. § 309.105(a)(3).
[222] However, the non-cash payments can be credited toward arrears, as well as current support obligations. 69 Fed. Reg. at 16,659.
[223] *See* 69 Fed. Reg. at 16,659.
[224] *Id.*
[225] 21 Indian L. Reptr. 6001 (No. CV-02-02-93 N. Pls. Intertr. Ct. App., Aug. 31, 1993).

Tribal court had discretion as to application of South Dakota State support guidelines and to adherence to South Dakota case law interpreting such guidelines. The mother had argued that the father had a duty to support his firstborn child, paramount to subsequent children born of the father. She based her position on a South Dakota case. The Court of Appeals held that the Tribal trial court did not need to adhere to such case law if it did not "fit within the acceptable cultural standards" of the Crow Creek Sioux Tribe. However, because there was no record about whether the Tribe "accepts as part of its cultural standard that the firstborn child has the paramount right of support over later born children, whether born within a marriage or outside of a marriage," the court remanded the issue back to the Tribal trial court for further hearings. If necessary, the court noted that it would be appropriate for the Tribal court judge to have testimony, possibly from Tribal elders, on this issue.

TRIBAL OR STATE SUBJECT MATTER JURISDICTION

Member Indian Custodian and Member Indian Noncustodian/Reside on Reservation

Public Law 280 Jurisdiction In a complete Public Law 280 State, the State has jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[226] In *County of Inyo v. Jeff*,[227] the California court found that California had concurrent jurisdiction in a child support action pursuant to Public Law 280. The court conducted an infringement analysis under *Williams* and concluded that the State had subject matter jurisdiction, despite the fact that both parents were member Indians. The dispositive factor for the court was the Federal requirement that States vigorously pursue the collection of child support from noncustodial parents or risk the loss of Federal funding.

Reaching a contrary result was the Iowa Supreme Court in *State of Iowa, ex rel. Dept. of Human Serv. v. Whitebreast*.[228] In that case, both parties were members of the Sac and Fox Tribe of the Mississippi. The custodial parent had assigned her support rights to the State in order to receive public assistance from the State of Iowa. In order to secure reimbursement of public assistance and prospective support from the noncustodial parent, the State agency brought an action in State court. The district court had dismissed the State's petition. On appeal, the Iowa Supreme Court affirmed the dismissal. Concluding that the State action was regulatory in nature rather than one of general application to private persons, it held that Public Law 280 was inapplicable.[229]

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[226] 28 U.S.C. § 1360.
[227] 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991).
[228] 409 N.W.2d 460 (Iowa 1987).
[229] *But see McKenzie County Social Serv. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986) (the court, while acknowledging that county was a non-Indian, held that county's interest was only through an assignment

The court then applied the *Williams* preemption-infringement analysis, concluding that State jurisdiction was preempted:

> [T]he public nature of the Child Support Recovery Unit . . . seems to us inescapable. Though its obligations are statutorily described in terms of "services" to be furnished in the enforcement of child support awards, CSRU's function is clearly regulatory in nature. Its duties are defined and shaped by a host of administrative regulations. . . . Congress has not given Public Law 280 States, like Iowa, the jurisdiction to adjudicate controversies spawned by . . . regulation involving Tribal Indians. Thus we affirm the district court's dismissal of the State's petition.
>
> Inherent in our decision is the recognition that in areas of regulation and taxation our State laws must give way to the pre-emptive force of Federal and Tribal interests. . . .[230]

No Public Law 280 Jurisdiction In States without Public Law 280 jurisdiction, where the cause of action arose in Indian country and both parents are member Indians who reside in Indian country, the outcome is straightforward – the Tribal court has exclusive jurisdiction over the action.[231] This conclusion is consistent with the Supreme Court's holdings that Indian tribes retain an inherent authority to regulate domestic relations among members. However, the outcome becomes less clear when the custodian receives public assistance from the State. Due to the assignment of support rights, some State courts find that the cause of action arose off the reservation. That may be sufficient to "tip the balance" to the State under some State courts' infringement analysis.

For example, the North Carolina court in *Jackson County Child Support Enforcement v. Swayney*[232] upheld State court jurisdiction over the child support component of an action between Tribal members. The conclusion is especially interesting given that the court denied State court subject matter jurisdiction over the paternity component of the action. Unlike paternity, for which the court found undue infringement on Tribal self-governance by the State, in the child support context the court found that the State was specifically required by the Federal government as part of the "AFDC[233] program to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support."[234] North Carolina later confirmed its opinion that the State and Tribe have concurrent jurisdiction when the action is one to

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of support rights from the Indian mother. The court considered the support action to be one between two Indians, and based its decision, in part, on an analysis of Public Law 280.) However, since the *McKenzie* decision was issued in 1986, North Dakota has enacted legislation confirming the separate interest of the people of the State of North Dakota in IV-D cases. See N.D. Century Code § 14-09-09.26.

[230] 409 N.W.2d at 463, 464.

[231] *See State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001).

[232] 352 S.E.2d 413 (N.C. 1987).

[233] Aid for Families with Dependent Children. AFDC was the public assistance program that was replaced in 1996 by Temporary Assistance for Needy Families (TANF).

[234] 352 S.E.2d at 420.

recover AFDC payments. In such a case, the court concluded, the tribe's interest in self-government is not significantly affected by concurrent jurisdiction.[235] The court also emphasized, however, that where the Tribal court has already assumed jurisdiction, it is unlawful infringement for the State court to later assume jurisdiction.[236]

In contrast, the Navajo Supreme Court has held that the provision of State public assistance is irrelevant and that Tribal jurisdiction is exclusive.[237] In *Billie v. Abbott*, both parties were enrolled Navajos living on the Utah side of the Navajo reservation. A Navajo divorce decree ordered Billie, who was unemployed, to pay "reasonable child support when he is employed and the monthly amount to be arranged by the parties." There was never a judicial determination of the support amount. Mrs. Billie subsequently applied to the State of Utah for AFDC benefits. In the absence of a court order specifying a support amount, the Utah child support agency used its administrative process to establish a support obligation in the amount of the AFDC grant. When the amount was not paid, Abbott, the director of Utah's child support agency, submitted the case for Federal income tax refund intercept. For several years Billie's tax refund was intercepted, collecting $218,278.66. In 1987, Billie brought an action in Navajo Tribal court seeking an injunction against further use of Utah's tax interceptions, the return of his intercepted Federal tax refunds, and payment of his cost and attorney's fees. On appeal, the Navajo Nation Supreme Court affirmed the Tribal court's decision as it related to subject matter and personal jurisdiction: "[T]he Navajo Nation's exclusive power to regulate domestic relations among Navajos living within its borders is beyond doubt."[238]

The Navajo Nation Supreme Court concluded that even if the obligee was receiving AFDC benefits from the State, the Tribal court had exclusive jurisdiction to establish the support obligation, to establish the arrearage amount, and to enforce the support order.

> Although Utah has an interest in serving eligible Navajo children, the manner in which it determines eligibility (use of non-Navajo law) implicates essential Navajo Tribal relations, and in the end Utah jeopardizes the rights of Navajos to have their support decided by Navajo courts. Only Navajo courts using Navajo law can decide Billie's child support obligation. Only Navajo courts can be used to collect past-due support owed by Navajos living on the Navajo reservation. . . . Utah's decision on Billie's support obligation would not only adversely affect Navajo authority over internal Tribal matters, but it may

[235] *Jackson County Child Support Enforcement Agency, ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995).
[236] The Tribal order awarded child custody to the wife and property to the wife with no support to be paid by the father. The North Carolina Supreme Court ruled that the Tribal court was available for the State to seek recovery of AFDC payments.
[237] *Billie v. Abbott*, 16 Indian L. Rptr. 6021 (Navajo Supreme Court Nov. 10, 1988)
[238] *Billie v. Abbott*, 16 Indian L. Rptr. 6021, 6023 (Navajo Supreme Court Nov. 10, 1988).

> encourage Navajos to go directly to Utah in hopes of receiving a larger award. State interference would indeed hinder the development of Navajo domestic relation law.[239]

Member Indian Custodian and Member Indian Noncustodian/One Member Resides off Reservation

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians, which occur in Indian country located within that State.[240] None of the researched support establishment cases discussed Public Law 280 jurisdiction under circumstances in which one of the Tribal members resided outside of Indian country.

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when both parents are enrolled members of the same Tribe but one member lives off the reservation, and the action is filed in State court, State courts will usually conduct a *Williams* preemption-infringement analysis to resolve any jurisdictional challenge. As stated in the paternity discussion, there is no definitive answer regarding subject matter jurisdiction in this fact pattern. South Dakota has case law holding that when one Tribal member resides outside the reservation, and the other parent and child reside on the reservation, the State and Tribal courts possess concurrent jurisdiction in a child support action.[241] The case may be adjudicated by the first tribunal to validly exercise jurisdiction.

The North Dakota Supreme Court recently reached a similar conclusion.[242] In its decision, the court distinguished between paternity actions between enrolled Tribal members (over which prior North Dakota decisions have found exclusive Tribal jurisdiction) and support establishment actions between enrolled Tribal members. The court cited with approval the North Carolina decision of *Jackson County Child Support Enforcement Agency v. Swayney*,[243] which also distinguished between paternity and support establishment actions. The North Dakota Supreme Court somewhat narrowed the reach of its decision by holding "Tribal courts and State courts have concurrent subject-matter jurisdiction to determine a support obligation against an enrolled Indian, where parentage is not at issue[244] and the defendant is not residing on the Indian reservation when the action is commenced."[245] Nevertheless, the Chief Justice filed a dissent, finding the majority's distinction between paternity cases and support establishment cases, and its corresponding conclusion that State court jurisdiction infringes on Tribal interests in the former but not the latter, troubling: "It seems to me to

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[239] *Id.*
[240] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[241] *See State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001).
[242] *See Rolette County Social Serv. Bd. v. B.E.*, 697 N.W.2d 333 (N.D. 2005).
[243] 352 S.E.2d 413 (N.C. 1987).
[244] In this case, the defendant and noncustodial parent was the mother who acknowledged her support obligation.
[245] *Rolette County,* 697 N.W.2d 333 (N.D. 2005)

be presumptuous for the State courts to determine for the Tribes what is infringement on their right to govern themselves."

Member Indian Custodian and Member Indian Noncustodian/Both Parents Reside off Reservation No cases were found with this fact pattern. When conception and the application for public assistance take place off the reservation, and all parties live off the reservation, at least one State Attorney General has concluded that State court jurisdiction would not unduly infringe upon Tribal sovereignty and therefore has authorized the child support agency to consider filing such cases in State court.[246]

Member Indian Custodian and Non-Member/Non-Indian NonCustodian

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians, which occur in Indian country located within that State.[247] If the plaintiff is the State IV-D agency bringing an action on behalf of an Indian custodial parent against a non-Indian, at least one court has concluded that the case is public in nature and is not one involving a private support action.[248] Under such an analysis, the case would then be considered one involving two non-Indians and Public Law 280 would be inapplicable. Other State courts focus on the assignment nature of the State's interest. Because the State derives its interest in the child support action from the Indian custodian by means of an assignment of support rights, such courts view the action as involving an Indian and therefore invoking Public Law 280 jurisdiction.[249]

No Public Law 280 Jurisdiction In the absence of Public Law 280 jurisdiction, when one parent is a non-member Indian and the action is filed in State court, the State court will usually engage in a *Williams* preemption-infringement analysis. The court will conduct the same analysis, regardless of whether the noncustodian is a non-member Indian or a non-Indian. Recognizing the sovereign status of each Federally recognized Tribe, the Supreme Court has treated non-member Indians in the same way as non-Indians with regard to jurisdictional issues.[250]

If the Indian custodial parent files the support action in Tribal court and the non-member Indian or non-Indian challenges jurisdiction, the Supreme Court's holdings in *Montana v. United States,*[251] *Strate v. A-1 Contractors,*[252] and *Nevada v. Hicks*[253] become relevant. The Tribal court must decide whether jurisdiction over the non-member noncustodian is necessary to protect Tribal self-government or to control internal relations. At least with regard to non-Indians whose claims arose on non-Indian

[246] *See* North Dakota Attorney General's Opinion 2000-F-07
[247] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[248] *See State of Iowa, ex. rel. Dept. of Human Serv. v. Whitebreast,* 409 N.W.2d 460 (Iowa 1987).
[249] *See, e.g., McKenzie County, Social Serv Bd. v. V .G*, 392 N.W.2d 399 (N.D. 1986), *cert. denied,* 480 U.S. 930 (1987).
[250] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353, 377 n. 2 (2001).
[251] 450 U.S. 544 (1981).
[252] 520 U.S. 438 (1997
[253] 533 U.S. 353 (2001).

land, the *Montana* Court has held that Tribal jurisdiction is presumptively lacking. Absent express authorization by Federal statute or treaty, Tribal jurisdiction over the conduct of nonmembers exists only in the following limited circumstances: either (1) the nonmember entered into a consensual relationship with the Tribe or its members, or (2) the nonmember's activity directly affects the Tribe's political integrity, economic security, health, or welfare.[254] When one of the parties is an Indian and the other is a non-Indian or nonmember Indian, the establishment of support arguably would fall within those exceptions.

Non-Indian/Non-Member Custodian and Indian NonCustodian When the non-Indian or non-member Indian custodial parent files a support establishment action against an Indian noncustodial parent in State court, the Indian obligor may raise a jurisdictional challenge.

Public Law 280 Jurisdiction In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians which occur in Indian country located within that State. See above for a discussion regarding the role of Public Law 280 jurisdiction. One of the few reported child support decisions to extensively discuss Public Law 280 jurisdiction is *Marriage of Purnel v. Purnel*. [255] The case was a post-judgment proceeding, following an earlier State court divorce decree, in which the trial court ordered the wife, a member of the Agua Caliente Band of the Cahuilla Indians, to pay support to her non-Indian husband. One of the issues raised was whether the State of California properly exercised jurisdiction. In concluding that it had, the court discussed Public Law 280 at length. It emphasized that as one of the mandatory Public Law 280 States, California had jurisdiction over civil causes of actions to which Indians are parties, including domestic relations matters.

The court noted the lack of decisions regarding Public Law 280 jurisdiction, other than cases involving State court jurisdiction that had been challenged due to an attempt to enforce the State's police powers or to exercise the State's authority to tax property, notwithstanding the Federal prohibition to do so in subdivision (b) of Public Law 280. Citing an earlier California decision,[256] the court concluded that when a California agency has filed a civil action seeking support pursuant to an assignment of support rights, it is acting as a private party. "In our view it is inconceivable that Congress could have intended that State courts not have jurisdiction to enforce the foregoing mandates [of Title IV-D], especially in view of the fact that such mandates arise only after approval of an application made to a county welfare department for AFDC benefits of a Native American child."[257] Similarly, a Public Law 280 State has jurisdiction to apply to Native American State laws on divorce.[258] Finally, the court noted that the defendant had

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[254] See *Nevada v. Hicks*, 533 U.S. at 358: *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *Montana v. United States*, 450 U.S. 544 (1981).
[255] *Supra* note 215.
[256] *County of Inyo v. Jeff*, 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991).
[257] 52 Cal. App. 4th 527, 536, 60 Cal. Rptr. 2d 667, 673.
[258] *See also United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974).

voluntarily appeared and participated in the State divorce proceedings. In the court's opinion, "there is no question but that the trial court had the jurisdiction to make the child support order it did." [259]

No Public Law 280 Jurisdiction *New Mexico ex rel. Dept. of Human Servcs. v. Jojola*[260] is a case from a State without Public Law 280 jurisdiction, in which the New Mexico Supreme Court upheld the exercise of State court jurisdiction. The court found that the plaintiff, the county agency that was providing public assistance to the mother, was a non-Indian, so it considered the case as one between an Indian and non-Indian. In conducting a *Williams* analysis, the court applied a three-prong test: Determining (1) whether the parties were Indian or non-Indian; (2) whether the cause of action arose within an Indian reservation; and (3) the nature of the interest to be protected. The court found that the parties were Indian and non-Indian, the cause arose outside of the reservation when the mother applied for public assistance, and there was no interference with any Tribal interest. The court was influenced by the Congressional mandate requiring States to seek reimbursement of public assistance.

When the non-Indian or non-member custodial parent files a support establishment action in the court of the Tribe in which the obligor is enrolled, the non-Indian or non-member Indian is deemed to have consented to Tribal jurisdiction. The issue then becomes whether Tribal law authorizes jurisdiction in such a case. If it does, and if the Tribal court has personal jurisdiction over the Indian noncustodial parent, the Tribal court will most likely uphold Tribal court jurisdiction.

Non-Indian Custodian and Non-Indian NonCustodian If neither parent is an Indian, Public Law 280 jurisdiction is inapplicable. If both parties reside off the reservation, the State court has exclusive jurisdiction. If at least one of the parties resides on the reservation but the cause of action arose off the reservation, a State court will most likely find it has jurisdiction because there is no infringement of Tribal interest. If the parties live on the reservation, the non-Indian custodial parent filed the support action in Tribal court, and the non-Indian noncustodian challenges the subject matter jurisdiction, the Tribal court will likely focus on where the cause of action arose and whether jurisdiction is necessary to protect the political integrity, economic security, or health or welfare of the Tribe.

[259] 52 Cal. App. 4th 527, 538, 60 Cal. Prtr. 2d 667, 674.
[260] 99 N.M. 500, 660 P.2d 590 (1983).

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CHAPTER SEVEN
MEDICAL SUPPORT ENFORCEMENT

STATE TITLE IV-D REQUIREMENTS

Definition Medical support is the legal provision of medical, dental, prescription, and other health care expenses. It can include provisions to cover health insurance costs as well as cash payments for unreimbursed medical expenses. Child support establishment addresses the health needs of children in three ways. First, there are Federal laws and regulations that require the parents to provide health insurance coverage. Second, the guideline calculation can apportion the costs not reimbursed by health insurance to each of the parents. Finally, the guidelines can address extraordinary medical expenses.

Support Guidelines There are three categories of medical expenses: health insurance premiums; payment for the uninsured portion of regular medical expenses, such as co-payments, deductibles, and uncovered expenses; and extraordinary medical expenses.[261] Many guidelines are silent regarding the definition of a medical expense.

- **Health insurance premiums**

  Federal regulations require that child support guidelines provide for children's health care needs through "health insurance or other means."[262] Because the cost of insurance varies so greatly, it is not included within the basic guideline amount. Instead, most State guidelines treat the cost of health insurance in one of two ways. The most common method is to add the actual cost of health insurance to the basic support amount and then prorate the cost between the parents based on their proportion of income.[263] The other method is to order one parent to pay for health insurance and then deduct that cost from the paying parent's income.

- **Uninsured medical expenses**

  Uninsured medical expense encompasses a range of items that includes co-payments, medication costs, uncovered procedures and conditions, and cash payments in lieu of health insurance.

  – **Definition of medical expense -** Some States provide a definition of medical expenses. For example, they list treatment provided by medical doctors and dentists, treatment for chronic conditions and asthma,

[261] *See* Elrod, *Adding to the Basic Support Obligation*, in Guidelines: The Next Generation (M. Haynes, ed., U.S. Dept. of Health & Human Serv. 1994)[hereinafter Guidelines: The Next Generation].
[262] 45 C.F.R. § 302.56(c)(3).
[263] An analysis of health care provisions is contained in L. Morgan, Child Support Guidelines: Interpretation and Application (Aspen Law and Business, Supp. 2000) [hereinafter Child Support Guidelines].

counseling, psychiatric treatment for mental disorders, and physical therapy as medical expenses.[264]

– **Inclusion within guideline -** Support guidelines that expressly address medical expenses vary in how they distinguish ordinary medical expenses from extraordinary medical expenses. Some States expressly provide that the basic support amount assumes a certain amount of unreimbursed medical costs. For example, the Alabama Schedule of Basic Child Support Obligations assumes unreimbursed medical costs of $ 200 per family of four per year. These assumed costs include medical expenses not covered or reimbursed by health insurance, Medicaid, or Medicare.[265] Many States set a threshold amount for what constitutes an add-on medical expense; by implication, medical expenses that do not meet that threshold are subsumed within the basic support amount. For example, in New Jersey, unreimbursed health care expenditures (medical and dental) up to and including $250 per child per year are included in the schedules, which provide that "such expenses are considered ordinary and may include items such as nonprescription drugs, co-payments or health care services, equipment or products." The fact that a family does not incur that amount of health care expense is not a basis for deviating from the guidelines. Predictable and recurring unreimbursed health care expenses in excess of $250 per child per year are added to the basic support amount. [266] In Indiana, uninsured expenses in excess of 6 percent of the basic support obligation are considered extraordinary medical expenses resulting in an add-on to the basic amount. Presumably, expenses less than the threshold for extraordinary medical expenses are considered ordinary expenses that are subsumed within the basic support amount.

  Other States take the approach that the basic support amount can be adjusted by adding the cost of any noncovered medical, dental, and prescriptive medical expense.[267]

  If the ordinary medical expense is subsumed within the basic support amount or treated as an adjustment to the amount, the expense is typically shared by the parents in accordance with the guideline formula. In contrast, Hawaii statutorily specifies that ordinary uninsured medical and dental expenses are the responsibility of the custodial parent.[268]

[264] *See* guidelines of Alabama, Colorado, Delaware, Kentucky, and Maine.
[265] Ala. R. Jud. Admin. 32 (2001).
[266] *See* N.J.Ct. R., Appendix IX-A (2005).
[267] *See*, *e.g.,* Fla. Stat. Ann. § 61.30(8) (2005).
[268] Hawaii Family Court Child Support Guidelines, Instructions, p.7 (1998).

- **Extraordinary medical expenses**

  Extraordinary medical expenses are those expenses that extend beyond the ordinary expectation of medical need in a family, as contemplated by most State guidelines formulas.

  – **Definition -** Numerous States define "extraordinary medical expenses."[269] There seem to be several approaches, the most common of which is to define extraordinary medical expenses as unreimbursed medical expenses that exceed a certain amount per child per calendar year.[270] The next most common approach is to define extraordinary medical expenses as uninsured expenses in excess of $100 for a single illness or condition.[271] A third approach is to define extraordinary medical expenses as uninsured expenses that exceed a certain percentage of the basic obligation.[272]

    Sometimes States combine a threshold amount with an illustrative list of types of qualifying expenses. Examples include Colorado, Kentucky, and Maine.

    Other States do not use the phrase "extraordinary medical expenses." They do, however, recognize an adjustment for certain unreimbursed medical expenses. Like those States that do expressly address extraordinary medical expenses, they usually establish a threshold based on a certain dollar amount per child per calendar year.[273]

  – **Inclusion within guideline -** No State support guideline includes extraordinary medical expenses within the basic support amount. Such expenses are usually the basis for a deviation from the basic support amount or an add-on to the guideline amount.[274]

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[269] Those States are Colorado, District of Columbia, Indiana, Kentucky, Louisiana, Maryland, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Vermont, Virginia, Washington, and West Virginia.

[270] Kentucky - $100; Maine - $ 250 per child or group of children per calendar year (2001); New Mexico - $ 100; Ohio - $ 100; South Carolina - $250; Vermont - $ 200 (but statute does not State whether that threshold is per child).

[271] Examples of this approach are found in the guidelines of Colorado and Maryland.

[272] Indiana – 6 percent (2004); Washington – 5 percent (2000).

[273] *See, e.g*., Alabama (guideline assumes unreimbursed medical costs of $ 200 per family of four per year); Iowa (CP pays first $ 250 per year per child of routine medical and dental expenses up to $ 500 per year for all children. Additional amounts are apportioned between parents) (2004); Massachusetts (CP pays first $100 per child per year. For routine medical and dental expenses above that amount, court allocates between parties) (2002); New Jersey ($250 per child per calendar year) (2005); Pennsylvania ($250 per child per year); Virginia (any reasonable and necessary unreimbursed medical or dental expenses in excess of $250 per calendar year per child) (2005).

[274] *See* Child Support Guidelines, *supra* note 263, Table 3-2. *See also* Notar & Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in Guidelines: The Next Generation, *supra* note 261.

Health Insurance Coverage Federal law and regulations require States to provide for children's health needs by obtaining health insurance or by other means.[275] Current regulations require State IV-D agencies to secure medical support information and to obtain and enforce medical support in the form of health care coverage from the noncustodial parent, when such coverage is available at a reasonable cost.[276] Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of the service delivery mechanism.[277]

To remove some of the impediments to obtaining medical coverage, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93),[278] which:

- prohibited discriminatory health care coverage practices;
- created "qualified medical child support orders" (QMCSOs)[279] to obtain coverage from group plans subject to ERISA;[280] and
- allowed employers to deduct the cost of health insurance premiums from an employee's income.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[281] amended the Social Security Act to require States, as a condition of receiving Federal funds, to enact a provision for health care coverage in all orders established or enforced by the IV-D agency.[282] Before PRWORA, the requirement to seek health insurance coverage had been mandatory for public assistance cases, while nonpublic assistance IV-D applicants could opt not to have medical support established and enforced.

Because health care costs remained problematic, Congress again addressed medical support in 1998. Provisions in the Child Support Performance and Incentives

[275] 42 U.S.C. § 652(f); 45 C.F.R. § 302.56(c)(3).
[276] 45 C.F.R. §§ 303.30, 303.31.
[277] 45 C.F.R. §§ 302.80, 303.30, 303.31. The meaning of "reasonable cost" has evolved. 45 CFR 303.31 (a)(1) now reads, " Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism."
[278] P.L. No. 103-66 (1993).
[279] A "QMCSO" is a medical support order that creates the existence of an "alternative recipient's" right to receive benefits under a group plan. An "alternative recipient" is the child of a participant or beneficiary of a plan.
[280] In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA) to help protect employer-provided pension and health benefits and to encourage employers to establish such plans. ERISA regulates most privately sponsored pension plans and health benefit plans. The law is important for child support purposes because it preempts State laws and regulations governing health insurance and employee benefit plans, including employer self-funded health insurance plans. ERISA also imposes requirements regarding information that must be provided to plan participants and beneficiaries, internal procedures for determining benefit claims, and standards of conduct of those responsible for plan management.
[281] P.L. No. 104-193 (1996).
[282] 42 U.S.C. § 666(a)(19)(A).

Act of 1998 (CSPIA)[283] were enacted to eliminate barriers to establishing and enforcing medical support coverage. CSPIA requires State IV-D agencies to enforce health care coverage by use of a National Medical Support Notice (NMSN). Implementing Federal regulations are at 45 C.F.R. § 303. A parallel regulation, developed by the Department of Labor, adopts the use of the NMSN under ERISA.[284] CSPIA also established the Medical Child Support Working Group, which was required to submit a report to the Secretaries of HHS and Labor recommending measures to improve health care coverage.[285] The resulting report contains 76 recommendations that would expand health care coverage for children in the IV-D system.[286]

National Medical Support Notice

The standardized NMSN complies with ERISA's informational requirements and restrictions[287] and with Title IV-D requirements. It also contains a severable employer withholding notice to advise the employer of:

- State law applicable to the requirement to withhold;
- the duration of withholding;
- limitations on withholding, such as the Consumer Credit Protection Act;
- prioritization under State law for withholding child support and medical support, if insufficient funds are available for both; and
- the name and phone number for the appropriate division of the State IV-D agency handling the withholding.[288]

The NMSN notifies the parent's employer of the provision for health care coverage for the child. In addition, if the NMSN is properly completed and satisfies ERISA's conditions, it constitutes a QMCSO as defined by ERISA.[289] The intent is to simplify the processing of cases for employers.

States must mandate the use of the NMSN in all cases in which the noncustodial parent is required to provide health care coverage and that parent's employer is known.[290] There is an exception to using the NMSN if the order stipulates that alternative health care coverage must be provided.

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[283] P.L. No. 105-200 (1998).
[284] 29 C.F.R. § 2590.
[285] Section 401 of P.L. No. 105-200 (1998).
[286] The Working Group's report, *21 Million Children's Health: Our Shared Responsibility,* can be found on the Federal Office of Child Support Enforcement (OCSE) web site at http://www.acf.dhhs.gov/programs/cse/rpt/medrpt/index.html.
[287] 29 U.S.C. § 1169(a).
[288] 45 C.F.R. § 303.32.
[289] 29 U.S.C. § 1169(a).
[290] Section 466(a)(19) of Title IV-D of the Social Security Act, as amended by section 401(c)(3) of CSPIA, codified at 42 U.S.C. § 666(a)(19)(B).

Federal regulations[291] require States to have the following procedures:

- The NMSN must be used to notify employers of a health care coverage order;
- The NMSN must be transmitted to an employer within 2 business days from entry of the individual in the State Directory of New Hires;
- The employer must transmit the NMSN to the health coverage provider within 20 business days of the date of the NMSN and must withhold contributions and send them to the plan;
- The NMSN can be contested based on mistake of fact;
- The employer must notify the IV-D agency upon termination of the parent's employment; and
- The IV-D agency must notify the employer when the order becomes ineffective and must work with the custodial parent to choose a plan when options for coverage exist.

TRIBAL TITLE IV-D REQUIREMENTS

There is no current requirement that Tribal support orders include medical support. However, there is no prohibition for a Tribal support order to do so. Tribes are encouraged to make sure that children have access to medical care through the Indian Health Service (IHS) or otherwise.[292] The IHS is an agency of the United States Public Health Service, within the Department of Health and Human Services. It does not provide health insurance coverage. However, it is responsible for providing Federal health services to the approximately 1.5 million American Indians and Alaska Natives who belong to the more than 562 Federally recognized tribes in 35 States.

As of October 1998, the Federal system consisted of 37 hospitals, 59 health centers, 44 health stations, and four school health centers. American Indians and Alaska Natives, who are enrolled members of their Tribe and who reside within the service delivery area of an IHS facility, can access the services with no out-of-pocket charge. However, State child support workers need to be aware that Tribal members may not live near an available IHS facility. Also, lack of IHS funds may result in some Tribes requiring the Tribal member to use private insurance or Medicaid prior to IHS services.

Although there is no requirement for Tribes to include medical support in the establishment or modification of a support order, to the extent that the Tribe is enforcing a valid State support order pursuant to the Full Faith and Credit for Child Support Orders Act, it must also enforce any provision within the State support order concerning health care coverage.[293] If the State order requires the father to repay Medicaid costs

[291] 45 C.F.R. § 303.32(c).
[292] 69 Fed. Reg. 16,638 at 16,660.
[293] *Id.*

associated with birthing costs, issues regarding the Federal government's trust responsibility to provide health care to Native Americans and Alaska Natives may arise.[294]

[294] *See* C. Barbero, The Federal Trust Responsibility: Justification for Indian-Specific Health Policy (2005).

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CHAPTER SEVEN
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

Child Support Performance and Incentives Act of 1998, P.L. No. 105-200 (1998)

Consumer Credit Protection Act, P.L. No. 90-321 (1969), codified as amended at 15 U.S.C. §§ 1601 *et seq*.

Employee Retirement Income Security Act (ERISA), P.L. No.93-406 (1974)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Omnibus Budget Reconciliation Act of 1993, P.L. No. 103-66 (1993)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

Title IV-D of the Social Security Act, P.L. No. 93-647 (1975), codified at 42 U.S.C. §§ 651 *et seq*.

15 U.S.C. §§ 1601 *et seq*.

28 U.S.C. § 1738B

29 U.S.C. § 1169(a)

42 U.S.C. § 652(f)

42 U.S.C. § 666(a)(19)

29 C.F.R. § 2590

45 C.F.R. § 302.56(c)(3)

45 C.F.R. § 302.80

45 C.F.R. § 303.30

45 C.F.R. § 303.31

45 C.F.R. § 303.32

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

Ala. R. Jud. Admin. 32 (2001)

Fla. Stat. Ann. § 61.30(8) (2005)

Hawaii Family Court Child Support Guidelines, Instructions (1998)

N.J.Ct. R., Appendix IX-A (2005)

Case Law

None

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C. Barbero, The Federal Trust Responsibility: Justification for Indian-Specific Health Policy (2005).

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Notar & Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in Guidelines: The Next Generation (M. Haynes, ed. U.S. Dept. of Health & Human Serv. 1994).

CHAPTER EIGHT
MODIFICATION OF SUPPORT

Support orders that were fair when initially issued pursuant to support guidelines do not usually remain so with the passage of time. The financial circumstances of the parents change; the necessity for childcare might be eliminated; the costs of food, clothing, medical care, and school increase or decrease.

STATE TITLE IV-D REQUIREMENTS

Federal law requires a State, as a condition of receiving Federal IV-D funds, to have laws and procedures providing for a review of IV-D support orders at least once every three years at the request of either party or, in an assistance case, at the request of the State.[295] States can establish a reasonable quantitative standard based on either a fixed dollar amount or percentage, or both, as a basis for determining whether an inconsistency between the existing child support award amount and the guideline amount is adequate grounds for petitioning for adjustment of the order. States may also adopt procedures for three-year reviews that do not require a change in circumstances or a percentage of difference from the prior order.[296] States can use any of three different methods for the review:

- Child support guidelines;[297]
- Application of a cost-of-living adjustment in accordance with a formula developed by the State;[298] or
- Use of automated methods to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the appropriate adjustment under any threshold that might be established by the State.[299]

If child support guidelines are not used, either parent must be allowed to contest the adjustment.[300] Implementing Federal regulations also provide that addressing a child's health care needs in an order, through health insurance or other means, must be an adequate basis under State law to petition for an adjustment of the order, regardless of whether an adjustment in the amount of child support is necessary.[301]

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[295] Section 351 of the Personal Responsibility and Work Opportunity Act of 1996, P.L. No. 104-193, codified at 42 U.S.C. § 666(a)(10).
[296] *Id.*
[297] 42 U.S.C. § 666(a)(10)(A)(i)(I).
[298] 42 U.S.C. § 666(a)(10)(A)(i)(II).
[299] 42 U.S.C. § 666(a)(10)(A)(i)(III).
[300] 42 U.S.C. § 666(a)(10)(A)(ii).
[301] 45 C.F.R. § 303.8.

TRIBAL TITLE IV-D REQUIREMENTS

Pursuant to Federal regulation, the initial Tribal application for Title IV-D funding must include a statement identifying how the Tribe or Tribal organization will operate a IV-D program that meets the objectives of Title IV-D. Among the objectives that the Tribal IV-D plan must address is the modification of support orders.[302] Beyond that general requirement, there are no Federal regulations detailing modification procedures that a Tribe must provide.

A Tribal court will apply Tribal law in a modification action. Whether an administrative agency could modify a judicial support order was the issue in *Esther Bedoni v. Navajo Nation Office of Hearings and Appeals*.[303] The court concluded that under the Navajo Nation Child Support Enforcement Act, the Office of Hearings and Appeals could only modify its own administrative orders. The Tribal trial court maintained jurisdiction to modify trial court orders.

INTERSTATE/INTERGOVERNMENTAL CASES

States, as a condition of receiving Federal IV-D funding, are required to enact the 1996 Uniform InterState Family Support Act (UIFSA).[304] Tribes are <u>not</u> required to enact UIFSA. On the other hand, both States and Tribes are subject to the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).[305] Like UIFSA, FFCCSOA sets limits on when a "State" is permitted to modify another State's support order. The Act defines "State" to include "Indian country (as defined in section 1151 of title 18)."[306] Therefore, both States and Tribes should be applying consistent rules regarding when another jurisdiction's support order can be modified. Those rules[307] are outlined below:

- If there is only one support order and an individual party or child resides in the issuing State, that State has continuing, exclusive jurisdiction to modify.
- If there is only one support order and no party or child lives in the issuing State, the party seeking modification must register the order for modification in a State – other than his or her own – that has personal jurisdiction over the nonmovant.
- If there is more than one support order entitled to recognition and more than one State can claim continuing, exclusive jurisdiction, the tribunal

[302] 45 C.F.R. §§ 309.15 and 309.90.
[303] No. SC-CV-13-02 (Supreme Court of the Navajo Nation Sept. 3, 2003).
[304] Section 5537 of P.L. No. 105-33 (1997), amending Section 321 of P.L. No. 104-193 (1996) (codified at 42 U.S.C. § 666(f)). UIFSA (1996) is located at 9 Pt. 1B U.L.A. 235 (1999). It can also be accessed through the website of the National Conference of Commissioners on Uniform State Laws: www.nccusl.org. UIFSA was amended in 2001 but there is currently no federal funding mandate that States enact the 2001 amendments.
[305] P.L. No. 103-383 (1994) (codified at 28 U.S.C. § 1738B). *See also* 69 Fed. Reg. 16,638 at 16,658.
[306] 28 U.S.C. § 1738B(b).
[307] Section 105 of UIFSA and 28 U.S.C. § 1738B(e), (f).

must determine the controlling order.[308] The State that issued the controlling support order is the State with continuing, exclusive jurisdiction to modify.

- If there is more than one support order entitled to recognition and no issuing State can claim continuing, exclusive jurisdiction, a tribunal with jurisdiction over both parties must issue a new support order, which becomes the controlling order in the case.

One Alaska Native commenter to the proposed final rule on Tribal child support enforcement programs stated that Tribal court jurisdiction does not mesh with FFCCSOA when there is no geographic region from which to determine whether the parent or child resides "in the State" for purposes of CEJ or a controlling order determination. The Federal response was that "FFCCSOA does not limit the exercise of jurisdiction to a geographical area. FFCCSOA only requires a court exercising jurisdiction to have the authority to do so."[309]

[308] The order issued by the child's home State, as defined by the Act, is the controlling order. If no issuing State is the child's home State, the most recent order is the controlling order. Section 207 of UIFSA.
[309] 69 Fed. Reg. 16,638 at 16,665.

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CHAPTER EIGHT
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

Balanced Budget Act of 1997, P.L. No. 105-33 (1997)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

28 U.S.C. § 1738B

42 U.S.C. § 666(a)(10)

42 U.S.C. § 666(f)

45 C.F.R. § 303.8

45 C.F.R. § 309.15

45 C.F.R. § 309.90

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

UIFSA (1996), 9 Pt. 1B U.L.A. 235 (1999)

UIFSA (2001), 9 Pt. 1B U.L.A. __ (Supp. 2001)

Section 105 of UIFSA (1996) and (2001)

Section 207 of UIFSA (1996) and (2001)

Case Law

Esther Bedoni v. Navajo Nation Office of Hearings and Appeals, No. SC-CV-13-02 (Supreme Court of the Navajo Nation Sept. 3, 2003)

Periodicals/Publications

None

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CHAPTER NINE
SUPPORT ENFORCEMENT

Once a court or agency has entered a support order with proper subject matter and personal jurisdiction, the order is enforceable. Both State and Tribal IV-D programs must provide enforcement services to their customers.

ENFORCEMENT REMEDIES

State and Tribal laws provide a variety of enforcement remedies. Some actions are directed against particular assets, such as personal or real property, and require that the court or agency have jurisdiction over the property. Such jurisdiction is called *in rem* jurisdiction, which is Latin meaning jurisdiction over the *res*, or thing. Other enforcement remedies are directed against the person, such as civil contempt or criminal prosecution. Those remedies require *in personam* jurisdiction, which is jurisdiction over the person. Federal law does not address jurisdictional requirements. However, Federal law does require that States and Tribes have certain types of remedies available to enforce support orders, in order to receive Federal IV-D funding. States and Tribes may have and use enforcement remedies in addition to the ones discussed below.

State Title IV-D Requirements Certain enforcement remedies are available exclusively to State IV-D agencies. Other remedies are available to any child support tribunal,[310] as well as to private attorneys and collection agencies. Some always involve court action; others are administrative in nature, requiring little or no court action. Determining correct remedies is case-specific. Thus, the facts, coupled with Federal and State mandates, dictate how a IV-D caseworker should proceed to enforce the particular support order. The following list highlights enforcement remedies that a State must have in order to receive Federal IV-D funding.

- **Income Withholding**

The most effective child support enforcement tool is income withholding, a procedure by which automatic deductions are made from wages or other income. Once initiated, income withholding can keep support flowing to the family on a regular basis. Today, any child support order issued or modified in a State, regardless of whether the case is a IV-D case, must contain a provision for income withholding.[311] Additionally, immediate withholding is required in all IV-D cases that have an order issued or modified on or after November 1, 1990.[312] The exceptions to immediate withholding are very limited. The Family Support Act of 1988[313] carved out a "good cause" exception to immediate income withholding. That exception requires the tribunal to approve a written agreement executed between the custodial parent and the noncustodial parent for an alternative payment arrangement. The tribunal must make a finding that implementing immediate income withholding would not be in the best interest of the child and require

[310] The term "tribunal" refers to a court and/or administrative agency.
[311] 42 U.S.C. § 666(a)(8)(B)(ii); 45 C.F.R. § 303.100(g).
[312] 45 C.F.R. § 303.100(b).
[313] P.L. No. 100-485 (1988).

some proof, if the order is being modified, that previously ordered support was paid in a timely manner.[314]

PRWORA brought about several additional changes to income withholding. For instance, different types of income, not just wages, are now subject to withholding.[315] Additionally, State agencies must have administrative authority to initiate income withholding. PRWORA also required the States to adopt UIFSA[316] and its direct income withholding provision. Under UIFSA, income withholding can be initiated in one State, and sent directly to an employer in another State, without involving a tribunal or the IV-D agency in either State.[317] Direct income withholding is available in all interState cases, including those handled by private attorneys.

In IV-D cases in which income withholding is not immediate, including those cases whose order predates the statutory date of November 1, 1990, and cases in which the court has found good cause, an income withholding must be initiated when the support owed is at least equal to one month's support amount.[318] Additionally, the noncustodial parent can request that income withholding be initiated or the State IV-D agency can determine, after request by the custodial parent, that income withholding would be appropriate.[319] In cases involving income withholding that is initiated rather than immediate, the noncustodial parent is entitled to notice. Should the noncustodial parent wish to contest the withholding, the only issue that the tribunal should consider is a mistake of fact (i.e., an incorrect amount or the incorrect individual).[320]

The National Directory of New Hires (NDNH) interacts with the Federal Case Registry (FCR), which contains information about persons in child support cases being handled by State IV-D agencies. These two databases compare their data and, when a match occurs, the NDNH provides the appropriate State with information concerning the noncustodial parent. That information can be used by the State to initiate an income withholding notice to the noncustodial parent's employer. OCSE has issued a standardized *Order/Notice to Withhold Income for Child Support*, which must be used for all child support orders.[321]

- **Judgments**

The Omnibus Budget Reconciliation Act of 1986[322] provided that all support orders must be entitled to judgment status. Further amendments to the Social Security Act have made it a State requirement that unpaid support installments become a judgment by operation of law, entitled to full faith and credit by States, and not subject to retroactive modification.

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[314] 42 U.S.C. § 666(b)(3)(A); 45 C.F.R. § 303.100(b)(2).
[315] 42 U.S.C. § 666(b)(8).
[316] Unif. InterState Family Support Act (1996)[hereinafter UIFSA], 9 Pt. 1B U.L.A. 235 (1999).
[317] UIFSA §§ 501 – 506 (amended 2001), 9 Pt. 1A U.L.A. 336 – 346 (1999).
[318] 45 C.F.R. § 303.100(c)(1).
[319] 45 C.F.R. § 303.100(c).
[320] *Id*.
[321] 42 U.S.C. §§ 666(a)(8)(B) and 666(b)(6)(A)(ii).
[322] P. L. No. 99-509 (1986).

- **Liens and Levy**

Federal law requires States, as a condition of receiving Federal funds, to provide that a lien, in the amount of overdue support, arises by operation of law against a noncustodial parent's real and personal property.[323] Methods for creating, and executing on, the liens are subject to State law. Federal law also requires States to give full faith and credit to the lien of another State, as long as "the State agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the State[.]"[324] To increase recognition of sister State liens, Congress required States to impose liens using standardized forms beginning March 1, 1997.[325]

- **Federal Tax Refund Intercept**

States, as a condition of receiving Federal funds, are required to submit qualifying IV-D cases for Federal income tax refund offset. Note that current Federal law does not allow a State to release tax information to a Tribal IV-D agency.[326] Tribes and States may enter into agreement to refer Tribal cases to the State for submittal for Federal income tax refund offset. Any such access would currently also require a request for State IV-D services. However, there is nothing to preclude an individual from applying for and receiving services from both a State and Tribal IV-D agency.[327]

- **Financial Institution Data Match (FIDM)**

FIDM is a means of locating certain obligor assets, which later can be levied to fulfill the unpaid support amount. These assets include demand deposit accounts, checking accounts or negotiable withdrawal order accounts, savings accounts, time deposit accounts and money-market mutual fund accounts. As provided in PRWORA, a State IV-D agency, as a condition of receiving Federal IV-D funding, must establish agreements with financial institutions to perform data match exchanges, in which account information is matched against a list of delinquent obligors.[328] After identifying accounts owned by the obligor, the State IV-D agency, consistent with State law, can seek to attach these assets and seize them to satisfy delinquent support debts.

The Child Support Performance and Incentive Act of 1998[329] amended the FIDM process to authorize OCSE to act as a conduit between States and multiState financial institutions to facilitate a centralized, quarterly data match.

- **State Income Tax Refund Offset**

Any State that has an income tax must, in order to receive Federal IV-D funding, have enacted a statute authorizing the State revenue agency to withhold income tax

[323] 42 U.S.C. § 666(a)(4)(A).
[324] 42 U.S.C. § 666(a)(4)(B).
[325] 42 U.S.C. § 652(a)(11)(B)and 42 U.S.C. § 654(9)(E). The Notice of Lien form and accompanying instructions are available on the OCSE web site at www.acf.dhhs.gov/programs/cse.
[326] *See* 69 Fed. Reg. 16,638 at 16,656.
[327] *See* 69 Fed. Reg. 16,638 at 16,654.
[328] 42 U.S.C. § 666(a)(17).
[329] P.L. No. 105-200 (1998).

refunds due individuals who owe a child support debt. The procedure is nearly identical to the Federal tax refund offset procedure. The State revenue agency performs a role similar to the IRS.[330]

- **License Revocation**

As a condition of receiving Federal IV-D funds, a State must have procedures regarding the withholding, suspension, or restriction of the licenses of noncustodial parents who owe past due support. Specifically, the mandate relates to drivers' licenses, professional and occupational licenses, as well as recreational and sporting licenses.[331] Licenses can be affected when the noncustodial parent meets established criteria or fails to comply with subpoenas or warrants related to child support proceedings. Appropriate notice is required. Use of these procedures is not mandated in every case, but must be available at the State's discretion.

- **Consumer Reporting Agencies**

PRWORA required the States, as a condition of receiving Federal funds, to institute measures to periodically report unpaid child support to credit bureaus.[332]

- **Posting Bonds**

The Child Support Enforcement Amendments of 1984 required States, as a condition of receiving Federal funds, to enact and use "procedures which require that a noncustodial parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such noncustodial parent of the proposed action, and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State)."[333]

Tribal Title IV-D Requirements Tribes that do not receive Federal funding for their child support programs must provide full faith and credit to valid child support orders, but are not subject to Federal requirements governing specific enforcement remedies. Like States, Tribes that receive Federal funding to operate Tribal IV-D programs are subject to Federal regulations that require the enforcement of support orders. However, unlike States, the only mandated enforcement remedy is income withholding.

- **Income Withholding**

The income withholding requirements for Tribes operating Federally funded IV-D programs are similar to those requirements governing State IV-D programs. Tribal laws must require amounts to be withheld for both current support and any arrears.[334] Tribal IV-D agencies are required to use the Federal standardized income withholding notice.[335] Like States, Tribes cannot exceed, but may set lower income withholding

[330] P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666(a)(3)(A).
[331] 42 U.S.C. § 666(a)(16).
[332] 42 U.S.C. § 666(a)(7)(A).
[333] P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666.
[334] 45 C.F.R. § 309.110(b).
[335] 45 C.F.R. § 309.110(l).

limits than the Consumer Credit Protection Act.[336] Employers who discriminate due to withholding must be subject to a fine. Where there are multiple withholding orders for the same obligor, the Tribal IV-D agency must allocate withheld amounts to ensure that each order receives some amount of current support.[337] Tribal law must provide for a fine if the employer discharges an employee due to withholding.[338]

There is an important exception, however. Tribes are not required to have immediate income withholding. In promulgating the final rule, OCSE noted that many of the comments it had received from Tribes to the proposed rule indicated that other methods of collecting support – such as bringing the noncustodial parent before Tribal elders -- were more effective than income withholding.[339] Therefore, Federal regulations governing Tribal IV-D programs require that income be subject to withholding once the noncustodial parent has failed to make support payments equal to one month's amount of support.[340]

The regulations also provide for an exception to income withholding when either parent demonstrates, and the tribunal enters a finding, that there is good cause not to require income withholding; or a signed written agreement is reached between the custodial and noncustodial parent that provides for an alternate agreement.[341] A Tribal IV-D agency must receive and process income withholding orders from State or other Tribes and ensure such orders are promptly served on employers.[342] However, because Tribes are not required to enact UIFSA, Tribal employers or Tribally-owned businesses are not required to honor direct income withholding orders. Tribes may choose to require employers to honor direct withholding requests, but the enactment of such a law is not mandated.[343]

Federal regulations leave it to Tribal law to determine what type of income can be withheld for child support enforcement.[344] "For purposes of this regulation, we [the Federal Office of Child Support Enforcement] have defined income at 309.05, to mean any periodic form of payment due to an individual, regardless of source, except that the exclusion of per capita, trust or Individual Indian Money (IIM) payments must be expressly decided by a Tribe. This allows Tribes the flexibility to exclude specific categories of payments from this definition, including per capita payments, trust income, and gaming profit distributions. We have not required Tribes to withhold the Tribal benefits (casino profits, oil and mineral rights) of obligors. . . . In respect for Tribal sovereignty, we have determined that it is not appropriate in this regulation to directly affect Tribal management of Tribes' own resources."[345]

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[336] 45 C.F.R. § 309.110(c).
[337] 45 C.F.R. § 309.110(m).
[338] 45 C.F.R. § 309.110(k).
[339] 69 Fed. Reg. 16,638 at 16,661.
[340] 45 C.F.R. § 309.110(i).
[341] 45 C.F.R. § 309.110(h).
[342] 45 C.F.R. § 309.110.
[343] *See* 69 Fed. Reg. 16,638 at 16,662.
[344] *See* 69 Fed. Reg. 16,638 at 16,661.
[345] *Id.*

RECOGNITION OF JUDGMENTS

Full Faith and Credit The United States Constitution requires that States give full faith and credit to the "Public Acts, Records, and Judicial Proceedings of every other State."[346] Because of their dependent sovereign status, Tribes are not bound by the Full Faith and Credit Clause of the Constitution.[347] Nor has Congress required Federal and State courts to give full faith and credit to all Tribal court decisions.[348] However, it has required full faith and credit in three specific areas: domestic violence orders (18 U.S.C. § 2265), child custody orders (25 U.S.C. § 1911(d)), and child support (28 U.S.C. § 1738B). In 1994, Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA),[349] which specifically applies to Indian country (as defined by 18 U.S.C. § 1151), as well as States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories and possessions.[350] The Act requires the appropriate parties of such jurisdictions to:

- enforce according to its terms a child support order[351] made consistently with FFCCSOA by a court or agency of another State; and
- not seek or make a modification of such an order except in accordance with FFCCSOA.

Therefore, Tribes and States must recognize and enforce each other's valid child support orders, i.e., orders entered with appropriate subject matter and personal jurisdiction.[352] There is no Federal directive regarding how such recognition must occur. Many Tribes use a registration process for enforcement purposes under FFCCSOA.

Comity Comity between sovereigns is a voluntary, rather than mandated, recognition of each other's judgments and decrees:

> "[c]omity", in the legal sense, is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative,

[346] U.S. Constitution art. IV, § 1, cl. 1.
[347] The U.S. Constitution does not apply to Tribes. *Talton v. Mayers*, 163 U.S. 376 (1896).
[348] *See, e.g.,* Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 n. 18 (2003); Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D.L. Rev. 311 (2000); Stoner and Orona, *supra* note 27.
[349] P.L. No. 103-383 (1994) (codified at 28 U.S.C. § 1738B).
[350] *See* OCSE-AT-02-03 on the applicability of FFCCSOA to States and Tribes.
[351] A Tribal order that did not State a specific dollar amount of support and did not provide criteria by which to judge whether the parties were fulfilling their obligations was not a recognizable child support order to which the court must give full faith and credit or extend comity. *John v. Baker*, Alaska Supreme Court No. S-11176 (No. 596 decided Dec. 16, 2005). The Alaska Supreme Court stated that a Tribal child support order need not match the format of a support order issued by State courts in order to be recognized. However, if the order simply directed the parties "to help each other financially," it was not concrete enough to be enforceable. The court pointed out that the issuing Northway Village Tribal court, in a brief filed in a related custody proceeding, had also maintained that its custody order did not include child support.
[352] *See, e.g., Hanson v. Grandberry*, Puyallup Tribal Court (No. CV 98-004 June 8, 1999)(http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm). *See also Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005).

> executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the laws.[353]

Whereas FFCCSOA only addresses valid child support orders, a basis for States and Tribes to recognize each other's paternity adjudications is the doctrine of comity. Some States have specific statutes outlining when comity is appropriate. For example, South Dakota provides that before a State court may consider recognizing a Tribal court order or judgment, the party seeking recognition must establish by clear and convincing evidence that:

(a) The Tribal court had jurisdiction over both subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including, but not limited to, due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the State of South Dakota.[354]

In *Smith v. Scott*,[355] the Mashantucket Pequot Tribal Court used the doctrine of comity to recognize and enforce a Connecticut money judgment for damages in a sexual abuse case. In deciding whether a particular judgment is to be recognized and enforced through comity, the Tribal court set forth several requirements that must be met. First, comity will not apply unless there is reciprocal recognition of judgments, i.e., the other sovereign – here the State of Connecticut – must recognize judgments of the Mashantucket courts. Second, the foreign judgment must not contravene the public policy of the Tribe. Finally, the foreign judgment must have been issued by a court of competent jurisdiction in the foreign jurisdiction.

ENFORCEMENT OF TRIBAL SUPPORT ORDER

The following discussion focuses on enforcement of a Tribal support order. It assumes that it is a valid support order, with appropriate subject matter and personal jurisdiction.

Obligor (Indian or Non-Indian) Resides and Works on Reservation

When the obligor resides and works on the reservation, Tribal courts may enforce the support order through a variety of means. The following remedies are common under Tribal codes:

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[353] *Hilton v. Guyot*, 159 U.S. 113 (1894).
[354] S.D. Codified Laws Ann § 1-1-25. *See also* N.D. Rule of Court 7.2.
[355] 30 Indian L. Rptr. 105 (Mashantucket Pequot Tribal Court, No. MPTC-CV-2002-182 April 23, 2003).

- an ongoing assignment of part of the obligor's periodic earnings or trust income;
- an order to withhold and pay money due;
- contempt;[356] and
- lien and execution on property.

As noted earlier, Tribes operating Federally funded IV-D programs must provide for enforcement by income withholding. A non-Tribal employer operating on the reservation must honor a Tribal income withholding order. By entering into "consensual relations" with the Tribe "through commercial dealings," the non-Indian employer is subject to Tribal jurisdiction.[357]

Tribal courts also often invoke non-punitive enforcement remedies, such as dispute resolution or admonishment by Tribal elders.

Obligor (Indian or non-Indian) Resides on Reservation but Works off Reservation

When the obligor resides on a reservation but works off the reservation, the Tribal IV-D agency can enforce the order by sending an income withholding order directly to the off-reservation employer. Although Tribes are not required to enact UIFSA as a condition of receiving Federal IV-D funds, States are. Therefore, each State has enacted UIFSA, which requires an employer to honor direct income withholding orders/notices sent by States or Tribes. The Tribal court may also enforce the support order by contempt since it continues to have personal jurisdiction over the obligor.[358] Assuming Tribal code authority, the support order can be enforced against any property the obligor may own on the reservation.

The Tribal IV-D agency can also ask the State court or administrative agency to recognize and enforce the Tribal support order pursuant to the FFCCSOA. The State court or agency will then use State law to enforce the Tribal support order. This may be particularly effective if the obligor owns property off the reservation.

The Tribal support order can also be registered in a State court pursuant to UIFSA. Because UIFSA defines "State" to include Indian Tribes, a support order issued by a Tribe is enforceable in the State as soon as it is registered for enforcement; there is a presumption that the registered order is valid. If the obligor wishes to challenge the validity of the registered order, he or she must do so within the 20-day time limit for raising a challenge. At least one State court has held that a motion to vacate a Tribal support order based on lack of personal jurisdiction is a defense to registration that must be raised within the 20-day time period or it is waived.[359]

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[356] *See Hogdon v. Nelson,* No. SC-CV-19-94 (Navajo Supreme Court 8/23/1995). Accessible through www.Tribalresourcecenter.org/opinions.
[357] *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1314 (9th Cir. 1990).
[358] *See, e.g.*, 9 Navajo Tribe Code tit 9, § 1303.
[359] *Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005).

ENFORCEMENT OF STATE SUPPORT ORDER

The following discussion focuses on enforcement of a State support order. It assumes that it is a valid support order, with appropriate subject matter and personal jurisdiction.

Obligor (Indian or non-Indian) Resides and Works off Reservation

Whether or not the obligor is an Indian, so long as he or she resides and works off the reservation, the State court may enforce its support order just as it would enforce a support order involving non-Indian parties.

Indian Obligor Resides and Works on Reservation

The State court may attempt to enforce its order by a contempt proceeding against the obligor. However, service of process on the obligor must be valid. See the discussion on Service of Process, herein.

The State agency may also seek enforcement of the order by income withholding. UIFSA requires that an employer honor a direct income withholding request. However, as noted earlier, no Tribe has enacted UIFSA nor is there a requirement that Tribes receiving Federal IV-D funding do so. Therefore, an employer in Indian country is not required to honor a State-issued direct income withholding request unless Tribal law so provides. If the Indian obligor works on a reservation where the Tribe receives Federal IV-D funding, the State agency can forward the State income withholding order to the Tribal IV-D agency for processing. Pursuant to 45 C.F.R. § 309.110(n), the Tribal IV-D agency must receive and process income withholding orders from the State or other Tribes and ensure that such orders are promptly served on employers.

It is unlikely that a State agency can seek enforcement of an arrearage judgment by sending a State garnishment order directly to the obligor's employer, if that employer is located on a reservation. Courts have found such action an unlawful infringement on Tribal sovereignty.[360] Both *Joe v. Marcum* and *Begay v. Roberts* involved Indian defendants who had incurred commercial debts with non-Indians off the reservation. In each case, the non-Indian entity obtained money judgments, which it then attempted to enforce by writs of garnishments against the Indian's employer, which was located on the reservation. In *Joe v. Marcum*, the employer was a Delaware incorporated business, which operated a strip mine and maintained its offices exclusively on the reservation. The writ of garnishment was served on the reservation. The Federal court concluded that to permit the State court of New Mexico to run a garnishment against an employer, on the reservation, and attach wages earned by an Indian for on-reservation labor, "would thwart the Navajo policy not to allow garnishment. Such impinges upon Tribal sovereignty."[361]

[360] *See, e.g.*, *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980); *Begay v. Roberts*, 807 P.2d 1111 (Ariz. App. 1990).
[361] *Joe v. Marcum,* 621 F.2d at 361-62.

In contrast, although the defendant in *Begay v. Roberts* worked on the reservation, his employer was a political subdivision of the State of Arizona, with offices Statewide. The writs were served on the employer at one of its offices off the reservation. Begay argued that although the State court may have had jurisdiction to enter the judgments against him, it did not have jurisdiction to garnish his wages because he was an Indian who lived and worked on the Navajo reservation. The garnishee maintained that, because the employer issued the wages off the reservation, the State court had jurisdiction to garnish them. In its decision, the Arizona Court of Appeals emphasized that it did not matter that, under other circumstances, the employer was subject to the jurisdiction of the Arizona courts: "Because Begay is a Navajo Indian living and working on the reservation, . . . this case cannot be decided without considering the Indian law implications. The fact that the transaction resulting in the underlying actions occurred off the reservation does not eliminate these implications, although it may be a factor to consider."[362] The court used the preemption and infringement analysis set forth in *Williams v Lee.*[363] It concluded that "the garnishment of a reservation Indian's wages earned on the reservation is preempted and infringes on Navajo Tribal sovereignty."

Several factors were key to the court's holding. First, it stated that the Navajo Treaty of 1868 had been interpreted consistently to preclude State court jurisdiction over Navajos living on the reservation. Second, although the garnishment in this case took place physically off the reservation, unlike the garnishment in *Joe v. Marcum*, it did not believe that such a distinction affected the result; just as in *Joe v. Marcum*, the effect of the garnishment would reduce Begay's income and thus threaten or have a direct effect on the "health and welfare of the tribe," citing *Montana v. United States*.[364] Third, the State action of issuing a writ of garnishment against an Indian's wages, which were earned on the reservation, infringed upon Navajo Tribal sovereignty because the Navajo Tribal Code did not provide for enforcement of judgments by garnishment. Rather, the Navajo Tribe had chosen to provide alternative remedies for the enforcement of judgments against reservation Indians.

The State IV-D agency may seek recognition and enforcement of the order pursuant to FFCCSOA. Tribes within Indian country are required to give full faith and credit to valid State child support orders. Once a State support order is recognized under FFCCSOA, the Tribal court can use enforcement methods that are available under Tribal law.

If the State has complete Public Law 280 jurisdiction over domestic matters, the State IV-D agency can probably also seek enforcement against any nontrust property[365] that is owned by the Indian obligor and located within the State, including personalty.[366]

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[362] *Begay v. Roberts*, 807 P.2d at 1111, 1115 (Ct. App. 1990).
[363] *Williams v. Lee,* 358 U.S. 217 (1959).
[364] *Montana v. United States,* 450 U.S. 544 (1981).
[365] 25 U.S.C. § 1322(b) excludes trust property from execution.
[366] *See Calista Corp. v. DeYoung*, 562 P.2d 338 (Alaska 1977) (allowed State with Public Law 280 jurisdiction to collect child support arrears by obtaining cash distributions from stock in corporations formed pursuant to the Native Claims Settlement Act).

Indian Obligor Resides on Reservation but Works off Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the Indian obligor while he or she is working off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off the reservation.

When the obligor derives income off the reservation, the State IV-D agency can seek enforcement of the State support order by income withholding against the off-reservation income. A case in point is *First v. State*.[367] Applying a preemption/infringement test, the Montana Supreme Court found no Federal preemption to State enforcement against off-reservation income and no unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them. It therefore upheld State administrative income withholding against off-reservation income (unemployment benefits), payable to an enrolled Tribal member living on the reservation, as a means to enforce a State child support order. The court held that State court jurisdiction did not violate Federal law, but actually promoted Federal law regarding the Title IV-D child support program. It also concluded that since the Tribal code only addressed support enforcement against on-reservation income and was silent on enforcement against off-reservation income, Montana's assertion of subject matter jurisdiction did not interfere with Tribal sovereignty. It noted that although the purpose of the income withholding was to enforce a child support obligation, it was a collection action and therefore "not an area dominated by Tribal tradition and custom."[368]

If the obligor is a Federal employee, the Federal government has the authority to withhold wages for child support, regardless of American Indian/American Native membership, residency, or employment on a reservation.[369]

If the obligor owns property on the reservation against which the support order may be enforced, the State IV-D agency may ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court would then use Tribal law to enforce the State support order.

Indian Obligor Resides Off Reservation but Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the Indian obligor while he or she is off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off reservation.

The State agency may also seek enforcement of the order by income withholding. UIFSA requires that an employer honor a direct income withholding

[367] 247 Mont. 465, 808 P.2d 467 (1991).
[368] *Id*. at 473.
[369] *See* OCSE-IM-02-01 Income Withholding from Federal Employees Working on Indian Reservations.

request. However, no Tribe has enacted UIFSA nor is there a requirement that Tribes receiving Federal IV-D funding do so. Therefore, an employer in Indian country is not required to honor a State-issued direct income withholding request against wages earned by an Indian obligor, unless Tribal law so provides. Based on case law addressing writs of garnishment, it is likely that such direct State action would be considered an infringement on Tribal sovereignty, regardless of whether the employer was the Tribe, a Tribally-owned employer, or an employer that also does business within the State – especially if the Tribe had not authorized income withholding for support enforcement.[370] If the Indian obligor works on a reservation where the Tribe receives Federal IV-D funding, the State agency can forward the State income withholding order to the Tribal IV-D agency for processing. Pursuant to 45 C.F.R. § 309.110(n), the Tribal IV-D agency must receive and process income withholding orders from State or other Tribes and ensure that such orders are promptly served on employers.

Probably the best approach is for the State IV-D agency to seek recognition and enforcement of the order pursuant to FFCCSOA. Tribes within Indian country are required to give full faith and credit to valid State child support orders. Once a State support order is recognized under FFCCSOA, the Tribal court can use enforcement methods that are available under Tribal law.

Non-Member or Non-Indian Obligor Resides and Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. Service of process must be valid. See the discussion on service of process herein. It can also enforce the order against any personal or real property that the obligor owns off reservation.

If the non-member or non-Indian obligor works for the Tribe or a Tribally owned business, direct enforcement by State income withholding or garnishment of wages will likely be unsuccessful due to Tribal sovereign immunity. If the non-member or non-Indian obligor works on the reservation for an employer that is not entitled to claim Tribal sovereign immunity, it is less clear whether such action infringes on Tribal sovereignty.

If the Tribe operates a Federally funded IV-D program, the State IV-D agency can ask the Tribal IV-D agency for assistance in processing the State income withholding order. The Tribal IV-D agency is required by Federal regulation to promptly serve the State withholding order on the employer.[371]

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. This may be particularly effective if the obligor owns property on the reservation and Tribal law allows enforcement of the State support order against such property.

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[370] *See Joe v. Marcum,* 621 F.2d 358 (10th Cir. 1980) and *Begay v. Roberts,* 7 P.2d 1111 (1990).
[371] 45 C.F.R. § 309.110(n).

Non-Member or Non-Indian Obligor Resides off Reservation but Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the obligor while he or she is off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off reservation.

If the non-member or non-Indian obligor works for the Tribe or a Tribally owned business, direct enforcement by State income withholding or garnishment of wages will likely be unsuccessful due to Tribal sovereign immunity. If the non-member or non-Indian obligor works on the reservation for an employer that is not entitled to claim Tribal sovereign immunity, it is less clear whether such action infringes on Tribal sovereignty.

If the Tribe operates a Federally funded IV-D program, the State IV-D agency can ask the Tribal IV-D agency for assistance in processing the State income withholding order. The Tribal IV-D agency is required by Federal regulation to promptly serve the State withholding order on the employer.[372]

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. In *Hanson v. Grandberry*,[373] the plaintiff, a non-Indian who resided off the reservation, sought enforcement in Tribal court of a State child support order against the defendant, also a non-Indian, who resided off the reservation but who was an employee of the Puyallup Tribe, working at the Tribal College located within the reservation. The defendant argued that simply because he was an employee of the Tribe did not mean that the Tribe automatically had jurisdiction over him. The plaintiff argued that by voluntarily working for a Tribal enterprise, the defendant had consented to Tribal jurisdiction. She sought full faith and credit of the order and garnishment of wages. The Puyallup Tribal Court held that the defendant had entered into a consensual relationship with the Tribe, thereby giving the Tribe jurisdiction over him. Furthermore, FFCCSOA authorized the Tribe to enforce the State child support order.

Non-Member or Non-Indian Obligor Resides on Reservation but Works off Reservation

The State IV-D agency may attempt to enforce the State support order by contempt; the best approach for avoiding service of process issues is to serve the obligor while he or she is at work or otherwise off the reservation. When the obligor derives income off the reservation, the State IV-D agency can also seek enforcement of

[372] 45 C.F.R. § 309.110(n).
[373] Puyallup Tribal Court (No. CV 98-004 June 8, 1999)(http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm).

the State support order by income withholding against the off-reservation income. Federal and State income tax refund offset are also effective remedies.

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. This may be particularly effective if the obligor owns property on the reservation and Tribal law allows enforcement of the support order against such property.

CHAPTER NINE
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

U.S. Constitution, Full Faith and Credit Clause, U.S. Constitution art. IV, § 1, cl. 1.

Alaska Native Claims Settlement Act, P.L. No. 92-203 (1971), codified at 43 U.S.C. §§1609 - 1624

Child Support Enforcement Amendments of 1984, P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666

Child Support Performance and Incentive Act of 1998, P.L. No. 105-200 (1998)

Consumer Credit Protection Act, P.L. No. 90-321, 82 Stat. 146 (1969), codified at 15 U.S.C. §§ 1601 *et seq*.

Family Support Act of 1988, P.L. No. 100-485 (1988)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Omnibus Budget Reconciliation Act of 1986, P. L. No. 99-509 (1986)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

15 U.S.C. §§ 1601 *et seq*.

18 U.S.C. § 1151

18 U.S.C. § 2265

25 U.S.C. § 1322(b)

25 U.S.C. § 1911(d)

42 U.S.C. § 652(a)(11)(B)

42 U.S.C. § 654(9)(E)

42 U.S.C. § 666

42 U.S.C. § 666(a)(3)(A)

42 U.S.C. § 666(a)(4)(A)

42 U.S.C. § 666(a)(4)(B)

42 U.S.C. § 666(a)(7)(A)

42 U.S.C. § 666(a)(8)(B)

42 U.S.C. § 666(a)(16)

42 U.S.C. § 666(a)(17)

42 U.S.C. § 666(b)(3)(A)

42 U.S.C. § 666(b)(6)(A)(ii)

42 U.S.C. § 666(b)(8)

43 U.S.C. §§1609 - 1624

45 C.F.R. § 303.100

45 C.F.R. § 309.110

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

Uniform InterState Family Support Act (1996), 9 Pt. 1B U.L.A. 235 (1999)

Sections 501-506, UIFSA

9 Navajo Tribe Code tit 9, § 1303

S.D. Codified Laws Ann § 1-1-25

Case Law

Hilton v. Guyot, 159 U.S. 113 (1894)

Talton v. Mayers, 163 U.S. 376 (1896)

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990)

Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980)

Hanson v. Grandberry, Puyallup Tribal Court (No. CV 98-004 June 8, 1999) (http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm)

Hogdon v. Nelson, No. SC-CV-19-94 (Navajo Supreme Court 8/23/1995)

Smith v. Scott, 30 Indian L. Rptr. 105 (Mashantucket Pequot Tribal Court, No. MPTC-CV-2002-182 April 23, 2003)

Begay v. Roberts, 807 P.2d 1111 (Ariz. App. 1990)

Calista Corp. v. DeYoung, 569 P.2d 338 (Alaska 1977)

First v. State, 247 Mont. 465, 808 P.2d 467 (1991)

John v. Baker, Alaska Supreme Court No. S-11176 (No. 596 decided Dec. 16, 2005)

Smith v. Hall, 2005 N.D. 215 (filed Dec. 20, 2005)

Periodicals/Publications

Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 (2003).

Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D.L. Rev. 311 (2000).

Stoner and Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M.L. Rev. 381 (2004).

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CHAPTER TEN
EFFORTS AT FACILITATING INTERJURISDICTIONAL SUPPORT ENFORCEMENT

TRIBAL AND STATE CHILD SUPPORT PROGRAMS

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[374] as amended by the Balanced Budget Act of 1997,[375] authorizes the direct funding of Tribal child support enforcement programs by the Federal government. The Department of Health and Human Services published a final rule on March 30, 2004,[376] providing the mechanism for Tribes to submit child support enforcement plans and, upon approval, to receive direct Federal funding of Tribally operated programs.

As of March 2007, the following Tribes have been approved to operate their own child support programs:

- Chickasaw Nation / OK
- Forest County Potawatomi Community / WI
- Lac du Flambeau Band of Lake Superior Chippewa Indians / WI
- Lummi Nation / WA
- Menominee Tribe / WI
- Navajo Nation / NM, AZ, UT
- Port Gamble S'Klallam Tribe / WA
- Puyallup Tribe of Indians / WA
- Sisseton-Wahpeton Oyate / SD
- Central Council Tlingit and Haida Indian Tribes / AK

There are also twenty-seven tribes with start-up programs: Osage Tribe of Oklahoma; Cherokee Nation of Oklahoma; Quinault Indian Nation (WA); Nooksack Indian Tribe (WA); Confederated Tribes of Umatilla (OR); Confederated Tribes of Colville (WA); Winnebago Tribe (NE); Three Affiliated Tribes (Mandan, Hidatsa and Arickara Nation) (ND); Red Lake Band of Chippewa Indians (MN); Oneida Tribe of Indians (WI); Keewenaw Bay Indian Community (MI); White Earth Nation (MN); Muscogee (Creek) Nation, (OK); Pueblo of Zuni (NM); Ponca Tribe of Oklahoma; Penobscot Nation (ME); Kickapoo Tribe of Kansas; Kaw Nation (OK); Mescalero Apache Tribe (NM); Comanche Nation (OK); Modoc Tribe (OK); Klamath Tribes (OR); Tulalip Tribes (WA); Aleutian/Pribilof Islands Association (AK); Northern Arapaho Tribes (WY); Chippewa Cree Tribe (MT); and Coeur D'Alene Tribe (ID) .

Some Tribal child support programs use the computer systems within their corresponding State. Others are not yet computerized and operate using manual

[374] P.L. No. 104-193.
[375] P.L. No. 105-33.
[376] 69 Fed. Reg. 16,638 (Mar. 30, 2005) (to be codified at 45 C.F.R. Part 309).

systems. A few Tribes have agreements with their individual States or counties for personal service on their reservation, although most do not.

Some Tribes operate their own Temporary Assistance for Needy Families (TANF) program. Members of Tribes that do not have their own program receive TANF benefits through the State's system.

Federal regulations governing State IV-D plans were also amended to require States to cooperate with Tribal IV-D programs.[377] 45 C.F.R. § 302.36(a)(2) now requires States to extend the full range of services available under the IV-D plan to all Tribal IV-D programs.

COOPERATIVE AGREEMENTS

PRWORA also provides that State IV-D agencies may enter into cooperative agreements with an Indian Tribe, Tribal organization, or Alaska Native Village, group, regional or village corporation so long as it "has an established Tribal court system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such Tribal entity."[378] It is not necessary that the Tribal entity have laws and procedures meeting Federal requirements for all IV-D functions. Implementing regulations are at 45 C.F.R. § 302.34.[379] Such arrangements shall contain provisions for providing courts and law enforcement officials with pertinent information needed in locating noncustodial parents, establishing paternity and securing support, to the extent that such information is relevant to the duties to be performed pursuant to the arrangement. A State may delegate one or multiple IV-D functions to the Tribal entity under a cooperative agreement.[380] Under cooperative agreements, Tribes will not have direct access to the Federal Parent Locator Service (FPLS), Federal debt recovery, or the Federal income tax refund offset. However, Tribal cases will be processed using all resources available through the State IV-D program, as outlined in 45 C.F.R. §§ 303.70, 303.71, and 303.72.[381]

45 C.F.R. § 303.107 establishes requirements for cooperative agreements. They must:

> (a) Contain a clear description of the specific duties, functions and responsibilities of each party;
>
> (b) Specify clear and definite standards of performance which [sic] meet Federal requirements;
>
> (c) Specify that the parties will comply with title IV-D of the Act, implementing Federal regulations and any other applicable Federal regulations and requirements;

[377] 69 Fed. Reg. 16,638 (Mar. 30, 2005).
[378] Public Law No. 104-193, 110 Stat. at 2256 (codified as amended at 42 U.S.C. § 654(33)). According to OCSE-AT-98-21 (July 28, 1998), it is not necessary that the Tribe comply with every federal IV-D regulation in order to qualify for a cooperative agreement with a State IV-D agency.
[379] 54 Fed. Reg. 30,222 (July 19, 1989), as amended at 61 Fed. Reg. 67,240 (Dec. 20, 1996).
[380] OCSE-AT-98-21 (July 28, 1998).
[381] *Id.*

> (d) Specify the financial arrangements including budget estimates, covered expenditures, methods of determining costs, procedures for billing the IV-D agency, and any relevant Federal and State reimbursement requirements and limitations;
>
> (e) Specify the kind of records that must be maintained and the appropriate Federal, State and local reporting and safeguarding requirements; and
>
> (f) Specify the dates on which the arrangement begins and ends, any conditions for revision or renewal, and the circumstances under which the arrangement may be terminated.[382]

Federal financial participation (FFP) in the eligible costs of providing IV-D services under such a cooperative agreement is available to the State.[383]

An example of a formal cooperative agreement is one between the Eastern Band of Cherokee Indian Tribe and the State of North Carolina. The State has one child support enforcement office that serves several counties in the area, including the reservation. The office, located in Bryson City, 10 miles from Cherokee, provides two case workers to the Cherokee CFR Court, one for intake of new cases, and the other for enforcement of current active cases. The primary objective of both offices is to provide the best services available to enrolled children.[384]

INTERGOVERNMENTAL AGREEMENTS

Nationwide, States and Indian Tribes have negotiated hundreds of intergovernmental agreements (IGAs) on such diverse subjects as hunting and fishing rights, taxation, cross-deputization, and the Indian Child Welfare Act.[385] States and Tribes are also exploring the use of IGAs to facilitate support enforcement. An example is the Colville Agreement of 1987 entered into by the Washington State Department of Social and Health Services and the Colville Confederate Tribes.[386]

[382] 54 Fed. Reg. 30,223 (July 19, 1989).
[383] *See* OCSE-AT-98-21 on cooperative agreements.
[384] Strengthening the Circle, *supra* note 179 at 10.
[385] *See* American Indian Law Center, State/Tribal Agreements: A Comprehensive Study (1981).
[386] For an overview of options for overcoming jurisdictional barriers, *see* J. Mickens, Toward a Common Goal: Tribal and State Intergovernmental Agreements for Child Support Cases (State Justice Institute 1994).

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CHAPTER TEN
TABLE OF STATUTES AND AUTHORITIES

Statutes and Regulations

Balanced Budget Act of 1997, P.L. No. 105-33 (1997)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

42 U.S.C. § 654(33))

45 C.F.R. § 302.36(a)(2)

45 C.F.R. § 303.70

45 C.F.R. § 303.71

45 C.F.R. § 303.72

45 C.F.R. § 303.107

54 Fed. Reg. 30,222 (July 19, 1989), as amended at 61 Fed. Reg. 67,240 (Dec. 20, 1996)

54 Fed. Reg. 30,223 (July 19, 1989)

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

Case Law

None

Periodicals/Publications

American Indian Law Center, State/Tribal Agreements: A Comprehensive Study (1981).

J. Mickens, Toward a Common Goal: Tribal and State Intergovernmental Agreements for Child Support Cases (State Justice Institute 1994).

Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children (1998).

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CONCLUSION

The goal of this revised monograph has been to update information regarding the history, processes, jurisdictional issues, and innovations of State and Tribal interaction in the area of child support. Basic knowledge of both State and Tribal programs, and communication among stakeholders in each community, will lead to continued improvement in the delivery of services to Indian children. As one Tribal judge commented, "[o]nce we are willing to find out about each other, we can work together."

As the topic of Tribal and State interaction increasingly appears on the agenda of child support conferences, speakers and attendees have had opportunities for sharing best practices. Practice tips have included the following:

- To determine if someone is enrolled in a Tribe, ask the person for his or her Certificate of Degree of Indian Blood (CDIB) card, which shows enrollment.
- Remember that each Tribe is different, with its own laws.
- Find out what procedure(s) are required to register a State support order for enforcement with the Tribe.
- Coordinate service of process in Indian country with the Tribe. When personal service is required, Tribal authorities are often the most appropriate individuals for serving State process on a reservation.
- State and Tribal court clerks are excellent resources regarding pleadings, required forms, and filing deadlines and procedures.
- Attorneys should check regarding authority to practice law in a particular forum. Admission to practice in a State court does not automatically mean that the attorney is admitted to practice in a Tribal court in that State.
- Communicate.
- Build a foundation of trust.

Speakers have also made the following long-range recommendations:

- National and State child support conferences should include sessions that provide attendees an opportunity to become better informed about Tribal cultures and Tribal child support programs.
- Tribal child support conferences should include sessions that provide attendees an opportunity to learn about State's best practices so that Tribes can decide if such practices are helpful in developing their own child support programs.

- Joint conferences should be regularly planned for Tribal and State court judges who hear child support cases in order to address mutual problems, issues, and solutions regarding child support.

Appendix A
INTERNET RESOURCES

Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) responsibility is the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian Tribes, and Alaska Natives. There are 562 Federal recognized Tribal governments in the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility. In addition, the Bureau of Indian Affairs provides education services to approximately 48,000 Indian students. For information about the BIA see http://www.doj.gov/bureau-indian-affairs.html (Note: As of June 2005, the BIA website and the BIA mail servers have been made temporarily unavailable due to litigation.)

Indian Health Service

The Indian Health Service (IHS), an agency within the Department of Health and Human Services, currently provides health services to approximately 1.5 million American Indians and Alaska Natives who belong to 562 Federally recognized Tribes in 35 States. For information about health services for Indian children see www.ihs.gov

National Tribal Child Support Association

For information about Tribal IV-D child support programs see www.supportTribalchildren.org

National Tribal Justice Resource Center

According to its website, the National Tribal Justice Resource Center is the largest and most comprehensive site dedicated to Tribal justice systems, personnel and Tribal law. The Resource Center is the central national clearinghouse of information for Native American and Alaska Native Tribal courts, providing both technical assistance and resources for the development and enhancement of Tribal justice system personnel. Programs and services developed by the Resource Center are offered to all Tribal justice system personnel -- whether working with formalized Tribal courts or with tradition-based Tribal dispute resolution forums. For information about Tribal courts see www.Tribalresourcecenter.org

Native American Legal Resource Center at Oklahoma City University (OCU) School of Law

OCU School of Law's Native American Legal Resource Center is dedicated to advancing scholarship in the field of American Indian law and improving the quality of legal representation for Native Americans. It advises Tribes and governments on matters of economic development and supports the activities of the OCU chapter of the Native American Law Student Association. The Center also helps make available Tribal law by publishing the *Oklahoma Tribal Court Reports* and *the Oklahoma Tribal Constitutions* Annotated. For information about American Indian law and initiatives in

area of domestic violence, see
http://www.okcu.edu/law/academiccenters/academiccenters_nativeamerican.html

Native American Rights Fund and the National Indian Law Library

Founded in 1970, the Native American Rights Fund (NARF) is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian Tribes, organizations and individuals nationwide. It operates the National Indian Law Library (NILL), which is a public law library devoted to Federal Indian and Tribal law. For information about Tribal law see www.narf.org

Office of Child Support Enforcement

The Federal Office of Child Support Enforcement (OCSE) is within the Administration for Children and Families, Department of Health and Human Services. Its mission is to provide direction, guidance, and oversight to State and Tribal CSE program offices for activities authorized and directed by Title IV-D of the Social Security Act and other pertinent legislation. Central and regional offices collaborate to assess State needs, and to provide technical assistance, policy clarification, training and support for CSE programs. For information about Federal, State, and Tribal initiatives in child support enforcement see http://www.acf.hhs.gov/programs/cse/fct/Tribal.htm

Tribal Law and Policy Institute

The Tribal Law and Policy Institute is a Native American owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples. The Institute hosts a Tribal Court Clearinghouse. For Tribal codes see http://www.Tribal-institute.org

U.S. House Committee on Resources, Office of Native American and Insular Affairs Subcommittee

The jurisdiction of the House Committee on Resources includes: Native Americans generally, including the care and allotment of Native American lands and general and special measures relating to claims that are paid out of Native American funds; and Insular possessions of the United States generally (except those affecting the revenue and appropriations). For information about the Office of Native American and Insular Affairs Subcommittee see
http://resourcescommittee.house.gov/subcommittees/naia.htm
For frequently asked questions and answers regarding American Indians see
http://resourcescommittee.house.gov/subcommittees/naia/nativeamer/faqspf.htm

U.S. Senate Committee on Indian Affairs

Until 1946, when a legislative reorganization act abolished both the House and Senate Committees on Indian Affairs, the Senate Committee on Indian Affairs had been in existence since the early 19th century. After 1946, Indian affairs legislative and oversight jurisdiction was vested in subcommittees of the Interior and Insular Affairs Committees of the House of Representatives and the Senate. In 1977, the Senate re-established the Committee on Indian Affairs and voted it a permanent Committee in

1984. The Committee has jurisdiction to study the unique problems of American Indian, Native Hawaiian, and Alaska Native peoples and to propose legislation to alleviate these difficulties. These issues include, but are not limited to, Indian education, economic development, land management, trust responsibilities, health care, and claims against the United States. Additionally, all legislation proposed by members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives is under the jurisdiction of the Committee. For information on Federal legislation related to American Indians, Native Hawaiians, or Alaska Natives see http://indian.senate/gov/

U.S. Department of Justice, Office of Tribal Justice

The Office of Tribal Justice (OTJ) was established to provide a single point of contact within the Justice Department for meeting the Federal responsibilities owed to Indian Tribes. Because Indian issues cut across so many entities within the Executive Branch, OTJ, in cooperation with the Bureau of Indian Affairs, serves to unify the Federal response. According to its website, one of the activities for which OTJ has coordination and liaison responsibilities is Tribal Justice Systems and Public Law 280 Policy. For information on current legal issues in Indian Country see www.usdoj.gov/otj

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Appendix B
PUBLIC LAW 280

The relevant text of P.L. 280 as enacted in 1953[387] is set out below with subsequent amendments. An amendment in 1954 brought the Menominee Tribe within the provisions of this section; the deleted exception is indicated by a double strike through. The 1958 amendments[388] are underlined; they extended both the criminal and civil provisions of Public Law 280 to all Indian country within Alaska. In 1970, Congress again amended Public Law 280 by excepting the Metlakatla Indian community from the exclusive jurisdiction of Alaska, and providing that sections 1152 and 1153 (the General Crimes Act and the Major Crimes Act) are not applicable within the areas of Indian country listed in the mandatory Public Law 280 States, as "areas over which the several States have exclusive jurisdiction"; these 1970 amendments[389] are crossed out and capitalized. 1984 amendments deleted references to "Territories" that had been added in 1958; the deleted language is crossed out and in italics.

"AN ACT
"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"`1162. State jurisdiction over offenses committed by or against Indians in the Indian country.'

"**SEC. 2**. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"` 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"`(a) Each of the States ~~*or Territories*~~ listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian

[387] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).
[388] Act of August 8, 1958, Pub. L. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).
[389] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

country listed opposite the name of the State ~~*or Territory*~~ to the same extent that such State ~~*or Territory*~~ has jurisdiction over offenses committed elsewhere within the State ~~*or Territory*~~, and the criminal laws of such State ~~*or Territory*~~ shall have the same force and effect within such Indian country as they have elsewhere within the State ~~*or Territory*~~:

"`State ~~*or Territory*~~ of Indian country affected

State or Territory of	Indian country affected
Alaska	All Indian country within the ~~Territory~~ STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, ~~except the Menominee Reservation~~

"`(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian Tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"`(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section AS AREAS OVER WHICH THE SEVERAL STATES HAVE EXCLUSIVE JURISDICTION.'

"**SEC. 3**. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"`1360. State civil jurisdiction in actions to which Indians are parties.'

"**SEC. 4**. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"` 1360. State civil jurisdiction in actions to which Indians are parties

"`(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
"`State of Indian country affected.

State of	Indian country affected
Alaska	All Indian country within the ~~Territory~~ STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, ~~except the Menominee Reservation~~

"`(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"`(c) Any Tribal ordinance or custom heretofore or hereafter adopted by an Indian Tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.'

"**SEC. 5**. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"**SEC. 6**. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"**SEC. 7**. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

(Added Aug. 15, 1953, ch. 505, Sec. 4, 67 Stat. 589; amended Aug. 24, 1954, ch. 910, Sec. 2, 68 Stat. 795; Pub. L. 85-615, Sec. 2, Aug. 8, 1958, 72 Stat. 545; Pub. L. 95-598, title II, Sec. 239, Nov. 6, 1978, 92 Stat. 2668; Pub. L. 98-353, title I, Sec. 110, July 10, 1984, 98 Stat. 342.)

AMENDMENTS

1984 - Subsec. (a). Pub. L. 98-353 struck out "or Territories" after "Each of the States", struck out "or Territory" after "State" in 5 places, and substituted "within the State" for "within the Territory" in item relating to Alaska.

1978 - Subsec. (a). Pub. L. 95-598 directed the amendment of subsec. (a) by substituting in the item relating to Alaska "within the State" for "within the Territory", which amendment did not

become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1958 - Subsec. (a). Pub. L. 85-615 gave Alaska jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in all Indian country within the Territory of Alaska.

1954 - Subsec. (a). Act Aug. 24, 1954, brought the Menominee Tribe within the provisions of this section.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective July 10, 1984, see section 122(a) of Pub. L. 98-353, set out as an Effective Date note under section 151 of this title.

ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

AMENDMENT OF STATE CONSTITUTIONS TO REMOVE LEGAL IMPEDIMENT; EFFECTIVE DATE

Section 6 of act Aug. 15, 1953, provided that: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act (adding this section and section 1162 of Title 18, Crimes and Criminal Procedure): Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

CONSENT OF UNITED STATES TO OTHER STATES TO ASSUME JURISDICTION

Act Aug. 15, 1953, ch. 505, Sec. 7, 67 Stat. 590, which gave consent of the United States to any other State not having jurisdiction with respect to criminal offenses or civil causes of

action, or with respect to both, as provided for in this section and section 1162 of Title 18, Crimes and Criminal Procedure, to assume jurisdiction at such time and in such manner as the people of the State shall, by legislative action, obligate and bind the State to assumption thereof, was repealed by section 403(b) of Pub. L. 90-284, title IV, Apr. 11, 1968, 82 Stat. 79, such repeal not to affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Retrocession of jurisdiction by State acquired by State pursuant to section 7 of Act Aug. 15, 1953, prior to its repeal, see section 1323 of Title 25, Indians.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 sections 566e, 711e, 713f, 714e, 715d, 1300b-15, 1300f, 1300i-1, 1323, 1747, 1772d, 1918.

Appendix C
FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS

Section 1738B. Full faith and credit for child support orders

(a) General Rule. - The appropriate authorities of each State -

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions. - In this section:

"child" means -

(A) a person under 18 years of age; and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

"child's State" means the State in which a child resides.

"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"child support order" -

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

(B) includes -

(i) a permanent or temporary order; and

(ii) an initial order or a modification of an order.

"contestant" means -

(A) a person (including a parent) who -

(i) claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

"court" means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

"modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of Child Support Orders. - A child support order made by a court of a State is made consistently with this section if -

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g) -

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing Jurisdiction. - A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority To Modify Orders. - A court of a State may modify a child support order issued by a court of another State if -

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of Child Support Orders. - If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this

section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) Enforcement of Modified Orders. - A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) Choice of Law. -

(1) In general. - In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) Law of State of issuance of order. - In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation. - In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) Registration for Modification. - If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

Claudia Garcia Groberg
Oregon Department of Justice
Civil Enforcement Division/Civil Recovery Section

Child Support Enforcement between State & Tribal Courts

Background:

a. The Child Support Program, which consists of the Division of Child Supp0lt (DCS) and 25 District Attorneys' (DA) offices in Oregon, may use any and all collection methods below to enforce a child support order:

Income Withholding -- ORS 25.372 -25.427
State and Federal Tax Intercept -- ORS 25.610 -25.625
Passport Suspension -- ORS 25.625
Financial Institutional Data Match -- ORS 25.640 -25.646
Personal Property Liens -- ORS 25.670 -25.690
License Suspension -- ORS 25.750 -25.785
New Hire Rep0lting-- ORS 25.790 -25.794
Real Property Lien-- ORS 18.150
Garnishment -- ORS 18.605
Contempt -- ORS Chapter 33
Bail Intercept -- ORS 25.715

b. We ask tribes to assist us in enforcing a child support order through wage withholding when the obligated parent is employed by the tribe. Tribes vary in their approach to honoring our wage withholding:
    1. Some tribes will register the order and withhold under Oregon law
    2. Some tribes will not register our order but will honor the wage withholding after allowing obligor an opp0ltunity for hearing.

3. Some tribes will request the state attorney to be licensed in their comt and appear at each wage withholding hearing.
4. IV-D Tribes issue their own income withholding orders.

c. Under Oregon law, the state withholds:
   i. 100% of current cases with no arrears;
   ii. 120% of current cases with arrears; and
   m. 100% of the last court ordered amount on judgment only cases

d. Some tribes take a more holistic approach to what amount should be withheld at any given time.

The Klamath Tribes

Tribal Council

TRIBAL COUNCIL RESOLUTION #2008-20

TRIBAL COUNCIL RESOLUTION APPROVING AMENDMENTS TO THE KLAMATH TRIBES CHILD SUPPORT ORDINANCE, KLAMATH TRIBAL CODE TITLE 4, CHAPTER 29

\,\'hereas, The Klamath and Modoc Tribes and the Yahooskin Band of Snake lndwns signrn:d the Treaty of 1864 establishing the Klamath Reservation; and

\<\'hereas, The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI, & VII, Section IV E) as approved and/or adopted by the General Council amended on November 25, 2000; and

W hcn'as, The K lan1ath Indian Tribes Restoration Act of August 27, 1986 (P.L. 99-398) restored to federal recognition the Sovereign Government of the Tribes' Constitution and By-laws; and

Whereas, The Klamath Tribes Tribal Council is the elected governmental body c,f the Tn bes and has been delegated the authority to direct the day-to-day business and governmental affairs of the Klamath Tribes under the general guidancl.' of the General Council (Constitution, Article VII, Section I; Tribal Council Bv-1aws. Article I); and

\\'hereas, The General Council adopted the Klamath Tribes Chi ld Suppo1i Ord i nane<:. Klamath Tribal Code Title 4, Chapter 29 on February 23, 2008; and

Whereas, Minor amendments have been recommended to be made to the Ord ma nee pri<•r to submission of the Application for federal funding to operate a Title IV-D chi l d support program; and

[('!{ 2008-

501 Chilo9uin E>ivd. - P.O. Box *4)6* - Chilo9uin, Oregon 97624
(541) *78)-2219* - Fax (541) *187-)706*

Whereas, The Child Support Ordinance may be amended by a Resolution adopted by majority vote of the Klamath Tribes Tribal Council; and

\Vhereas, The Klamath Tribes Tribal Council has determined that it is in the best interest of the Klamath Tribes to approve the recommended amendments to the ordinance as presented to the Tribal Council on April 24, 2008;

Now therefore be it resolved, The Klamath Tribes Tribal Council hereby approves the amendments to the Child Support Ordinance, Klamath Tribal Code Title 4, Chapter 29;

Be it further resolved, That the Ordinance, as amended, shall become effective upon Tribal Council acknowledgment of receipt of sufficient funds to operate the Child Support Enforcement Office.

Certification

We. the undersigned. Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a scheduled T1ibal Council meeting held on the_24th_ day of_April____. 2008.
the Tribal Council duly adopted this resolution by a vote of 7 for, t?.f opposed. anu abstentions.

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Joscphi(irk .?
Chairman
The Klamath Tribes

4"·--0 . . d ____ ---·-
T rina Case
Secretary
The Klamath Tribes

THE KLAMATH TRIBES
CHILD SUPPORT ORDINANCE
Title 4 Chapter 29

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

GENERAL PROVISIONS

29.1 Authority.

This Child Support Ordinance is adopted pursuant to the authority vested in the Klamath Tribes General Council by virtue of its inherent sovereignty as an Indian tribal government and Article VI of the Constitution of the Klamath Tribes that provides that the General Council has the power to adopt and enforce ordinances providing for the maintenance oflaw and order, and to exercise all other reserved powers.

29.2 Purpose.

The purpose of this Child Support Enforcement Ordinance is to establish a fair and equitable process for establishing, modifying and enforcing child suppo11orders and pcrfonning related activities including establishment of paternity, and locating noncustodial parents, to help provide for the care of children.

29.3 Policy.

It is the policy of the Klamath Tribes that **all** parents, both custodial and non-custodial , have an equal obligation to support their children. The Tribes are responsible for establishing governmental laws, procedures and guidelines for the equitable allocation of financial responsibility between parents for children's support where necessary.

29.4 Definitions.

For purposes of this Ordinance, the term

(a) "Acknowledged father" means a man who has established a father-child relationship under section 29.21 or 29.22.

(b) "Adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child.

(c) "Alleged father" means a man who alleges himself to be, or is alleged to be. the genetic father or a possible genetic father of a child, but whose paterni ty has not been detennined. The term does not include a presumed father, or a man whose parental rights have been terminated or declared not to exist.

(d) "Assignee" means an individual or agency that has been assigned the right to collect child support from the parent obligor.

(e) "Child" means any person under the age of eighteen years. In accordance with the terms of this Ordinance, "child" may also include a person over the age !.If eighteen years who has not yet completed High School. but shall never mean a person over the age of twenty.

(f) "Child support order" and "child support obligation" mean a judgment, decree. or order, whether temporary, final or subject to modification, issued by a court of competent jurisdiction, tribunal or an administrative agency for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing jurisdiction, or of the parent with whom the child is living, which provides for monetary support, health care, arrearages, or reimbursement, and which may include related costs and fees. interest and penalties, income withholding, attorneys' fees, and other relief.

(g) "Certify" means to present to the Tribal Court for determination.

(h) "Custodial parent" means a parent having the care, physical custody and control of a child or children.

(i) "Custodian" means any person who is not a parent, having the care, physical custody and control of a child or children.

(j) "comt" means any court having jurisdiction to detennine the liability of pcrs011s for the support of a child.

(k) "De novo" means independent review and consideration of all issues.

(l) "Deterrnination of parentage" means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity, adjudication by the court, adoption, or other method for determining parentage set forth at sections 29.20 and 29.21.

(m) "Disposable income" means that part of the income of an individual remaining after the deduction from the income of any amounts required to be withheld by law except laws enforcing spousal or child support and any amounts withheld to pay medical or dental insurance premiums.

(n) "Employer" means any entity or individual that engages an individual to perfom1 work or services for which compensation is given.

(o) "General Council" means the General Council of the Klamath Tribes with such powers that exist by virtue of the inherent sovereignty of the Klamath Trihes and as specified in the Constitution of the Klamath Tribes.

(p) "Genetic testing" means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. The tenn includes an analysis of one or a combination of the following:

1. Deoxyribunucleic acid; and
2. Blood-group antigens, red-cell antigens, human-leukocyte antigens. serum enzymes, serum proteins or red-cell enzymes.

(s) "Home Tribe or State" means the Tribal Reservation or Indian country nf a Tribe. or territory of a State in which a child lived with a parent or a person act mg as a parent for at least six consecutive months immediately preceding the time of tilin g of a petition or comparable pleading or application for support assistance and. if a child is less than six months old, the Tribal Reservation or Indian country of a Tribe, or territory of a State in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence is counted as part of the six-month or other period.

It) "Income-withholding order" means an order or other legal process directed tu an obligor's employer or other third party in possession of a monetary obligation owed to an obligor, as defined by the income-withholding law of the Klamath Tribes, to withhold support from the income of the obligor.

(u) "Initiating Tribe or State" means a Tribe, Tribal organization, or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to the Klamath Tribes Child Support Enforcement Office or Tribal Court.

(v) "Initiating tribunal" means the authorized tribunal in an initiating Tribe. Tribal organization, or State.

(w) "Issuing Tribe or State" means a Tribe or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding Tribe. Tribal organization, or State for purposes of establishment, enforcement. or modification of a child support order.

(x) "Issuing tribunal" means the authorized tribunal in an initiating Tribe. Tribal organization, or State.

(y) "Klamath Indian Reservation" means all lands held in trust by the United States for the benefit of the Klamath Tribes as part of the Klamath Indian Reservatiun.

(z) "Klamath tribal member" means an individual duly enrolled with the Klamath Tribes in accordance with the Constitution and laws of the Klamath Tribes.

(aa) "Klamath Tribes Child Support Enforcement Office" means the Office established pursuant to section 29.06 and that serves as the Tribal IV-D agency pursuant to 45 CFR Part 309.

(bh) "The Manager" means the Director for the Klamath Tribes Child Support Enforcement Office or any of his/her authorized representatives in child suppo1i. proceedings.

(cc) "Non-cash" support means support provided to a family in the nature of good and/or services, rather than in cash, but which nonetheless, has a certain and specific dollar value.

(dd) "Obligee" means an individual or agency to which child support is owed on behalf of a child.

(ee) "Obligor" means a parent who is required to pay child support to a person or agency on behalf of a child.

(ff) "Office"means the Klamath Tribes Child Support Enforcement Office or its equivalent in any other tribal government or state from which a w1itten request for establishment or enforcement of a support obligation is received.

(gg) "Order to withhold" means an order or other legal process that requires a withholder to withhold support from the income of an obligor.

(hh) "Parent" means the natural, biological or adoptive parent of a child.

(ii) "Paternity index" means the likelihood of paternity calculated by computing the ratio between:

!. The likelihood that the tested man is the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is the father of the child; and

2. The likelihood that the tested man is not the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is not the father of the child.

(jj) "Past support" means the amount of child support that could have been ordered and accumulated as arrears against a parent, where the child was otherwise not supported by the parent and for which period no valid support order was in effect.

(kk) "Probability of paternity" means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child, compared with a random, unrelated man of the same ethnic or racial group, expressed as a percentage incorporating the paternity index and a prior probability.

(ll) "Public assistance" means monetary assistance benefits provided by the Klamath Tribes, any other Indian tribe or state that are paid to or for the benefit of a child. Such payments include cash payments under Title IV-A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program.

(mm) "Register" means to record or file a child support order or judgment determining parentage in the appropriate location for the recording and filing of such order or judgment.

(nn) "Registering tribunal" means a tribunal in which a support order is registered.

(oo) "Responding Tribe or State" means an Indian tribe, Tribal organization or state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating Tribe or State under this Ordinance or a law substantially similar to this Ordinance.

(pp) "Responding tribunal" means the authorized tribunal in a responding Tlibe, Tribal organization or State. The responding tribunal for the Klanlath Tribes is the Klamath Tribes Child Support Enforcement Office or the Klamath Tlibal Court as set forth in this Ordinance.

(qq) "Social Services Department" means the Social Services Department of the Klamath Tribes and programs operated thereunder, including, but not limited to the Temporary Assistance to Needy Families program and the General Assistance program.

(rr) "Tribal Council" means the elected Tribal Council of the Klamath Tribes established under Article VII of the Constitution of the Klamath Tribes;

(ss) "Tribal Court or Court" means the Tribal Court of the Klamath Tribes Judicial Branch established under Article V of the Constitution of the Klamath Tribes.

(tt) "Tribal member" means an individual that is an enrolled Klamath member, or an individual that is enrolled with another federally recognized Indian tribe in accordance with the laws of such tribe.

(uu) "Tribe or State" means any Tribe, or Tribal organization within the exterior boundaries of the United States, a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the Jaws of the United States, and any foreign governments. that have enacted a law or established procedures for the issuance and enforcement of child support orders that are substantially similar to Klamath Tribes proceedings for recognition and enforcement of foreign orders.

(vv) "Tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

(ww) "Withholder" means any person who disburses income to the obligor and includes but is not limited to an employer, conservator, trustee or insurer of the obligor.

,J U RISDICTION

29Jl5 Jurisdiction.

(a) The Klamath Tribes Tribal Court and Klamath Tribes Child Support Enforcement Office shall have personal and subject matter jurisdiction over the establishment. modification and enforcement of child support and any associated proceedings. including but not limited to establishment of paternity and location of noncustodial parents, related to the purpose for which this Ordinance is established.

(b) The Tribal Court and, as applicable the Klamath Tribes Child Support Enforcement Office, has, but is not limited to, personal jurisdiction over the following, for purposes of enforcing the provisions of this Ordinance, and any associated matters:

1. Enrolled members of the Klamath Tribes;
2. Persons who consent to the jurisdiction of the Court by one of the following:
   (i) Filing an action;
   (ii) Knowingly and voluntarily giving written consent to jurisdiction of the Court;

(iii) Entering a notice of appearance in an action without conu m:11t1y filing an express written reservation of issues concemi ng personal jurisdiction, or filing a motion to dismiss for lack ofjurisdiction within 30 days of entering the notice of appearance;

(iv) Appearing in an action without concurrentl y filing an express written reservation of issues concerning personal jurisd iction, or filing, within 30 days of such appearance, a motion to dismiss for lack of jurisdiction;

3. Persons who are the parent or guardian of an emolled Klamath tribal member or the parent or guardian of a child eligible for enrollment with the Klamath Tribes;
4. Persons who have legally enforceable rights in any jurisd iction to visitation or custody of a child that is in any way a subject of the proceeding and the child is an enrolled member of the Klamath Tribcs. eligible for emollment with the Klamath Tribes;
5. Persons who are alleged to have engaged in an act of sexual intercourse on the Klamath Indian Reservation with respect to which a child that is ei ther an emolled member of the Klamath Tribes, or eligible for enroll ment \\ i th the Klamath Tribes, may have been conceived; and/or
6. Applicants for and recipients of Temporary Assistance to Need y Famil y benefits through the Klamath Tribes, whether the head of household. dependent, or other household member.

(c) Continuing jurisdiction.

1. In every action under this Ordinance where there is jurisdicti on, the Tribal Court, and as applicable the Klamath Tribes Child Support Enforcement Office, shall retain continuing jurisdiction over the parties.
2. Consent cannot be withdrawn once given, whether such consent was given expressly or impliedly.
3. Personal jurisdiction cannot be defeated by relocation after jurisdiction i s established.
4. Personal jurisdiction cannot be defeated by voluntary relinqui shment nf enrollment and membership with the Klamath Tribes.

(d) The Child Support Enforcement Office shall have jurisdiction over persons and entities as provided for in, and as necessary to carry out the provisions ot this Ordinance, for purposes of establishing paternity, establishing, modifying and enforcing child support orders, and performing associated activities. Challenges to the jurisdiction of the Child Support Enforcement Office shall be presen ted the Child Support Enforcement Office and certified to the Klamath T1ibes Tribal Court for decision. Appeals of Tribal Court determinations of jurisdicti on may be

appealed to the Klamath Tribes Supreme Court in accordance with the laws of the Klamath Tribes.

KLAMATH TRIBES CHILD SUPPORT ENFORCEMENT OFFICE

29.6 Establishment of Child Support Enforcement Office.

(a) There is established a Child Support Enforcement Office to be operated under the Klamath Tribes Judicial Branch. This Office is the Klamath Tribes Tribal IV-D agency pursuant to 45 *CPR* Part 309 and is the entity primarily responsible for providing support enforcement services described in this Ordinance. The Child Support Enforcement Office shall provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, and location of noncustodial parents, as appropriate, with respect to any child, obligee or obligor determined to be within the jurisdiction of the Klamath Tribes.

(b) When responsible for providing support enforcement services, and there is sufficient evidence available to support the action to be taken, the Child Support Enforcement Office shall perform, but not be limited, to the following:

1. Carrying out the policy and traditions of the Klamath Tribes regarding child support obligations;
2. Operating the Klamath Tribes Tribal IV-D Program;
3. Accepting all applications for IV-D services and promptly providing IV-D services;
4. Establishing child support orders in compliance with Klamath Tribes child support guidelines and formulas;
5. Establishing paternity for child support purposes;
6. Initiating and responding to child support modification proceedings and proceedings to terminate support orders;
7. Enforcing established child support orders and obligations;
8. Establishing and enforcing obligations to provide medical insurance coverage for children;
9. Establishing and enforcing obligations to provide child care expenses for children;
10. Collecting child support;
11. Accepting offers of compromise or partial or total charge-off of child support arrearages;
12. Distributing child support payments;
13. Maintaining a full record of collection and disbursements made;

14. Establish or participate in a service to locate parents utilizing all sources of available information and records, and to the extent available, the Fedcral Parent Locator Service;
15. Maintaining program records in accordance with section 29.07 (a).
16. Establishing procedures for safeguards applicable to all confident i al information handled by the Child Support Enforcement Office. that arc designed to protect the privacy rights of the parties, incl uding:
    1. Safeguards against unauthorized use or disclosure of info1 1 1l ation relating to proceedings or actions to establish paternity, to locate a noncustodial parent, or to establish, modify, or enforce suppmt. or to make or enforce a child custody determination;
    11. Prohibitions against the release of infonnation on the wherea bouts of I party or the child to another party against whom a protective order with respect to the former party or the child has been entered:
    n1. Prohibitions against the release of infonnation on the whereabouts of 1 party or the child to another person if the Office has reason to believe that the release of the infonnation to that person may resul t in physical or emotional harm to the party or the child.
    1v. Any mandatory notification to the Secretary that the Office has reasonable evidence of domestic violence or child abuse agai nst a party or the child and that the disclosure of such infonnation could be harmful to the party or the child.
    v. Procedures in accordance with any specific safeguard ing regulations applicable to Tribal IV-D prob rams.
    vi. Procedures under which sanctions must be imposed for the unauthorized use or disclosure of infonnation.
17. Publicizing the availabili ty of child support enforcement services available, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained, and publicizing the availability of and encouraging the use of procedures for voluntary establishment of paternity and child support;
18. Ensuring compliance with the provisions of applicable federal laws. including, but not limited to 42 U.S.C. 651 to 669 and 45 C.F.R. Chapter III.

(c) The Child Support Enforcement Office shall establish rules, procedures and fonns for carrying out its responsibilities and authority under this ordinance. All part ies to child support proceedings shall comply with the rules and proced ures adopted by the Office, and shall utilize the proper forms prepared by the Office.

29.7 **Record Maintenance.**

(a) The Child Support Enforcement Office shall maintain all records necessary for the proper and efficient operation of the program, including records regarding:

1. Applications for child support services;
2. Efforts to locate noncustodial parents;
3. Actions taken to establish paternity and obtain and enforce support:
4. Amounts owed, arrearages, amounts and sources of support collections. and the distribution of such collections;
5. Office IV-D program expenditures;
6. Any fees charged and collected, if applicable; and
7. Statistical, fiscal, and other records necessary for reporting and accountability required by federal law.

(b) The Office shall comply with the retention and access requirements at 45 CFR 74.53, including the requirement that records be retained for at least seven years.

COOPERATIVE ARRANGEMENTS AND AGREEMENTS

29.8 Cooperation With Other JV-D Tribal and State agencies.

The Klamath Tribes Child Support Enforcement Office shall extend the full range of services available under the Klamath Tribes approved IV-D plan to respond to all requests from, and cooperate with, other Tribal and State IV-D agencies.

29.9 Cooperative Agreements.

The Child Support Enforcement Office may enter into cooperative agreements and/or arrangements with other Tribal and State jurisdictions and agencies to provide for cooperative and efficient child support enforcement services. The Klamath Tribes Tribal Council must approve government-to-government cooperative agreements.

NOTICES AND FINDINGS OF FINANCIAL RESPONSIBILITY

29.10 0 Parties.

The following are parties to child support proceedings in the Klamath Tribal Court or within the Child Support Enforcement Office:

(a) The Klamath Tribes, acting by and through the Child Support Enforcement Office;

(b) Custodial and noncustodial parents, whether natural or adoptive, whose parental rights have not been legally terminated;

(c) Persons with physical custody of a child for whose benefit a suppmi order or an order establishing paternity is sought, is being modified or is being enforced;

(d) A male who is alleged to be the father of a child when an action is initiated to establish, modify or enforce a support or paternity order;

(e) Tribal or state agencies that have a vested interest in the outcome of the proceeding in accordance with Child Support Enforcement Office ruJes and procedures. and or by approval of the Klamath Tribal Court;

(f)) Any other person the Klamath Tribal Court has joined as a party pursuant to Court order.

29.1I Proceeding By Minor Parent.

A minor parent, or a guardian or other legal representative of a minor parent may maintain a proceeding on behalf of or for the benefit of the minor's child.

29.12 Administrative Notice and Finding of Financial Responsibility.

(a) At any time after the Klamath Tribes is assigned support rights. a public assistance payment is made, or a request for child support enforcement services is made by an individual or another Tribe or State child support enforcement agency, the Manager may, if there is no existing child support order, issue a notice and finding of financial responsibility. The notice shall include the following:

1. Name and date of birth for the child for whom support is to be paid;
2. Notice that the addressee is presumed to be the parent of the child. Where paternity has not already been legally established, the notice shall include the statements set forth at subsection (b).
3. Name of the person or agency having physical custody of the child for whom support is to be paid;
4. Itemization of assumed income and assets held by the parent to whom the notice is directed;
5. Anticipated amount of monthly support for which the parent will be responsible;
6. Anticipated past amount of support for which the parent will be responsible;

7. Whether the parent will be responsible for obtaining health care coverage for the child where it is available to the parent at a reasonable cost:
8. Notice that failure to respond to the Notice may lead to a finding of legal paternity for purposes of child support, where paternity has not already been established;
9. Notice that failure to respond to the Notice may lead to an award of child support and health care coverage being issued against the parent for the amount stated in the notice.
10. Notice that if the parent or other party objects to all or any part of the notice and finding of financial responsibility, the party must submit to the Child Support Enforcement Office, within 30 days of the date of service, a written response setting forth his or her objections.
1J. Notice that if the person does not submit a written objection to Joy paii of the notice, the Manager may enter an order in accordance with the notice and finding of financial responsibility.

(bJ Where paternity has not already been legally established, the notice shall also include the following:

I. The name of the child's other parent;
2. An allegation that the person is the parent of the child for whom suppo1i is owed;
3. The probable time or period of time during which conception took place: and
4. A statement that if the alleged parent or the obligee does not timely send to the Office issuing the notice a written response that denies paternity and requests a hearing, then the Manager, without further notice to the alleged parent, or to the obligee, may enter an order that declares and establishes the alleged parent as the legal parent of the child for child supprn1 purposes.

29.13 No Objection to Administrative Notice and Finding of Financial Responsibility; Issuance of Administrative Order.

Where no timely written response setting forth objections to the notice and finding of financial responsibility, or timely appeal of the second notice and finding of financial responsibility, is received by the Office, the Manager may enter an order in accordance with the notice, and shall include in that order:

(a) Name and birth date of the child for whom support is to be paid:

(b) Finding of legal paternity for purposes of child support;

(c) The amount of monthly support to be paid, with directions on the manner of payment;

(d) The amount of past support to be ordered against the parent;

(e) Whether health care coverage is to be provided for the child;

(f) Name of the person or agency/entity to whom support is to be paid; and

(g) A statement that the property of the parent is subject to collection action, including but not limited to wage withholding, garnishment and liens and execution thereon.

29.14 Timely Objection to Administrative Notice and Finding of Financial Responsibility; Negotiation Conference.

Where the Office receives a timely written response setting forth objections, the Office shall schedule a negotiation conference with the alleged obligor to occur within 15 days from the date that the written objections were received. If the Office and the obligor reach full agreement to the terms of a support award, such agreement shall be entered into the terms of a stipulated order for support. If the Office and obligor do not reach a full agreement as to the amount of child support and other provisions of the notice and finding of financial responsibility (excepting paternity), the Office shall issue a second notice and finding of financial responsibility within 15 days from the date of the negotiation conference. If the Office and the obligor do not reach agreement as to paternity, the Office shall certify the matter to the Tribal Court for hearing on the issues in dispute.

29.15 Second Administrative Notice and Finding of Financial Responsibility.

The second notice and finding of financial responsibility shall include the following:

{a) The infonnation set forth at Section 29.12, subsections {a)(l-7);

(b) Notice that if the parent or other party objects to all or any part of the second notice and finding of financial responsibility, the party must file an appeal with the Tribal Court, copied to the Klamath Tribes Child Support Enforcement Office. within 30 days of the date of service;

(c) Notice that if the parent does not file an appeal within 30 days of the date of service, the Manager may enter an order in accordance with the second notice and

finding of financial responsibility consistent with the requirements of section 29.13.

29.16 Manner of Service.

(a) The following notices and documents must be served by personal service, or by certified mail, return receipt requested, with delivery restricted to the addressee:
1. Notices and findings of financial responsibility served to the obligor:
2. Requests to modify of a child support order;
3. Orders to show cause alleging failure to comply with support order, unless other manner of service is expressly authorized by the Court:

(b) The following notices and documents may be served by regular mail:
I. Notices and findings of financial responsibility served to the obligee.
2. Responses denying paternity and requesting a hearing sent by the Office *to* the obligee.

(c) When service is authorized by regular mail, proof of service may be by notation upon the computerized case record by the person who made the service and shall include the address to which the documents were mailed, a description of the documents and the date that they were mailed. If the documents are returned as undeliverable, that fact shall also be noted on the computerized case record. If nn new address for service by regular mail can be obtained, service shall be by certified mail, return receipt requested or by personal service upon the obligee.

(d) When a case is referred for action to the Klamath Tribes Child Support Enforcement Office from another state or tribe, the Office shall accomplish service on the obligee by sending the documents to the initiating agency, by regular mail. Tue initiating agency shall then make appropriate service upon the obligee.

29.17 Filing Order With Court. Effective as Tribal Court Judgment.

Upon issuing a child support order, or modified child support order, the Manager shall cause a tiue copy of the order to be filed in the office of the Clerk for the Tribal Couli, along with a certificate of service of the order upon the parties to the proceeding. Such filing shall render the order effective as a Tribal Court order and judgment.

29.I 8 Administrative Child Support Orders Final.

Administrative child support orders and findings of paternity issued in accordance with this Ordinance are final and action by the Office to enforce and collect upon the orders. including anearages, may be taken from the date of issuance of the orders.

29.19 Appeals of Child Support Enforcement Office Action.

(a) Appeals of orders issued by the Office based upon a notice and finding of financial responsibility shall be presented to the Tribal Cou1t within 30 days of the date of service of the notice. All issues presented for appeal to the Cou1i shall be reviewed de novo.

(b) Challenges to the jurisdiction of the Child Support Enforcement Office lti take action for or against a person shall be brought before the Klamath Tribes Tribal Court. The issues of jurisdiction shall be reviewed by the Comi de novo.

(c) In any hearing, the Klamath Tribes Rules of Civil Procedure and Rules of Evidence shall apply, to the extent that they are not inconsistent with the provisions of this Ordinance.

PARENTAGE

29.20 Mother-Child Relationship.

A woman is considered the mother of a child for child support purposes where:

(a) The woman gave birth to the child;

(b) The woman legally adopted the child; or

(c) The woman has been adjudicated to be the mother of the child by a cot1ti of competent jurisdiction.

29.21 Father-Child Relationship.

A man is considered the father of a child for child support purposes where:

(a) There is an unrebutted presumption of paternity;

(b) The man and the child's mother have executed an acknowledgment of paternity;

(c) The man legall y adopted the child; or

(cl) The man has been adjudicated to be the father of the child by a couli of competent jurisdiction.

29.22 **Establishing Paternity.**

(a) An action to establish paternity for child support purposes may be initiated for any child up to and including 18 years of age.

(b) In an action to establish child support for a minor child, the Manager may enter an order of paternity where there is:

I. Presumption of Paternity. A man is presumed to be the natural father of a child for purposes of child support if:

(i) He and the child's natural mother are or have been married to each other and the child is born during the marriage;

(ii) He and the mother of the child are or were married to each Qther and the child is born within 300 days after the marriage is interrupted or terminated by death, annulment, declaration of invalidity, divorce, or decree of separation;

(iii) He and the mother of the child married each other in apparent compliance with the law before the birth of the child, notwithstanding later determination of possible invalidity of the marriage, and the child was born during the purported maniage. or within 300 days after it was interrupted or tenninated by death. annulment, declaration of invalidity, divorce. or decree of separation; or

(iv) He and the mother married each other in apparent compliance with the law after the birth of the child, and he voluntarily asserted his paternity of the child, where such assertion is noted in a record filed with a tribal or state agency charged with maintaining bilih records.

2. Voluntary acknowledgment of paternity in accordance with section 29.23.

3. Failure to file an objection to allegation of paternity in a Notice and Finding of Financial Responsibility.

29.23 **Execution of Acknowledgment of Paternity.**

(a) An acknowledgment of paternity must:

I. Be signed under penalty of perjury by the mother and the father by a man seeking to establish his paternity.

2. State that the child whose paternity is being acknowledged does not have a presumed father and does not have another acknowledged or adjudicated father.

3. State whether there has been genetic testing and, if so, that the acknowledging man's claim of patemity is consistent with the results of the testing.
4. State that the signatories understand that the acknowled gment is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the acknowledgment is permitted only in accordance with the provisions set forth in section 29.29.

29.24 Denial of Paternity.

A presumed father may sign a denial of his paternity. The denial is valid only if:

(a) An acknowledgment of paternity signed, or otherwise authenticated. by anotlwr man is filed pursuant to section 29.23; or,

<b) The denial is signed, or otherwise authenticated, under penalty of perjury: and

(cl The presumed father has not previously:
1. Acknowledged his paternity, unless the previous acknowledgment has heen lawfully rescinded or successfully challenged; or
2. Been adjudicated to be the father of the child, unless the previous adjud icat ion has been lawfully vacated, reversed, or successfully challenged.

29.25 Objection to Allegation of Paternity.

(a) Where a man has filed a timely written denial or objection to an Office allegation of paternity, or if the Manager determines that there is a valid issue with respect to paternity of the child, the Manager shall certify the matter to the Tribal Comi for a dete1mination based upon the contents of the file and any evidence which may be produced at trial.

(b) The certification shall include true copies of the notice and finding of financial responsibility, the return of service, the denial of paternity and request fr>r hearing or appeal, and any other relevant papers.

(c) When a party objects to the entry of an order of paternity and blood tests result in a cumulative paternity index of 99 or greater, notwithstanding the party's objection, evidence of the tests, together with testimony of a parent. is a sufficient basis upon which to presume paternity for purposes of establishing temporary child support pending final determination of paternity by the Court.

29.26 01·der for Testing.

(a) The Office may order genetic testing only if there is an allegation of paterni ty stating facts establishing a reasonable probability of the requisite sexual C•Jntact and there is no acknowledged or adjudicated father, or such acknowled gement or adjudication has been lawfully reopened or challenged.

(b) Genetic testing of a child shall not be performed prior to birth without the consent of the mother and the alleged father.

29.27 Requirements for Genetic Testing.

(a) Genetic testing must be of a type reasonably relied upon by experts in the fi eld of genetic testing and performed in a testing laboratory accredited by:
1. The American Association of Blood Banks, or a successor;
2. The American Society for Histocompatibility and lmmunogenetics, or a successor to its functions; or
3. An accrediting body designated by the Federal Secretary of Health and Human Services.

(b) A specimen used in genetic testing may consist of one or more samples. or a combination of samples, of blood, buccal cells, bone, hair, or other bod y ti ssui; or fluid. The specimen used in the testing need not be the same kind for each individual undergoing genetic testing.

(c) Based on the ethnic or racial group of an individual, the testing laboratory shal l determine the databases from which to select frequencies for use in calculation of the probabili ty of paternity. lfthere is disagreement as to the testing laboratory" s choice, the individual objecting may require the testing laboratory to recalculate the probability of paternity using a different ethnic or racial group, or may engage another testing laboratory to perform the calculations.

29.28 Genetic Testing Results.

(a) A man is rebuttably identified as the father of a child if the genetic testing results disclose that:
I. The man has at least a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing; and
2. A combined paternity index of at least I00 to I.

(b) A man who is rebuttably identified as the father pursuant to subsection (a) may rebut the genetic testing results only by other genetic testing in accordance wi th

section 29.27 that excludes the man as the genetic father of the child. or identifies another man as the possible father of the child.

(c) lf more than one man is identified by genetic testing as the possible father of the child. the men may be ordered to submit to further genetic testing to identi fy the genetic father.

29.29 Reopening Issue of Paternity.

(a) No later than one year after an order establishing paternity is entered by the Office, and if no genetic parentage test or challenge by court adjudication has been completed, a party may apply to the Manager to have the issue of patemi1y reopened. Upon receipt of a timely application, the Manager shall order the mother and the male party to submit to parentage tests. The person havi ng physical custody of the child shall submit the child to a parentage test.

(b) Where no genetic parentage test has been completed, a person detenni ned to be the father may apply to the Manager to have the issue reopened for challengi ng determination of paternity after the expiration of one year upon clear evidence n l" fraud, duress, or material mistake of fact.

(c) If a party refuses to submit to the genetic parentage test. the issue of paternity shall be resolved against that party by an appropriate order of the Cou1t upon the motion of the Manager.

(d) Child support paid before an order is vacated under this section shall not he returned to the payer.

29.30 Genetic Testing When Specimens Not Available.

(a) Subject to 29.30(b), if a genetic-testing specimen is not available from a man who may be the father of a child, for good cause and under circumstances considered by the Office or the Court to be just, the following individuals may he orJered to submit specimens for genetic testing:

I. The parents of the man;
2. Brothers and sisters of the man;
3. Other children of the man and their mothers; and
4. Other relatives of the man necessary to complete genetic testi ng.

(b) Issuance of an order under this section requires a finding that a need for genet ic testing outweighs the legitimate interests of the individual sought to be tested.

29.31 Proceeding Before Birth.

A proceeding to determine parentage may be commenced before the birth of the child, but may not be concluded until after *the* birth of the child. Genetic testing specimens shall not be collected until after the birth of the child, except under extraordinary circumstances and upon the consent of both the mother and the alleged father.

29.32 Full Faith and Credit.

Full faith and credit shall be given to an acknowledgement of paternity or denial of paternity effective in another tribe or state if the acknowledgment or denial has been signed and is in compliance with the law of the other jurisdiction.

29.33 Establishment of Mother-Child Relationship and Paternity For Child Support Purposes Only.

(a) The establishment of a mother-child relationship, or of paternity made pursuant to this Ordinance shall be for purposes of child support only. The detennination of parental relationships made pursuant to this Ordinance shall not be considered conclusive for purposes of enrollment, the eligibility for which is governed by the Constitution of the Klamath Tribes and the Klamath Tribes Enrollment Ordinance.

(b) This section does not prohibit a party to a parentage proceeding being adjudic<ited by the Tribal Court from joining the issue of paternity for purposes of detennining possible eligibility for enrollment in accordance with Klamath Tribal law and procedures.

RULES OF PROCEDURE AND EVIDENCE

29.34 Rules of Civil Procedure and Evidence.

To the extent not in conflict with the procedures of this Ordinance, the Klamath Tribes Rules of Civil Procedure and Evidence shall apply to all proceedings herein.

29.35 Special Rules of Evidence and Procedure.

(a) Jn any proceeding to establish, enforce, or modify a support obligation, cxtrin:;ic evidence of authenticity is not required for the admission of a computer printout of the Manager that may reflect *the* employment records of a parent, the suppo11 payment record of an obligor, the payment of public assistance, the amounts pnid.

the period during which public assistance was paid, the persons receiving or having received assistance and any other pertinent information, if the printout bears a seal purporting to be that of the Manager and is certified as a true copy by 0liginal, facsimile, or scanned signature of a person purporting to be an employee of the Manager. Printouts certified in accordance with this section constitute piima facie evidence of the existence of the facts stated therein.

(b) The Child Support Enforcement Office may subpoena financial records and other information needed to establish paternity or to establish, modify or enforce a support order. Service of the subpoena may be by certified mail.

(c) Persons or entities that fail to comply with a subpoena issued under this section without good cause are subject to a civil penalty.

(d) The physical presence of the parties may not be required for the establishment. enforcement, or modification of a support order or order determining parentage.

(e) A velified petition, affidavit, or document substantially complying with federally mandated forms and documents incorporated by reference in any of them, not excluded under the hearsay rule if given in person, are admissible in evidence if given under oath by a party or witness residing in the territory of another Tribe or State.

(f) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record is evidence of the facts asse1ted in it, and is admissible to show whether payments were made.

(g) Copies of bills for testing parentage and for prenatal and postnatal health care of the mother and child furnished to the adverse party at least 20 days before trial are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

(h)) Documentary evidence transmitted from another Tribe or State to the Klamath Tribes by facsimile, or other means that does not provide an original writing may not be excluded from evidence on an objection based on the means of transmission.

(i) In a proceeding under this Ordinance, the Court may permit a party or witness residing in the territory of another Tribe or State to be deposed or to testify hy telephone, audiovisual means or other electronic means at a designated tnhunal or other location in that Tribe or State. The Court shall cooperate ' ith tribunals of

other Tribes or States in designating an appropriate location for the deposition or testimony.

(j) A privilege against disclosure of communications between spouses does not apply in a proceeding under this Ordinance.

(k) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this Ordinance.

CHILD SUPPORT GUIDELINES

29.36 Establishing Child Support Guidelines.

Klamath Tribes Child Support Guidelines shall be prepared by the Klamath Tiibes Child Support Enforcement Office and presented for review and approval by the Klamath Tribes Tribal Council. The guidelines shall be reviewed and considered for updating at least once every three years to ensure that their application results in the determination of appropriate child support amounts. The guidelines shall make provision for imputed income and establish any specific bases for deviation from the guidelines.

(a) In establishing the guidelines, the Office shall take into consideration the following:

1. All earnings, income and resources of each parent, including real and personal property;
2. The earnings history and potential of each parent;
3. The reasonable necessities of each parent;
4. The educational, physical and emotional needs of the child for whom the support is sought;
5. Preexisting support orders and current dependents;
6. Non-cash contributions including fuel, clothing and child-care:
7. Other criteria that the Office determines to be appropriate.

(b) All child support shall be computed as a percentage of the combined Gross Income of both parents.

(c) The guidelines may anticipate certain circumstances of deviation from the standard formula upon consideration of, but not limited to the following:

1. Costs of a health benefit plan incurred by the obligor or the obligee:
2. Social security or apportioned Veteran's benefits paid to the child. ur to a representative payee administering the funds for the child's use and benefit, as a result of the obligor's disability or retirement:

3. Survivors' and Dependents' Education Assistance under 38 U.S.C. Chapter 35 paid to the child, or to a representative payee for the benefit of the child as a result of the obligor's disability or retirement.

29.37 **Guidelines Presumed Correct.**

(a) There is a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award that would result from the application of the guidelines is the correct amount of the child support obligation in any proceeding for the establishment or modification of a child supp0li obligation.

(b) Rebutting the presumption requires a written finding on the record that the application of the guidelines would be unjust, inequitable, unreasonable. inappropriate under the circumstances in a particular case. or not in the best interest of the child. The following factors shall be considered in a challenge to strict adherence to the guidelines:

1. Evidence of other available resources of a parent;
2. Number and needs of other dependents of a parent;
3. Net income of a parent remaining after withholdings required by law or as a condition of employment.
4. Special hardships of a parent, including but not limited to. medical circumstances of a parent and extraordinary visitation transportation costs affecting his or her ability to pay child support;
5. The needs of the child, including extraordinary child care costs due to special needs;
6. Evidence that a child who is subject to the support order is not living with either parent or is a "child attending school."

29.38 **Income.**

(a) Standard for determination of income. All income and resources of each parent's household shall be disclosed and considered when detennining the child suppo1i obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic supprnt obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(b) Ve1ification of income. Tax returns for the proceeding two years and cuITent pay stubs shall be provided to verify income and deductions. Other sufficient information shall be required for income and deductions that do not appear nn ta» returns or paystubs. The Office shall have authority to conduct lawfol discovery

in accordance with the methods set forth in this Ordinance, the Klamath Tribes Child Support Enforcement Rules and Procedures, and the Klamath Tribes Ruks of Civil Procedure, to verify income of the parents.

(c)) Income includes the following:

J. Salaries;
2. Wages;
3. Commissions;
4. Deferred compensation;
5. Contract-rel ated benefits;
6. Dividends;
7. Gifts;
8. Prizes
9. Royalties;
I0. Per capita payments, including payments received as a share of profits due to membership in an Indian tribe, including, but not limited to gaming revenue distributions;
11. Gambling winnings;
12. Interest;
13. Trust income;
14. Severance pay
15. Annuities;
16. Capital gains;
17. Pension or retirement program benefits;
18. Workers' compensation;
19. Unemployment benefits;
20. Spousal maintenance actually received;
2J. Bonuses;
22. Social security benefits; and
23. Disability insurance benefits.

(d) The following are excluded as sources of income that shall be disclosed. but shall not be included in gross income:

1. Income from a spouse or significant other who is not the parent of the child;
2. Income from other adults in the household;
3. Public assistance payments, including Temporary Assistance for Needy Families, Supplemental Security Income, General Assistance, and food stamps;
4. Foster care payments;
5. Child care assistance benefits.

29.39 Income Deductions.

Ded uctions will be made from the obligor's total income to assess monthly income from which the child support obligation will be based:

(a) Mandatory union or professional dues;

(bl Court-ordered spousal maintenance payments to the extent actually paid:

(c) Court ordered child support.

29.40 Imputed Income.

Income will be imputed to an obligor parent when the parent is voluntarily unemployed or vol untarily and unreasonably underemployed. The Child Suppo11Guidelines shall set forth the standards for determining and applying imputed income.

29.41 Rcbuttable Presumption of Inability to Pay Child Support When Receiving Certain Assistance Payments.

(a) A parent who is eligible for and is receiving cash payments under Title JV·A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue unless the presumption is rebutted.

(b) Each month, the Social Services Department shall identify those persons receiving cash payments under the programs listed in subsection (a) that are administered by the Social Services Department and provide that infomiat ion tn the Manager. Ifbenefits are received from programs listed in subsection (a) of this section that are administered by another tribe, state, or federal agency, tile obligor shall provide the Manager with written documentation of the benefits.

(c)) Within 30 days following identification of persons under subsection (b) of this section, the Office shall provide notice of the presumption to the obligee and obligor and shall inform all parties to the support order that, unless a party objects as provided in subsection (d) of this section, child support shall cease accrui ng beginning with the support payment due on or after the date the obligor first begins receiving the cash payments and continuing through the last month in which the obligor received the cash payments. The Office shall serve the notice on the obligee by certified mail, return receipt requested, and shall ser\'e th<:
notice on the obligor by first class mail to the obligor.

(d) A party may object to the presumption by sending an objection to the Office within 30 days after the date of service of the notice. The objection must describe the resources of the obligor or other evidence that might rebut the presumption of inability to pay child support. Upon receiving an objection, the Ofticc shall present the case to the Tribal Court for determination as to whether the presumption has been rebutted.

(e) If no objection is made, or if the Tribal Court finds that the presumption has not been rebutted, the Office shall discontinue billing the obligor for the peliod of time described in subsection (c) of this section and no arrearage shall accrue for the period during which the obligor is not billed.

(fl Within 30 days after the date the obligor ceases receiving cash payments under a program described in subsection (a) of this section, the Office shall provide notice to all parties to the support order:

1. Specifying the last month in which a cash payment was made:
2. Stating that the payment of those benefits has tenninated and that by operation of law billing and accrual of support resumes.

(g) Receipt by a child support obligor of cash payments under any of the programs listed in subsection (a) of this section shall be sufficient cause to allow the Office or the Tribal Court to issue a credit and satisfaction against child support arrearage for months that the obligor received the cash payments, absent good cause to the contrary.

29.42 **Child Support Payments.**

(a) Each child support order shall specify that the support payments be made either to the Child Support Enforcement Office, or to the person or agency to whom 1s receiving the payments for the child.

(b) In any case where the obligee receives public assistance from the Klamath Tribes or other tribal or state agency, or has previously received public assistance ti1r which assignment has been made and has not been completely satisfied. pa1lllents shall be made to the Child Support Enforcement Office.

(c) The parties affected by the child support order shall immediately infolllll thc Child Support Enforcement Office of any change of address. employment. or of other conditions that may affect the admirustration of the order.

29.43 **Health Insurance.**

(a)) In any order for child support, either the custodial or non-custodial parent or both, shall be required to maintain or provide health insurance coverage, including medical and dental, for the child that is available at a reasonable cost.

1. Insurance premiums for the child shall be added to the base child suppo1i obligation. If the insurance policy covers a person other than the child. only that portion of the premium attributed to the child shall be allocated and added to the base child support obligation.
2. If the obligee pays the medical insurance premi um, the obligor shall pay the obligor's allocated share of the medical insurance premium to the obligee as part of the base child support obligation.

(b) Health insurance coverage required under this section shall remai n in effect until the child support order is modified to remove the coverage requiremen t. tht' coverage expires under the terms of the order, or the child reaches the age of majority or is emancipated, unless there is express language to the contra ry i n the order.

(c) A parent who is required to extend health insurance coverage to a child under this section is liable for any covered health care costs for which the parent recei ves direct payment from an insurer.

(d) This section shall not be construed to limit the authority of the Child Support Enforcement Office, or the Court, to enter or modify support orders containi ng provisions for payment of uninsured health expenses, health care costs, or insurance premi ums which are in addition to and not inconsistent with this section.

(e) A parent ordered to provide health insurance coverage shall provide to t he other parent or the Child Support Enforcement Office proof of such coverage. or proof that such coverage is not available at a reasonable cost within twenty days of the entry of the order or immediately upon notice of unavailability.

(fJ Every order requiring a parent to provide health care or insurance coverage is subject to d irect enforcement as provided under this Ordinance.

29.44 Medical Expenses.

Reasonable and necessary medical, dental, orthodontic, optometric, psychological, or any other physical or mental health expenses of the child incurred by either parent and not reimbursed by insurance may be allocated in the same proportion as the parents' Adjusted Gross Income as separate items that are not added to the base child support

obligation. If reimbursement is required, the other parent shall reimburse the parent who incurs the expense within thirty (30) days of receipt of documentation of the expense.

29.45 Child-Care Expenses.

The Office or the Court may include in a child support order payment of child care expenses. Such payment shall be allocated and paid monthly in the same proportion as base child support where such expenses are necessary for either or both parents to be employed, seek employment, or attend school or training to enhance employment income.

INCOME WITHHOLDING AND GARNISHMENT

29.46 Payment of Support by Income Withholding.

(a) Except as provided in section 29.47, all child support orders established by the Klamath Tribes Child Support Enforcement Office and the Klamath Tribe Trihal Court shall include a provision requiring the obligor to pay suppm1 hy income withholding regardless of whether support enforcement senices are being provided through the Klamath Tribes Child Supp011Enforcement Office.

(b) The Child Support Enforcement Office shall initiate income withholding hy sending the noncustodial parent's employer a notice using the standard Federal income withholding form.

(c) When an arrearage exists and notice of the delinquent amount has been given to the obligor, the Tribal Court, upon application, shall issue a withholding order upon the ex parte request of a person holding supp01t rights or the Child Support Enforcement Office Manager.

(d) In the case of each noncustodial parent against whom a support order is or has been issued or modified, or is being enforced, so much of his or her income must be withheld as is necessary to comply with the order.

(e) In addition to the amount to be withheld to pay the current month's obligation, the amount withheld must include an amount to be applied toward liquidation of any overdue support.

(f) The total amount to be withheld for current month's obligations and overdue support shall not exceed the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. !673(b)).

(g) The only basis for contesting a withholding is an error in the amount of cunent or overdue support, or in the identity of the alleged noncustodial parent.

(h) Improperl y withheld amounts shall promptly be refunded.

(i) Income withholding shall be promptly terminated in cases where there is no longer a current order for support and all arrearages have been satisfied.

29.47 Exceptions To Income Withholding Requirement.

(a) The Manager or the Court shall grant an exception to income withholdi ng req uired under section 29.46 where:

1. Either the custodial or noncustodial parent demonstrates, and the tiihu na l enters a written finding, that there is good cause not to requi re income withholding (Good cause shall include, but not be limited to. com;i di:ra t ion of whether the obligor has paid in full any arrears owed, and has cm n pl ied with the terms of previous withholding exceptions); or,
2. A signed written agreement is reached between the noncustodi al and custodial parent, which provides for an alternative arrangement, and is reviewed and entered into the record by the tribunal

(b) Where immediate income withholding is not in place, the income of the noncustodial parent shall become subject to withholding, at the earliest, on t he date on which the payments which the noncustodial parent has failed to make under a child support order are at least equal to the support payable for one month.

29.48 Employer Notification Requirement.

Em ployers must notify the Klamath Tribes Child Support Enforcement Office prompt l y when the noncustodial parent's employment is terminated with the employer. Notification shall include the noncustodial parent's last day of employment. last know n address, and the name and address of the noncustodial parent's new employer i f known. Such notification shall occur regardless of whether termination of employmrn t was voluntary or involuntary.

29.49 Employer Penalties.

(a) Any employer who discharges a noncustodial parent from employment. refuses to employ, or takes disciplinary action against any noncustodial parent bccau;e of withholding pursuant to a child support order shall be fined in the amount of one-thousand dollars ($1,000.00).

(b) An employer that fails to withhold income in accordance with the provisions of the income withholding order shall be liable for the accumulated amount the employer should have withheld from the noncustodial parent's income.

29.50 Processing Withholding Orders.

The Child Support Enforcement Office is responsible for receiving and processing income withholding orders from states, tribes, and other entities, and ensuring that orders are properly and promptly served on employers within the Klamath Tribe's jurisdiction.

29.51 Allocation of Withheld Amounts.

The Child Support Enforcement Office shall allocate withheld amounts across multiple withholding orders to ensure that in no case shall allocation result in a withholding for one of the support obligations not being implemented.

29.52 Garnishment of Per Capita Payments.

(a) Per capita payments may be garnished and applied to child support arrearages unless a child support order has specified the amount of arrearages owed and the obligor is current with an arrearage payment schedule approved by the Office or the Court. Action for garnishment of per capita payments may be brought by any party to the proceeding and shall be done in accordance with this section. Klamath tribal law, or the law of any other applicable jurisdiction.

(b) Requests for garnishment of Klamath Tribes per capita payments shall be presented to the Tribal Court and shall include the following:
1. A sworn statement by the party, stating the facts authorizing issuance of the garnishment order;
2. A description of the terms of the order requiring payment of support and/or arrearages, and the amount past due, if any; and,
3. A sworn statement that written notice has been provided to the obligor and the Office at least fifteen days prior to the party filing the request for garnishment.

(c) If an obligor is subject to two or more attachments for child support on account of different obligees, and the amount of the per capita payment to be garnished is not sufficient to respond fully to all of the attachments, the obligor's per capita payment available for garnishment shall be apportioned among the various obligees equally.

(d) Upon receipt of a request for garnishment of a Tribal Member's per capita payment that complies with this section, the Court shall issue a garnishment order indicating the amount to be garnished. The Clerk of the Court shall forward a copy of the order to all parties to the proceeding within five days of the entry of the order.

(e) Garnishment of Klamath Tribal member per capita payments is limited to 50% of the per capita payment pursuant to the Klamath Tribes Revenue Allocation Plan. This limit shall remain in effect unless and until the Revenue Allocation Plan is amended to provide for a different amount, which revised amount shall he complied with.

MODIFICATION AND TERMINATION

29.53 Grounds for Modification and Termination.

A child support order may be modified or terminated in accordance with the following·

(a) Substantial change of circumstances. Any party to the proceedings may initiate a request with the Manager for modification or termination of a child support order based upon a substantial change of circumstances. Such proceeding shall be in accordance with the procedures established by the Manager.

1. Except as provided for in subparagraph (2) of this section, if a child support award, or modification of award, is granted based upon substantial change in circumstances, twenty-four months must pass before another request for modification is initiated by the same party based upon a substantial change of circumstances.
2. The Child Support Enforcement Office may initiate proceedings at Jny time to modify an order of child support in cases of substantial!y changed circumstances if public assistance money is being paid to or for the benefit of the child.
3. Voluntary unemployment or voluntary underemployment by itself, is not a substantial change of circumstances.

(b) Emancipation and death. Unless otherwise agreed in w1iting or expressly provided in the order, provisions for the support of a child are tenninated hy emancipation of the child, by the death of the parent obligated to support th<: child, or by the death of the child.

(c) Maniage and re-maniage to each other. Unless expressly provided hy an order nf the Child Support Enforcement Office, or the Court, the support provisions of the order are terminated upon the marriage to each other of parties to a paternity

order, or upon remarriage to each other of the parties to the child support proceeding. Any remaining provisions of the order, including provisions establishing paternity, remain in effect unless otherwise expressly provided in the order.

(d) Compliance with support guidelines. A support order may be modified one year or more after it has been entered without showing a substantial change of circumstances in order to add an adjustment in the order of support consistent with updated Klamath Tribes child support guidelines.

(e) Child is eighteen. A child support order automatically terminates when a child reaches eighteen years of age unless the order provides that continued suppo1t is necessary to assist the child through completion of High School.

(f) Child support orders may only be modified as to installments accruing subsequent to the request for modification unless the request for modification is based upon an automatic termination provision.

29.54 Request to Modify Child Support Order.

Any time the Support Enforcement Office is providing support enforcement services in accordance with this Ordinance, the obligor, the obligee, the party holding the support rights or the Manager may submit a request to modify the existing order pursuant to this section.

(a) The request shall be in writing in a form prescribed by the Manager. and shall:
1. set out the reasons for modification;
2. state whether there exists a support order, in any tribal or state jurisdiction. involving the child, other than the order the party is moving to modify:
3. state, to the extent known, whether there is pending in this state or any other jurisdiction any tYPe of support proceeding involving the child:
4. state whether there exists a support order, in any tribal or state jurisdiction. involving the child, other than the order the party is moving to modify:
5. provide any other information requested by the Manager;
6. provide a certification as to the truth of the infonnation provided in the request under penalty of perjury.

(bl The requesting party shall serve the request upon all patties to the proceeding, including the obligor, the obligee, the party holding the support rights and the Manager.

(c) The nonrequesting parties have 30 days to resolve the matter by stipub1ed agreement or to serve the requesting party and all other parties by regular mail with a written response setting forth objections to the request, and a request for hearing.

(d) Upon receipt of a written response submitted by a nonrequesting pa lly setting forth objections to the request for modification and requesting a heari ng. the Manager shall forward the request for modification to the Tribal Court for detennination.

(e) When the moving party is the Manager and no objections and request for hea1ing have been served upon the Manager within 30 days of perfecting service of the request on all parties, the Manager may enter an order granting the mod ification request.

(f) When the requesting party is other than the Manager, and no objections and request for hearing have been served upon the moving pa1ly or the Manager within 30 days of perfecting service, the requesting party may submi t to 1he Manager a true copy of the request, certificates of service for each partv scTv ed. along with a certification that no objections or req uest for heari ng have be(!11 served on the requesting party. Upon receipt of the copy of the request. certificates of service and certification from the requesting paiiy, the Manager shall issue an order granting the modification request.

(g) A request for modification made under this section does not stay the Manager from enforcing and collecting upon the existing order unless so ordered by the Comt.

29.55 **Incremental Adjustment.**

If an adjustment to a child support order is modified to increase the award by more than thirty percent and the change would cause a significant hardship, the adjustment maybe implemented in two stages, the first at the time of the entry of the order and the second six months from the entry of the order.

COMPLIANCE AND ENFORCEMENT

29.56 **Failure to Comply With Support Order.**

(a) Ifan obligor fails to comply with a support order, a petition or mollon may be filed by a party to the proceeding to initiate a contempt action in the Court. I f the Court finds there is reasonable cause to believe the obligor has failed to compl y

with a support order, the Court may issue an order to show cause requiri ng the obligor to appear at a certain time and place for a hearing, at which time the obligor may appear to show cause why the relief requested should not be grante<l. A copy of the petition or motion shall be served on the obligor along with the order to show cause.

(b) lfthe obligor contends at the hearing that he or she lacked the means to comply with the support order, the obligor shall establish that he or she ex ercised due diligence in seeking employment, in conserving assets, or otherwise m renderi ng himself or herself able to comply with the order.

(c) The Court retains continuing jurisdiction and may use a contem pt action to enforce a support order until the obligor satisfies all duties of suppoti, incl uding arrearages that accrued pursuant to the support order.

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29.57 Arrearages.

Anearagcs shall include any monies, in-kind or traditional support recognized by the Child Support Enforcement Office to be owed to or on behal f of a child to satisfy a chil d suppoti obligation or to satisfy in whole or in part arrears or delinquency of such obligation. whether denominated as child support, spousal support, or maintenance. Arrearages also include medical and child-care support obligations.

29.58 Compromise and Charge-off.

(a) The Child Support Enforcement Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to the Klamath Tribes up to the total amount of public assistance paid to •.>r for the benefit of the persons to whom the support was incuned.

(b) The Child Support Enforcement Office may execute offers of compromi ;e of disputed claims or may grant partial or total charge-off of child suppo1i arrears owed to any other tribe or state up to the total amount of public assi stance paid lo or for the benefit of the persons to whom the support was incurred in accordance with agreements entered into between the Klamath Tribes and the tribe or state to which the child support arrearage collection rights have been assigned.

(c) U pon concurrence of the Child Support Enforcement Office, the Office may execute offers of compromise of disputed claims or may grant partial or total

charge-off of child support arrears owed to a parent obligee agreeing to compromise or partial or total charge-off.

(d) The obligor may execute a written extension or waiver of any statute that may bar or impair the collection of the debt and the extension or waiver shall be effective according to its terms.

29.59 Charge-Off Requests

Charge-off requests shall be in writing and in accordance with the rules and procedures established by the Office.

29.60 Factors.

tn considering an offer of compromise, or request for partial or total charge-off, the Child Support Enforcement Office shall consider the following factors:

(a) Error in law or bona fide legal defects that materially diminish chances of collection;

(b) Collection of improperly calculated arrears;

(c) Substantial hardship;

(d) Costs of collection action in the future that are greater than the amount to be charged off;

(e) Settlement from lump sum cash payment that is beneficial to the tribe or state considering future costs of collection and likelihood of collection;

(t) Tribal custom or tradition.

29.61 Substantial Hardship.

When considering a claim of substantial hardship, the Office should consider, but not be limited to the following factors:

(a) The child on whose behalf support is owed is reunited with the obligor parent because the formerly separated parents have reconciled or because the child has been returned to the parent from foster care or care of another.

(b) The obligor parent is aged, blind or disabled and receiving Supplemental Security income, Social Security, or similar benefits.

(c) The mother of the child is seeking charge-off of debt accrued on behalf of a child who was conceived as a result of incest or rape and presents evidence of rape or incest acceptable to KTCSE.

(d) Payment of the arrears interferes with the obligor's payment of current support to a child living outside the home.

(e) The obligor has limited earning potential due to dependence on seasonal employment that is not considered in the child support order. illiteracy or limilcd English speaking proficiency, or other factors limiting employability or earning capacity.

(f) The obligor's past efforts to pay child support and the extent of the obligor's participation in the child's parenting.

(g) The size of the obligor's debt.

(h) The obligor's prospects for increased income and resources.

29.62 Violation of Charge-Off Agreement.

When the obligor violates the terms of a conditional charge-off agreen1ent. the Office, after notice and opportunity for a hearing, may enter an order providing:

(a) Any amount charged off prior to the violation shall remain uncollectible:

(b) Re-establishment of collection for further amounts that would have been charged off if not for the violation;

(c) That the obligor may not reinstate the terms of the charge-off agreement by renewed compliance with its terms, unless the Office agrees to reinstate the conditional charge-off upon a finding of good cause for the violation.

RECOGNITION, ENFORCEMENT AND MODIFICATION OF FOREIGN CHILD SUPPORT ORDERS; EXERCISE OF JURISDICTION IN SIMULTANEOUS PROCEEDINGS

29.63 Full Faith and Credit.

The Kl amath Tribes recognize and shall enforce child support orders issued by other Trihes. Tribal organizations, States and foreign governmental entities in accordance w i th the requirements of the Full Faith and Credit for Child Support Orders Act, 28 U .S.C. 17388, whether such orders are administrative or judicial in nature.

29.64 Requests for Establishment, Recognition and Enforcement.

All requests for establishment, recognition and enforcement of child suppo1i urders and associated proceedings shall be presented by a party to the case, or a Tribe or Stale tribunal, to the Klamath Tribes Child Support Enforcement Office for processi ng.

29.65 **Simultaneous Proceedings.**

ta) The Child Support Enforcement Office and Klamath Tribal Court may exercise jurisdiction to establish a support order if the application for assistance is filed with the Child Support Enforcement Office after a petition or comparable pleadi ng is filed in another Tribe or State tribunal only if:

1. The application for assistance is filed with the Child Suppoti Enforcement Office before the expiration of the time allowed in the other Tribe or State tribunal for filing a responsive pleading challenging the exercise of jurisdiction by the other Tribe or State;
   The contesting party timely challenges the exercise of jurisdiction i n the other Tribe or State; and
3. If relevant, the Klamath Tribes is the home T1ibe of the child.

(b) The Klamath Tribes Child Support Enforcement Office and Tribal Court may not exercise jurisdiction to establish a support order if the application for assistance i> filed before a petition or comparable pleading is filed in another Trihe or State i r

I. The application, petition or comparable pleading in the other Tribe or State is filed before the expiration of the time allowed for filing a responsive pleading challenging the exercise of jurisdiction by the Klamath Tribes;
2. The contesting party timely challenges the exercise of jurisdict ion i n the Klamath Tribes; and,
3. If relevant, the other Tribe or State is the home tribe or state of the child.

29.66 **Continuing, Exclusive Jurisdiction to Modify Child Support Order.**

(a) The Klamath Tribes shall have continuing, exclusive jurisdiction over a chil d support order entered by the Klamath Tribes for the benefit of a child who is an enrolled member of the Klamath Tribes, or eligible for enrollment with the Klamath Tribes, until all of the parties who are individuals have filed wri tten

consents with the tribunal of another Tribe or State to modify the order and transfer continuing, exclusive jurisdiction.

(b) The Court may not exercise its continuing, exclusive jurisdiction lo modify the order if the order has been lawfully modified by a tribunal of another Tribe or State. TIle Klamath Tribes shall recognize the continuing, exclusive jurisdiction of a tribunal of another Tribe or State that has lawfully issued a child support order.

(c) If a Klamath Tribes child support order is lawfully modified by a ttibuna l of another Tribe or State, the Klamath Tribes loses its continuing, exclusi ve jurisdiction with regard to prospective enforcement of the order issued and may only:

1. Enforce the order that was modified as to amounts accruing before the modification;
2. Enforce nonmodifiable aspects of that order;
3. Provide other appropriate relief for violations of that order that occuned before the effective date of the modification.

(d) A temporary support order issued ex parte or pending resolution of a iu1isdict iunal conflict does not create continuing, exclusive jurisdiction in the issuing tri bunal.

Z9.67 **Initiating and Responding Tribunal of the Klamath Tribes.**

(a) The Klamath Tribes Child Support Enforcement Office shall serve as the initiating tribunal to forward proceedings to another Tribe or State and as a responding tribunal for proceedings initiated in another Tribe or State.

(b) The Child Support Enforcement Office may serve as an initiating tribuna l to request a tribunal of another Tribe or State to enforce or modi ty a support order issued by the Klamath Tribes.

(cl The Klamath Tribes Child Support Enforcement Office, provided it has continuing, excl usive jurisdiction over a support order, shall act as the respondi ng tribunal to enforce or modify the order. If a party subject to the continuing, exclusive jurisdiction of the Klamath Tribes does not reside in the issui ng Tribe or Statejurisdiction, in subsequent proceedings, the Klamath Tribes tlibunal may seek assistance to obtain discovery and receive evidence from a tribu nal of another Tribe or State.

(d) If the Klamath Tribes lacks continuing, exclusive jurisdiction over a child support order, or a spousal support order, it may not serve as a responding tri bunal to modify a child support or spousal support order of another Tribe or State.

29.68 **Determination of Controlling Order.**

(a)) !f a proceeding is brought under this Ordinance, and one tribunal has already issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this Ordinance, and two or more child support orders have been issued by tribunals of this Tribe or another T1ibe or State with regard to the same obligor and child, the following rules shall be used tL> determine which order to recognize for purposes of continuing, exclusive jurisdiction:

I. If only one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, the order of that tribunal controls and must be recognized.

2. If more than one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, an order issued by a tribunal in the current home tribe or State of the child controls, and must be recognized. but if an order has not been issued in the current home Tribe or State of the child, the order most recently issued controls and must be recognized.

3. If none of the tribunals, except the Klamath Tribes, would have continuing, exclusive jurisdiction under this Ordinance, the Klamath Tribes shall issue a child support order, which controls and must be recognized.

29.69 **Child Support Orders For Two or More Obligees.**

ln responding to multiple registrations or requests for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another Tribe <>r State, such orders shall be enforced in the same manner as if multiple orders had been issued.

29.70 **Application of Law of the Klamath Tribes.**

Except as otherwise provided in this Ordinance, a responding tribunal of the Klamath Tribes:

(a) Shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in the Klamath Tribes and may exercise all powers and provide remedies available in those proceedings: and

{b) Shall determine the duty of support and the amount payable in accordance with the law and support guidelines of the Klamath Tribes.

29.71 Duties as Initiating Tribunal.

(a) Upon the receipt of an application or petition authorized by this Ordinance, the Child Support Enforcement Office shall forward three copies of the application or petition and its accompanying documents:
1. To the responding tribunal in the responding Tribe or State; or
2. If the identity of the responding tribunal is unknown, to the information agency of the responding Tribe or State with a request that the application or petition and documents be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) As the Initiating tribunal, the Child Support Enforcement Office and/or Klamath Tribal Court shall issue any certificates or other documents, make findings, specify the amount of support sought, and provide any other documents necessary to satisfy the requirements of the responding Tribe or State.

29.72 Duties and Powers as Responding Tribunal.

(a) When the Klamath Tribes Child Support Enforcement Office receives an application, petition or comparable pleading from an initiating tribunal. the Child Support Enforcement Office shall take appropriate action, in accordance with the provisions of this Ordinance, to assist the initiating tribunal, which may include initiation of proceedings to accomplish one or more of the following:
1. Issue or enforce a support order, modify a child support order or take action to establish parentage;
2. Registration of initiating tribunal's order with the Klamath Tribes Tribal Court for recognition and enforcement;
3. Order an obligor to comply with a support order, specifying the amount and the manner of compliance;
4. Order income withholding;
5. Enforce orders by civil contempt;
6. Set aside property for satisfaction of the support order;
7. Place liens and order execution;
8. Order an obligor to keep the tribunal informed of the obligor·s cun-ent residential address, telephone number, employer, address of employment and telephone number at the place of employment:
9. Order the obligor to seek appropriate employment by specified methods:
10. Award reasonable attorney's fees and other fees and costs;

I 1. Garnish per capita payments; and
12. Grant any other available remedy.

(b) The Klamath Tribes responding tribunal shall include in a support order issued pursuant to this section, or in the documents accompanying the order, the calculations on which the support order is based.

(c) Ifthe Klamath Tribes tribunal issues an order pursuant to this section. it shall send a copy of the order by first-class mail to the applicant/petitioner and the respondent, any other party, and to the initiating tribunal, if any.

29.73 Inappropriate Tribunal.

If an application, petition, or comparable pleading is received by the Klamath Trib<'s Child Support Enforcement Office and the Office deems it is an inappropriate tribunal. it shall forward the pleading and accompanying documents to an appropriate tiibunal in another Tribe or State and notify the applicant/petitioner by first-class mail where and when the application or pleading was sent.

29.74 Credit for Payments.

Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another Tribe or State must be credited against the amounts accruing or accrued for the same period under a support order issued by the Klamath Tribes.

29.75 I!:mployer's Receipt of Income-Withholding Order of Another Tribe or State.

An income-withholding order issued in another tribe or jurisdiction may be sent by first-class mail to the obligor's employer without first filing a request for assistance with the Klamath Tribes Child Support Enforcement Office.

29.76 Employer's Compliance With Income-Withholding Order of Another Tribe or State.

(a) Upon receipt of the income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued by another jurisdiction that appears regular on its face as if it had been issued the Klamath Tribes.

(c)) Except as otherwise inconsistent with section *29.46(f),* the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order that specify:

1. The duration and the amount of periodic payments of cmTent child support, stated as a sum certain;
2. Medical support, whether in the form of periodic cash payment. stated as J sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
3. The person or agency designated to receive payments and the address to which the payments are to be forwarded;
4. The amount of periodic payments of fees and costs for a suppoli enforcement agency, the issuing tribunal and the obligee's atl0rney, stated as sums certain;
5. The amount of periodic payments of arrearages and interest on anearages, stated as sums certain.

29.77 **Administrative Enforcement of Order.**

(a) A party seeking assistance to enforce a support order or an income-withholding order, or both, issued by a tribunal of another tribe or jurisdiction shall send the documents required for registering the order set forth at section 29. 79 t0 the Klamath Tribes Child Support Enforcement Office.

(b) Upon receipt of the documents, the support enforcement agency shall regiskr the order with the Court, and consider, if appropriate, use of any administrative procedure authorized by the laws of the Klamath Tribes to enforce a support urJcr or an income-withholding order, or both.

29.78 **Contest by Obligor.**

(a1 An obligor may contest the validity or enforcement of an income-withholding order issued by another Tribe or State and received directly by a Tribal employer in the same manner as if a tribunal of the Klamath Tribes had issued the order.

(b) The obligor shall give notice of any contest to:

J. The support enforcement agency providing services to the obligee.
2. Each employer that has directly received an income-withhold ing order: and
3. The person or agency designated to receive payments in the income-withholding order, or if no person or agency is designated. to the obligcc.

REGISTRATION FOR ENFORCEMENT AND MODIFICATION

29.79 Registration of order for enforcement; procedure.

(a) A support order or income-withholding order of another Tribe or State may be registered in the Klamath Tribes by sending the following documents and information to the Klamath Tribes Child Support Enforcement Office for registeri ng;

1. A letter of transmittal to the Child Support Enforcement Office request ing registration and enforcement;
2. Two copies of all orders to be registered, including any modification of an order;
3. A sworn statement by the party seeking registration or a ce1 ii fied statement by the custodian of the records showing the amount of any arrearage;
4. The name of the obligor and, if known:
   - i. The obligor's address and social security number;
   - ii. The name and address of the obligor's employer and any other source of income of the obligor;
   - m. A description and the location of property of the obligor in this state not exempt from execution; and
   - 1v. The name and address of the obligee and. if applicable, the Llgency or person to whom support payments are to be remitted.
5. Any other information requested by the Child Support Enforcement Office.

(b) Upon receipt of a request for registration and necessary supporting documentation, the Child Support Enforcement Office shall cause the order to he registered, together with one copy of the supporting documents and information. regardless of their form.

29.80 Effect of registration for enforcement.

(a) A support order or income-withholding order issued by another tribe or state is registered when the order is filed in the Tribal Court.

(b) A registered order issued in another tribe or jurisdiction is enforcea ble in the same manner and is subject to the same procedures as an order issued by the C\1urt.

(c) Except as otherwise provided for in this Ordinance, a tribunal of the Klamath Tribes shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

29.81 Choice of Law.

The law of the issuing Tribe or State governs the nature, extent, amount and duration of cu1Tent payments and other obligations of support and the payment of an-earages under the order.

29.82 Notice of Registration of Order.

(a) When a support order or income-withholding order issued in another Ttib or State is registered, the Child Support Enforcement Office shall notify the nonregistering party. Notice must be given by first-class, certified or registered mail or by any means of personal service authorized by the law of the Klamath Tribes. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

I. That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of the Klamath tribes;
That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after the date of mailing or personal service of the notice;

3. That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and

4. Of the amount of any alleged arrearages.

(c) Upon registration of an income-withholding order for enforcement. the Child Support Enforcement Office shall notify the obligor's employer pursuant to the income-withholding laws of the Klamath Tribes.

29.83 Procedure to Contest Validity or Enforcement of Registered Order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in the Klamath Tribes shall request a hearing before the Tribal Court within 20 days after the date of mailing or personal service of notice of the registration. The nonregistering party may seek to vacate the registration. to assert any defense to an allegation of noncompliance with the registered orckr. w contest the remedies being sought or the amount of any alleged mTearages.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the Court shall schedule the matter for hearing and give notice to the parties, including the Child Support Enforcement Office, by first-class or electronic mail of the date, time and place of the hearing.

(d) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

1. The issuing tribunal lacked personal jurisdiction over the contesting party:
2. The order was obtained by fraud;
3. The order has been vacated, suspended, or modified by a later order:
4. The issuing tribunal has stayed the order pending appeal;
5. There is a defense under the law of the Klamath Tribes to the remedy sought;
6. Full or partial payment has been made;
7. The statute oflimitation precludes enforcement of some or all of the arrearages;

(e) Ifa party presents evidence establishing a full or partial defense to the validity or enforcement of the order, the Court may stay enforcement of the registered ordel, continue the proceeding to permit production of additional relevant evidence and issue other appropriate orders. All remedies available may be used to enforce an uncontested portion of the registered order under the laws of the Klamath T1ibes.

(1) If the contesting party does not establish a defense to the validity or enforcement of the order, the Court shall issue an order confirming the order.

29.84 Confirmed Order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could hJvc been asserted at the time of registration.

29.85 Registration For Modification

A party or support enforcement agency seeking to modify, or to modify 11n<l enforce. " child support order issued in another Tribe or State shall register that order with the Klamath Tribes in accordance with the procedures of this Ordinance if the order has not

been registered. A request for modification in accordance with the terms of this Ordinance may be submitted at the same time as the request for registration, or later. The request for modification must specify the grounds.

29.86 Effect of Registration for Modification

(a) The Klamath Tribes may enforce a child support order of another Tribe or State registered for purposes of modification, in the same manner as if the order had been issued by the Klamath Tribes, but the registered order may be modified only if after notice and hearing, the Klamath Tribes Child Support Enforcement Department or Tribal Court finds, in accordance with the provision of this Ordinance, that:

I. The following requirements are met:

1. The child, the individual obligee and the obligor do not reside in the issuing tribe or state;
11. The requesting party who is a nonresident of the Tribe seeks modification; and
111. The respondent is subject to the personal jurisdiction of the Klamath Tribes; or

2. The child or a party who is an individual is subject to the personal jUiisdiction of the Court and all of the parties who are individuals have filed a written consent in the issuing tribunal for the Klamath Tribes to modify the support order and assume continuing, exclusive jurisdichon over the order.

(b) Modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tJibunal of the Klamath Tribes and the order may be enforced and satisfied in the same manner.

(c) The Klamath Tribes may not modify any aspect of a child suppoli order thut 111av not be modified under the law of the issuing Tribe or State. If two or more tribunals have issued child support orders for the same obligor and child. the order that controls and must be so recognized under the provisions of this Ordinance. establishes aspects of the order that are nonrnodifiable.

(d) On issuance of the order modifying a child support order issued in another Trihe or State, a tribunal of the Klamath Tribes becomes the tribunal having continuing:. exclusive jurisdiction.

DISTRIBUTION OF CHILD SUPPORT COLLECTIONS

29.87 **Prompt disbursement of collections.**

The Klamath Tribes Child Support Enforcement Office shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The Offoc shall furnish to a requesting party or tribunal of another jurisdiction a certified statement by the custodian of the record of the amounts and dates of all payments received.

29.88 **Distribution of child support collections.**

(aJ The Child Support Enforcement Office shall, in a timely manner:

1. Apply collections first to satisfy current support obligations, except that any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Supp01i Enforcement Office must be applied to satisfy child support anearages.
2. Pay all support obligations to the family unless the family is cunently receiving or foITOerly received assistance from the Tribal TANF prob'Tam and there is an assignment of support rights to the Tribe's TANF agency, or the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from another state or tribal IV-D agency.

(b) Cunent recipient of Klamath Tribal TANF. If the family is currently recci vini; assistance from the Tribal TANF program and has assigned support rights to the Tribe and:

I. There is no request for assistance in collecting support on behalf of the family from a State or other Tribal IV-D agency, the Child Suppori Enforcement Office may retain collections on behalf of the family. not to exceed the total amount of Tribal TANF paid to the family. Any renlaining collections shall be paid to the family.

2. There is a request for assistance in collecting suppori on behalf of the family from a State or other Tribal IV-D agency, the Child Suppori Enforcement Office may retain collections, not to exceed the total amount of Tribal TANF paid to the family. Any collections exceeding the total anlount of Klamath Tribal TANF paid to the family shall be distributed i11 one of the following manners:
   (i) The Child Support Enforcement Office may send any remaining collections, as appropriate, to the requesting State lV-D agency for lawful distribution, or to the requesting Tribal JV-D agency for lawful distribution; or
   (ii) The Child Support Enforcement Office may contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to

detennine appropriate distribution under 45 CFR 309.I 15. and distribute collections as directed by the other agency.

(c) Former recipient of Klamath Tribal TANF. lf the family fonnerly received assistance from the Klamath Tribal TANF program and there is an assignment of support rights to the Tribe, and:

1. There is no request for assistance in collecting support from a State or other Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must pay current support and any arrearages owed to the family to the family and may then retain any excess collections, not to exceed the total amount of Tribal TANF paid to the family. Any nmaining collections must be paid to the family.
2. There is a request for assistance in collecting suppo11from a State l'r other Tribal IV-D agency under 45 CFR 309.120, the Child Supp01i Enforcement Office must:
   1. Send all support collected, as appropriate, to the requesting State •.ir other Tribal IV-D agency for lawful distribution; or,
   n. Contact the requesting State IV-D agency to detem1ine appropriate distribution under section 457 of the Act or the other Tribal 1V-D agency to determine appropriate distribution under 45 CFR 309.1 I 5, and distribute collections as directed by the other agency.

(d) Requests for assistance from State or other Tribal IV-D agency. lfthere is no assignment of support rights to the Klamath Tribes as a condition of receipt of Klamath Tribal TANF and the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from a state or another Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must:

1. . Send all support collected, as appropriate, to the requesting State or other Tribal IV-D agency for lawful distribution; or,
2. Contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal JV-D agency to determine appropriate distribution under 45 CFR 309.I 15, and distribute collections as directed by the other agency.

29.89 Federal income tax refund offset collections.

Any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Support Enforcement Office must be applied to satisfy child support arrearages.

MISCELLANEOUS

29.90 Stays.

Child support orders issued by the Child Support Enforcement Office and/or the Tribal Court may not be stayed pending appeal unless there is substantial evidence showing tlwt the obligor would be irreparably harmed and the obligee would not.

29.91 Mistake of fact.

Except as otherwise expressly provided in this Ordinance, a parent may be prospectively relieved from application of the terms of an administrative order issued by the Child Support Enforcement Office, or an order of the Tribal Court, upon proof of a mistake of fact. the truth of which would render the order void or otherwise invalid. when such mistake is brought forward within one year of its discovery and could not have been discovered before such time with reasonable diligence.

29.92 Cessation of Collection Efforts.

An obligee may request the Child Support Enforcement Office to cease child support collection efforts if it is anticipated that physical or emotional harm will be caused to the parent or caretaker of the child, or to the child for whom support was to have been paid.

29.93 Confidentiality of Records.

Child support records. including paper and electronic records. are confidential and may be disclosed or used only as necessary for the administration of the program. Office employees who disclose or use the contents of any records in violation of this section .lre subject to discipline, up to and including dismissal from employment and civil penalty. Program administration includes, but is not limited to:

(a) Extracting and receiving information from other databases as necessary to perform the Office's responsibilities;

(b) Comparing and sharing information with public and private entities as necessary to perform the Office's responsibilities, to the extent not otherwise prohibited by applicable Federal Jaw or Klamath Tribes Child Support Enforcement Prolram Rules and Procedures;

(c) Exchanging information with tribal or state agencies administering programs under Title XIX and Part A of Title IV of the Social Security Act as necessary for the Office and the tribal and state agencies to perform their responsibilities under state and federal Jaw.

29.94 No Waiver of Sovereign Immunity.

No provision in this Ordinance expressly or impliedly waives the sovereign immunit y of the Klamath Tribes, the Klamath Tribes Judiciary, or its officials, agents or employees. nor is intended to operate as consent to suit.

29.95 Effective Date.

This Ordinance shall be effective upon adoption and approval of the General Council in accordance wi th General Council Resolution.

29.96 Amendment or Repeal.

ll1is Ordinance, and any section, part and word hereof, may be amended or repealed by a Resol ution adopted by majority vote of the Klamath Tribes Tribal Council in accord ance with the Constitution of the Klamath Tribes.

29.97 Severability.

Should any provision set forth in this Plan, or the application thereof to any person nr circumstance, be held invalid for any reason whatsoever by a court of competent jurisdiction, the full remainder of such provision or the application of the provision tu another person or circUillstance shall not be effected thereby.

Certification

We. the undersigned, Tribal Council Chainnan and Secretary of the Klamath Tribes. do hereby ce1iify that at a Tribal Council meeting held on the _24th_ day of_____April_. 2008_ with a quorum pre the Tribal Council took action and duly amended this Plan by a vote of

-2-if-.-- for, opposed, and ;?., abstentions by Gael"irl Council Resol ution 2008 —-

-- O¢:.r/
Joe-,
Chai nnan
fhe Klamath Tribes

Torina Case
Secretary
The Klamath Tri es

LEGISLATI VE HISTORY

I. Title 4. Chapter 29 originall y adopted and approved by General Council on February __23rd_. 2008 pursuant to General Council Resolution No. 2008-001__.

The Klamath Tribes

Tribal Council

TRIBAL COUNCIL RESOLUTION #2008-ll

TRIBAL COUNCIL RESOLUTION APPROVING THE KLAMATH TRIBES CHILD SUPPORT ENFORCEMENT ORDINANCE AND RECOMMENDING TO GENERAL COUNCIL FOR APPROVAL

Whereas, The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians signed the Treaty of 1864 establishing the Klamath Reservation; and

Whereas, The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI, & Vll, Section IV E) as approved and/or adopted by the General Council amended on November 25, 2000; and

Whereas, The Klamath Indian Tribes Restoration Act of August 27, 1986 (P.L. 99-398) restored to federal recognition of the Sovereign Government of the Tribes' Constitution and By-laws; and

Whereas, The Klamath Tribes Tribal Council is the elected governmental body of the Tribes and has been delegated the authority to direct the day-to-day business and governmental affairs of the Klamath Tribes under the general guidance of the General Council (Constitution, Article Vll, Section I; Tribal Council By-laws, Article l); and

Whereas, The Klamath Tribes has a compelling interest in protecting the welfare of Tribal members and children within the jurisdiction of the Klamath Tribes; and

Whereas, The Tribes wishes to establish Tribal law that sets forth a fair and equitable process for establishing, modifying and enforcing child support orders and performing related activities, including establishment of paterni ty and locating noncustodial parents, to help provide for the care of children;

501 Chiloquin Blvd. – P.O. Box 436 – Chiloquin, Oregon 97624
(541) 783-2219 – Fax (541) 783-3706

Now therefore be it resolved, that the Tribal Council approves of the attached Child Support Enforcement Ordinance and directs that it be forwarded to the Klamath General Council for consideration and recommendation of its adoption as Title 4, Chapter 29 of the Klamath Tribes Tribal Code.

Certification

We, the undersigned, Tribal Council Chairman and Secretary of thlamath Tribes, do hereby certify that at a scheduled Tribal Council meeting held on the ..21- day of Nb!W.O.fl'r' , 2008, the Tribal Council duly adopted this resolution by a vote of 1 for, / opposed, and / abstentions.

Joseph Kirk
Chairman
The Klamath Tribes

Torina Case
Secretary
The Klamath Tribes

THE KLAMATH TRIBES
CHILD SUPPORT ORDINANCE
Title 4 Chapter 29

Table of Contents

THE KLAMATH TRIBES
CHILD SUPPORT ORDINANCE
Title 4 Chapter 29

Table of Contents

Table of Contents

Table of Contents

Table of Contents

GENERAL PROVISIONS

29.1 Authority.

This Child Support Ordinance is adopted pursuant to the authority vested in the Klamath Tribes General Council by virtue of its inherent sovereignty as an Indian tribal government and Article VI of the Constitution of the Klamath Tribes that provides that the General Council has the power to adopt and enforce ordinances providing for the maintenance oflaw and order, and to exercise all other reserved powers.

29.2 Purpose.

The purpose of this Child Support Enforcement Ordinance is to establish a fair and equitable process for establishing, modifying and enforcing child support orders and performing related activities including establishment of paternity, and locating noncustodial parents, to help provide for the care of children.

29.3 Policy.

It is the policy of the Klamath Tribes that all parents, both custodial and non-custodial, have an equal obligation to support their children. The Tribes are responsible for establishing governmental laws, procedures and guidelines for the equitable allocation of financial responsibility between parents for children's support where necessary.

29.4 Definitions.

For purposes of this Ordinance, the term

(a) "Acknowledged father" means a man who has established a father-child relationship under section 29.21 or 29.22.

(b) "Adjudicated father" means a man who has been adjudicated by a court of competent jurisdiction to be the father of a child.

(c) "Alleged father" means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. The term does not include a presumed father, or a man whose parental rights have been terminated or declared not to exist.

(d) "Assignee" means an individual or agency that has been assigned the right to collect child support from the parent obligor.

(e) "Child" means any person under the age of eighteen years. In accordance with the terms of this Ordinance, "child" may also include a person over the age of eighteen years who has not yet completed High School, but shall never mean a person over the age of twenty.

(f) "Child support order" and "child support obligation" mean a judgment, decree, or order, whether temporary, final or subject to modification, issued by a court of competent jurisdiction, tribunal or an administrative agency for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing jurisdiction, or of the parent with whom the child is living, which provides for monetary support, health care, arrearages, or reimbursement, and which may include related costs and fees, interest and penalties, income withholding, attorneys' fees, and other relief.

(g) "Certify" means to present to the Tribal Court for determination.

(h) "Custodial parent" means a parent having the care, physical custody and control of a child or children.

(i) "Custodian" means any person who is not a parent, having the care, physical custody and control of a child or children.

(j) "court" means any court having jurisdiction to determine the liability of persons for the support of a child.

(k) "De novo" means independent review and consideration of all issues.

(1) "Determination of parentage" means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity, adjudication by the court, adoption, or other method for determining parentage set forth at sections 29.20 and 29.21.

(m) "Disposable income" means that part of the income of an individual remaining after the deduction from the income of any amounts required to be withheld by law except laws enforcing spousal or child support and any amounts withheld to pay medical or dental insurance premiums.

(n) "Employer" means any entity or individual that engages an individual to perform work or services for which compensation is given.

(o) "General Council" means the General Council of the Klamath Tribes with such powers that exist by virtue of the inherent sovereignty of the Klamath Tribes and as specified in the Constitution of the Klamath Tribes.

(p) "Genetic testing" means an analysis of genetic markers to exclude or identify a man as the father or a woman as the mother of a child. The term includes an analysis of one or a combination of the following:

1. Deoxyribunucleic acid; and
2. Blood-group antigens, red-cell antigens, human-leukocyte antigens, serum enzymes, serum proteins or red-cell enzymes.

(s) "Home Tribe or State" means the Tribal Reservation or Indian country of a Tribe, or territory of a State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading or application for support assistance and, if a child is less than six months old, the Tribal Reservation or Indian country of a Tribe, or territory of a State in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence is counted as part of the six-month or other period.

(t) "Income-withholding order" means an order or other legal process directed to an obligor's employer or other third party in possession of a monetary obligation owed to an obligor, as defined by the income-withholding law of the Klamath Tribes, to withhold support form the income of the obligor.

(u) "Initiating Tribe or State" means a Tribe, Tribal organization, or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to the Klamath Tribes Child Support Enforcement Office or Tribal Court.

(v) "Initiating tribunal" means the authorized tribunal in an initiating Tribe, Tribal organization, or State.

(w) "Issuing Tribe or State" means a Tribe or State from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding Tribe, Tribal organization, or State for purposes of establishment, enforcement, or modification of a child support order.

(x) "Issuing tribunal" means the authorized tribunal in an initiating Tribe, Tribal organization, or State.

(y) "Klamath Indian Reservation" means all lands held in trust by the United States for the benefit of the Klamath Tribes as part of the Klamath Indian Reservation.

(z) "Klamath tribal member" means an individual duly enrolled with the Klamath Tribes in accordance with the Constitution and laws of the Klamath Tribes.

(aa) "Klamath Tribes Child Support Enforcement Office" means the Office established pursuant to section 29.06 and that serves as the Tribal IV-D agency pursuant to *45* CFR Part 309.

(bb) "The Manager" means the Director for the Klamath Tribes Child Support Enforcement Office or any of his/her authorized representatives in child support proceedings.

(cc) "Non-cash" support means support provided to a family in the nature of goods and/or services, rather than in cash, but which nonetheless, has a certain and specific dollar value.

(dd) "Obligee" means an individual or agency to which child support is owed on behalf of a child.

(ee) "Obligor" means a parent who is required to pay child support to a person or agency on behalf of a child.

(ff) "Office" means the Klamath Tribes Child Support Enforcement Office or its equivalent in any other tribal governrnent or state from which a written request for establishment or enforcement of a support obligation is received.

(gg) "Order to withhold" means an order or other legal process that requires a withholder to withhold support from the income of an obligor.

(hh) "Parent" means the natural, biological or adoptive parent of a child.

(ii) "Paternity index" means the likelihood of paternity calculated by computing the ratio between:

1. The likelihood that the tested man is the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is the father of the child; and
2. The likelihood that the tested man is not the father, based on the genetic markers of the tested man, mother, and child, conditioned on the hypothesis that the tested man is not the father of the child.

(jj) "Past support" means the amount of child support that could have been ordered and accumulated as arrears against a parent, where the child was otherwise not supported by the parent and for which period no valid support order was in effect.

(kk) "Probability of paternity" means the measure, for the ethnic or racial group to which the alleged father belongs, of the probability that the man in question is the father of the child, compared with a random, unrelated man of the same ethnic or racial group, expressed as a percentage incorporating the paternity index and a prior probability.

(ll) "Public assistance" means monetary assistance benefits provided by the Klamath Tribes, any other Indian tribe or state that are paid to or for the benefit of a child. Such payments include cash payments under Title IV-A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program.

(mm) "Register" means to record or file a child support order or judgment determining parentage in the appropriate location for the recording and filing of such order or judgment.

(nn) "Registering tribunal" means a tribunal in which a support order is registered.

(oo) "Responding Tribe or State" means an Indian tribe, Tribal organization or state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating Tribe or State under this Ordinance or a law substantially similar to this Ordinance.

(pp) "Responding tribunal" means the authorized tribunal in a responding Tribe, Tribal organization or State. The responding tribunal for the Klamath Tribes is the Klamath Tribes Child Support Enforcement Office or the Klamath Tribal Court as set forth in this Ordinance.

(qq) "Social Services Department" means the Social Services Department of the Klamath Tribes and programs operated thereunder, including, but not limited to the Temporary Assistance to Needy Families program and the General Assistance program.

(rr) "Tribal Council" means the elected Tribal Council of the Klamath Tribes established under Article VII of the Constitution of the Klamath Tribes;

(ss) "Tribal Court or Court" means the Tribal Court of the Klamath Tribes Judicial Branch established under Article V of the Constitution of the Klamath Tribes.

(tt) "Tribal member" means an individual that is an enrolled Klamath member, or an individual that is enrolled with another federally recognized Indian tribe in accordance with the Jaws of such tribe.

(uu) "Tribe or State" means any Tribe, or Tribal organization within the exterior boundaries of the United States, a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the Jaws of the United States, and any foreign governments, that have enacted a Jaw or established procedures for the issuance and enforcement of child support orders that are substantially similar to Klamath Tribes proceedings for recognition and enforcement of foreign orders.

(vv) "Tribunal" means a court, administrative agency or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

(ww) "Withholder" means any person who disburses income to the obligor and includes but is not limited to an employer, conservator, trustee or insurer of the obligor.

JURISDICTION

29.5 Jurisdiction.

(a) The Klamath Tribes Tribal Court and Klamath Tribes Child Support Enforcement Office shall have personal and subject matter jurisdiction over the establishment, modification and enforcement of child support and any associated proceedings, including but not limited to establishment of paternity and location of noncustodial parents, related to the purpose for which this Ordinance is established.

(b) The Tribal Court and, as applicable the Klamath Tribes Child Support Enforcement Office, has, but is not limited to, personal jurisdiction over the following, for purposes of enforcing the provisions of this Ordinance, and any associated matters:

1. Enrolled members of the Klamath Tribes;
2. Persons who consent to the jurisdiction of the Court by one of the following:
   (i) Filing an action;
   (ii) Knowingly and voluntarily giving written consent to jurisdiction of the Court;

(iii) Entering a notice of appearance in an action without concurrently filing an express written reservation of issues concerning personal jurisdiction, or filing a motion to dismiss for lack of jurisdiction within 30 days of entering the notice of appearance;

(iv) Appearing in an action without concurrently filing an express written reservation of issues concerning personal jurisdiction, or filing, within 30 days of such appearance, a motion to dismiss for lack of jurisdiction;

3. Persons who are the parent or guardian of an enrolled Klamath tribal member or the parent or guardian of a child eligible for enrollment with the Klamath Tribes;
4. Persons who have legally enforceable rights in any jurisdiction to visitation or custody of a child that is in any way a subject of the proceeding and the child is an enrolled member of the Klamath Tribes, eligible for enrollment with the Klamath Tribes;
5. Persons who are alleged to have engaged in an act of sexual intercourse on the Klamath Indian Reservation with respect to which a child that is either an enrolled member of the Klamath Tribes, or eligible for enrollment with the Klamath Tribes, may have been conceived; and/or
6. Applicants for and recipients of Temporary Assistance to Needy Family benefits through the Klamath Tribes, whether the head of household, dependent, or other household member.

(c) Continuing jurisdiction.

1. In every action under this Ordinance where there is jurisdiction, the Tribal Court, and as applicable the Klamath Tribes Child Support Enforcement Office, shall retain continuing jurisdiction over the parties.
2. Consent cannot be withdrawn once given, whether such consent was given expressly or impliedly.
3. Personal jurisdiction cannot be defeated by relocation after jurisdiction is established.
4. Personal jurisdiction cannot be defeated by voluntary relinquishment of enrollment and membership with the Klamath Tribes.

(d) Declination. The Judge of the Tribal Court, at his or her discretion, may decline to assume jurisdiction over one or more parties in the best interest of the Court, or for the convenience of one or more of the parties involved. Any declination shall be made after a hearing on the pertinent facts and shall be supported by written findings of fact specifying the basis for declination. Upon entry of an order of declination of jurisdiction, the matter shall be dismissed in its entirety for lack of jurisdiction.

(e) The Child Support Enforcement Office shall have jurisdiction over persons and entities as provided for in, and as necessary to carry out the provisions of, this Ordinance, for purposes of establishing paternity, establishing, modifying and enforcing child support orders, and performing associated activities. Challenges to the jurisdiction of the Child Support Enforcement Office shall be presented the Child Support Enforcement Office and certified to the Klamath Tribes Tribal Court for decision. Appeals of Tribal Court determinations of jurisdiction may be appealed to the Klamath Tribes Supreme Court in accordance with the laws of the Klamath Tribes.

KLAMATH TRIBES CHILD SUPPORT ENFORCEMENT OFFICE

29.6 Establishment of Child Support Enforcement Office.

(a) There is established a Child Support Enforcement Office to be operated under the Klamath Tribes Judicial Branch. This Office is the Klamath Tribes Tribal IV-D agency pursuant to 45 CFR Part 309 and is the entity primarily responsible for providing support enforcement services described in this Ordinance. The Child Support Enforcement Office shall provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, and location of noncustodial parents, as appropriate, with respect to any child, obligee or obligor determined to be within the jurisdiction of the Klamath Tribes.

(b) When responsible for providing support enforcement services, and there is sufficient evidence available to support the action to be taken, the Child Support Enforcement Office shall perform, but not be limited, to the following:

1. Carrying out the policy and traditions of the Klamath Tribes regarding child support obligations;
2. Operating the Klamath Tribes Tribal IV-D Program;
3. Accepting all applications for IV-D services and promptly providing IV-D services;
4. Establishing child support orders in compliance with Klamath Tribes child support guidelines and formulas;
5. Establishing paternity for child support purposes;
6. Initiating and responding to child support modification proceedings and proceedings to terminate support orders;
7. Enforcing established child support orders and obligations;
8. Establishing and enforcing obligations to provide medical insurance coverage for children;

9. Establishing and enforcing obligations to provide child care expenses for children;
10. Collecting child support;
11. Accepting offers of compromise or partial or total charge-off of child support arrearages;
12. Distributing child support payments;
13. Maintaining a full record of collection and disbursements made;
14. Establish or participate in a service to locate parents utilizing all sources of available information and records, and to the extent available, the Federal Parent Locator Service;
15. Maintaining program records in accordance with section 29.07 (a).
16. Establishing procedures for safeguards applicable to all confidential information handled by the Child Support Enforcement Office, that are designed to protect the privacy rights of the parties, including:
    1. Safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, to locate a noncustodial parent, or to establish, modify, or enforce support, or to make or enforce a child custody determination;
    11. Prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order with respect to the former party or the child has been entered;
    111. Prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the Office has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child.
    1v. Any mandatory notification to the Secretary that the Office has reasonable evidence of domestic violence or child abuse against a party or the child and that the disclosure of such information could be harmful to the party or the child.
    v. Procedures in accordance with any specific safeguarding regulations applicable to Tribal IV-D programs.
    v1. Procedures under which sanctions must be imposed for the unauthorized use or disclosure of information.
17. Publicizing the availability of child support enforcement services available, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained, and publicizing the availability of and encouraging the use of procedures for voluntary establishment of paternity and child support;
18. Ensuring compliance with the provisions of applicable federal laws, including, but not limited to 42 U.S.C. 651 to 669 and 45 C.F.R. Chapter III.

(c) The Child Support Enforcement Office shall establish rules, procedures and forms for carrying out its responsibilities and authority under this ordinance. All parties to child support proceedings shall comply with the rules and procedures adopted by the Office, and shall utilize the proper forms prepared by the Office.

29.7 Record Maintenance.

(a) The Child Support Enforcement Office shall maintain all records necessary for the proper and efficient operation of the program, including records regarding:
1. Applications for child support services;
2. Efforts to locate noncustodial parents;
3. Actions taken to establish paternity and obtain and enforce support;
4. Amounts owed, arrearages, amounts and sources of support collections, and the distribution of such collections;
5. Office IV-D program expenditures;
6. Any fees charged and collected, if applicable; and
7. Statistical, fiscal, and other records necessary for reporting and accountability required by federal law.

(b) The Office shall comply with the retention and access requirements at 45 CFR 74.53, including the requirement that records be retained for at least seven years.

COOPERATIVE ARRANGEMENTS AND AGREEMENTS

29.8 Cooperation With Other IV-D Tribal and State agencies.

The Klamath Tribes Child Support Enforcement Office shall extend the full range of services available under the Klamath Tribes approved *N-D* plan to respond to all requests from, and cooperate with, other Tribal and State IV-D agencies.

29.9 Cooperative Agreements.

The Child Support Enforcement Office may enter into cooperative agreements and/or arrangements with other Tribal and Statejurisdictions and agencies to provide for cooperative and efficient child support enforcement services. The Klamath Tribes Tribal Council must approve government-to-government cooperative agreements.

NOTICES AND FINDINGS OF FINANCIAL RESPONSIBILITY

29.10 Parties.

The following are parties to child support proceedings inthe Klamath Tribal Court or within the Child Support Enforcement Office:

(a) The Klamath Tribes, acting by and through the Child Support Enforcement Office;

(b) Custodial and noncustodial parents, whether natural or adoptive, whose parental rights have not been legally terminated;

(c) Persons with physical custody of a child for whose benefit a support order or an order establishing paternity is sought, is being modified or is being enforced;

(d) A male who is alleged to be the father of a child when an action is initiated to establish, modify or enforce a support or paternity order;

(e) Tribal or state agencies that have a vested interest in the outcome of the proceeding in accordance with Child Support Enforcement Office rules and procedures, and or by approval of the Klamath Tribal Court;

(f) Any other person the Klamath Tribal Court has joined as a party pursuant to Court order.

29.11 Proceeding By Minor Parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child.

29.12 Administrative Notice and Finding of Financial Responsibility.

(a) At any time after the Klamath Tribes is assigned support rights, a public assistance payment is made, or a request for child support enforcement services is made by an individual or another Tribe or State child support enforcement agency, the Manager may, if there is no existing child support order, issue a notice and finding of financial responsibility. The notice shall include the following:

1. Name and date of birth for the child for whom support is to be paid;
2. Notice that the addressee is presumed to be the parent of the child. Where paternity has not already been legally established, the notice shall include the statements set forth at subsection (b).
3. Name of the person or agency having physical custody of the child for whom support is to be paid;

4. Itemization of assumed income and assets held by the parent to whom the notice is directed;
5. Anticipated amount of monthly support for which the parent will be responsible;
6. Anticipated past amount of support for which the parent will be responsible;
7. Whether the parent will be responsible for obtaining health care coverage for the child where it is available to the parent at a reasonable cost;
8. Notice that failure to respond to the Notice may lead to a finding oflegal paternity for purposes of child support, where paternity has not already been established;
9. Notice that failure to respond to the Notice may lead to an award of child support and health care coverage being issued against the parent for the amount stated in the notice.
10. Notice that if the parent or other party objects to all or any part of the notice and finding of financial responsibility, the party must submit to the Child Support Enforcement Office, within 30 days of the date of service, a written response setting forth his or her objections.
11. Notice that if the person does not submit a written objection to any part of the notice, the Manager may enter an order in accordance with the notice and finding of financial responsibility.

(b) Where paternity has not already been legally established, the notice shall also include the following:

1. The name of the child's other parent;
2. An allegation that the person is the parent of the child for whom support is owed;
3. The probable time or period of time during which conception took place; and
4. A statement that if the alleged parent or the obligee does not timely send to the Office issuing the notice a written response that denies paternity and requests a hearing, then the Manager, without further notice to the alleged parent, or to the obligee, may enter an order that declares and establishes the alleged parent as the legal parent of the child for child support purposes.

29.13 No Objection to Administrative Notice and Finding of Financial Responsibility; Issuance of Administrative Order.

Where no timely written response setting forth objections to the notice and finding of financial responsibility, or timely appeal of the second notice and finding of financial

responsibility, is received by the Office, the Manager may enter an order in accordance with the notice, and shall include in that order:

(a) Name and birth date of the child for whom support is to be paid;

(b) Finding of legal paternity for purposes of child support;

(c) The amount of monthly support to be paid, with directions on the manner of payment;

(d) The amount of past support to be ordered against the parent;

(e) Whether health care coverage is to be provided for the child;

(f) Name of the person or agency/entity to whom support is to be paid; and

(g) A statement that the property of the parent is subject to collection action, including but not limited to wage withholding, garnishment and liens and execution thereon.

29.14 Timely Objection to Administrative Notice and Finding of Financial Responsibility; Negotiation Conference.

Where the Office receives a timely written response setting forth objections, the Office shall schedule a negotiation conference with the alleged obligor to occur within 15 days from the date that the written objections were received. If the Office and the obligor reach full agreement to the terms of a support award, such agreement shall be entered into the terms of a stipulated order for support. If the Office and obligor do not reach a full agreement as to the amount of child support and other provisions of the notice and finding of financial responsibility (excepting paternity), the Office shall issue a second notice and finding of financial responsibility within 15 days from the date of the negotiation conference. If the Office and the obligor do not reach agreement as to paternity, the Office shall certify the matter to the Tribal Court for hearing on the issues in dispute.

29.15 Second Administrative Notice and Finding of Financial Responsibility.

The second notice and finding of financial responsibility shall include the following:

(a) The information set forth at Section 29.12, subsections (a)(1-7), and (b);

(b) Notice that if the parent or other party objects to all or any part of the second notice and finding of financial responsibility, the party must file an appeal with the Tribal Court, copied to the Klamath Tribes Child Support Enforcement Office, within 30 days of the date of service;

(c) Notice that if the parent does not file an appeal within 30 days of the date of service, the Manager may enter an order in accordance with the second notice and finding of financial responsibility consistent with the requirements of section 29.13.

29.16 Manner of Service.

(a) The following notices and documents must be served by personal service, or by certified mail, return receipt requested, with delivery restricted to the addressee:
I. Notices and findings of financial responsibility served to the obligor;
2. Requests to modify of a child support order;
3. Orders to show cause alleging failure to comply with support order, unless other manner of service is expressly authorized by the Court;

(b) The following notices and documents may be served by regular mail:
I. Notices and findings of financial responsibility served to the obligee.
2. Responses denying paternity and requesting a hearing sent by the Office to the obligee.

(c) When service is authorized by regular mail, proof of service may be by notation upon the computerized case record by the person who made the service and shall include the address to which the documents were mailed, a description of the documents and the date that they were mailed. Ifthe documents are returned as undeliverable, that fact shall also be noted on the computerized case record. Ifno new address for service by regular mail can be obtained, service shall be by certified mail, return receipt requested or by personal service upon the obligee.

(d) When a case is referred for action to the Klamath Tribes Child Support Enforcement Office from another state or tribe, the Office shall accomplish service on the obligee by sending the documents to the initiating agency, by regular mail. The initiating agency shall then make appropriate service upon the obligee.

29.17 Filing Order With Court. Effective as Tribal Court Judgment.

Upon issuing a child support order, or modified child support order, the Manager shall cause a true copy of the order to be filed in the office of the Clerk for the Tribal Court,

along with a certificate of service of the order upon the parties to the proceeding. Such filing shall render the order effective as a Tribal Court order and judgment.

29.18 Administrative Child Support Orders Final

Administrative child support orders and findings of paternity issued in accordance with this Ordinance are final and action by the Office to enforce and collect upon the orders, including arrearages, may be taken from the date of issuance of the orders.

29.19 Appeals of Child Support Enforcement Office Action.

(a) Appeals of orders issued by the Office based upon a notice and finding of financial responsibility shall be presented to the Tribal Court within 30 days of the date of service of the notice. All issues presented for appeal to the Court shall be reviewed de novo.

(b) Challenges to the jurisdiction of the Child Support Enforcement Office to take action for or against a person shall be brought before the Klamath Tribes Tribal Court. The issues of jurisdiction shall be reviewed by the Court de novo.

(c) In any hearing, the Klamath Tribes Rules of Civil Procedure and Rules of Evidence shall apply, to the extent that they are not inconsistent with the provisions of this Ordinance.

PARENTAGE

29.20 Mother-Child Relationship.

A woman is considered the mother of a child for child support purposes where:

(a) The woman gave birth to the child;

(b) The woman legally adopted the child; or

(c) The woman has been adjudicated to be the mother of the child by a court of competent jurisdiction.

29.21 Father-Child Relationship.

A man is considered the father of a child for child support purposes where:

(a) There is an unrebutted presumption of paternity;

(b) The man and the child's mother have executed an acknowledgment of paternity;

(c) The man legally adopted the child; or

(d) The man has been adjudicated to be the father of the child by a court of competent jurisdiction.

29.22 Establishing Paternity.

(a) An action to establish paternity for child support purposes may be initiated for any child up to and including 18 years of age.

(b) In an action to establish child support for a minor child, the Manager may enter an order of paternity where there *is:*

I. Presumption of Paternity. A man is presumed to be the natural father of a child for purposes of child support if:

(i) He and the child's natural mother are or have been married to each other and the child is born during the marriage;

(ii) He and the mother of the child are or were married to each other and the child is born within 300 days after the marriage is interrupted or terminated by death, annulment, declaration of invalidity, divorce, or decree of separation;

(iii) He and the mother of the child married each other in apparent compliance with the law before the birth of the child, notwithstanding later determination of possible invalidity of the marriage, and the child was born during the purported marriage, or within 300 days after it was interrupted or terminated by death, annulment, declaration of invalidity, divorce, or decree of separation; or

(iv) He and the mother married each other in apparent compliance with the law after the birth of the child, and he voluntarily asserted his paternity of the child, where such assertion is noted in a record filed with a tribal or state agency charged with maintaining birth records.

2. Voluntary acknowledgment of paternity in accordance with section 29.23.

3. Failure to file an objection to allegation of paternity in a Notice and Finding of Financial Responsibility.

29.23 Execution of Acknowledgment of Paternity.

(a) An acknowledgment of paternity must:

1. Be signed under penalty of perjury by the mother and the father by a man seeking to establish his paternity.
2. State that the child whose paternity is being acknowledged does not have a presumed father and does not have another acknowledged or adjudicated father.
3. State whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing.
4. State that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the acknowledgment is permitted only in accordance with the provisions set forth in section 29.29.

29.24 Denial of Paternity.

A presumed father may sign a denial of his paternity. The denial is valid only if:

(a) An acknowledgment of paternity signed, or otherwise authenticated, by another man is filed pursuant to section 29.23; or,

(b) The denial is signed, or otherwise authenticated, under penalty of perjury; and

(c) The presumed father has not previously:
I. Acknowledged his paternity, unless the previous acknowledgment has been lawfully rescinded or successfully challenged; or
2. Been adjudicated to be the father of the child, unless the previous adjudication has been lawfully vacated, reversed, or successfully challenged.

29.25 Objection to Allegation of Paternity.

(a) Where a man has filed a timely written denial or objection to an Office allegation of paternity, or if the Manager determines that there is a valid issue with respect to paternity of the child, the Manager shall certify the matter to the Tribal Court for a determination based upon the contents of the file and any evidence which may be produced at trial.

(b) The certification shall include true copies of the notice and finding of financial responsibility, the return of service, the denial of paternity and request for hearing or appeal, and any other relevant papers.

(c) When a party objects to the entry of an order of paternity and blood tests result in a cumulative paternity index of 99 or greater, notwithstanding the party's

objection, evidence of the tests, together with testimony of a parent, is a sufficient basis upon which to presume paternity for purposes of establishing temporary child support pending final determination of paternity by the Court.

29.26 Order for Testing.

(a) The Office may order genetic testing only if there is an allegation of paternity stating facts establishing a reasonable probability of the requisite sexual contact and there is no acknowledged or adjudicated father, or such acknowledgement or adjudication has been lawfully reopened or challenged.

(b) Genetic testing of a child shall not be performed prior to birth without the consent of the mother and the alleged father.

29.27 Requirements for Genetic Testing.

(a) Genetic testing must be of a type reasonably relied upon by experts in the field of genetic testing and performed in a testing laboratory accredited by:
1. The American Association of Blood Banks, or a successor;
2. The American Society for Histocompatibility and Immunogenetics, or a successor to its functions; or
3. An accrediting body designated by the Federal Secretary of Health and Human Services.

(b) A specimen used in genetic testing may consist of one or more samples, or a combination of samples, of blood, buccal cells, bone, hair, or other body tissue or fluid. The specimen used in the testing need not be the same kind for each individual undergoing genetic testing.

(c) Based on the ethnic or racial group of an individual, the testing laboratory shall determine the databases from which to select frequencies for use in calculation of the probability of paternity. Ifthere is disagreement as to the testing laboratory's choice, the individual objecting may require the testing laboratory to recalculate the probability of paternity using a different ethnic or racial group, or may engage another testing laboratory to perform the calculations.

29.28 Genetic Testing Results.

(a) A man is rebuttably identified as the father of a child if the genetic testing results disclose that:

1. The man has at least a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing; and
2. A combined paternity index of at least 100 to 1.

(b) A man who is rebuttably identified as the father pursuant to subsection (a) may rebut the genetic testing results only by other genetic testing in accordance with section 29.27 that excludes the man as the genetic father of the child, or identifies another man as the possible father of the child.

(c) If more than one man is identified by genetic testing as the possible father of the child, the men may be ordered to submit to further genetic testing to identify the genetic father.

29.29 Reopening Issue of Paternity.

(a) No later than one year after an order establishing paternity is entered by the Office, and if no genetic parentage test or challenge by court adjudication has been completed, a party may apply to the Manager to have the issue of paternity reopened. Upon receipt of a timely application, the Manager shall order the mother and the male party to submit to parentage tests. The person having physical custody of the child shall submit the child to a parentage test.

(b) Where no genetic parentage test has been completed, a person determined to be the father may apply to the Manager to have the issue reopened for challenging determination of paternity after the expiration of one year upon clear evidence of fraud, duress, or material mistake of fact.

(c) If a party refuses to submit to the genetic parentage test, the issue of paternity shall be resolved against that party by an appropriate order of the Court upon the motion of the Manager.

(d) Child support paid before an order is vacated under this section shall not be returned to the payer.

29.30 Genetic Testing When Specimens Not Available.

(a) Subject to 29.30(b), if a genetic-testing specimen is not available from a man who may be the father of a child, for good cause and under circumstances considered by the Office or the Court to be just, the following individuals may be ordered to submit specimens for genetic testing:

1. The parents of the man;

2. Brothers and sisters of the man;
3. Other children of the man and their mothers; and
4. Other relatives of the man necessary to complete genetic testing.

(b) Issuance of an order under this section requires a finding that a need for genetic testing outweighs the legitimate interests of the individual sought to be tested.

29.31 Proceeding Before Birth.

A proceeding to determine parentage may be commenced before the birth of the child, but may not be concluded until after the birth of the child. Genetic testing specimens shall not be collected until after the birth of the child, except under extraordinary circumstances and upon the consent of both the mother and the alleged father.

29.32 Full Faith and Credit.

Full faith and credit shall be given to an acknowledgement of paternity or denial of paternity effective in another tribe or state if the acknowledgment or denial has been signed and is in compliance with the law of the other jurisdiction.

29.33 Establishment of Mother-Child Relationship and Paternity For Child Support Purposes Only.

(a) The establishment of a mother-child relationship, or of paternity made pursuant to this Ordinance shall be for purposes of child support only. The determination of parental relationships made pursuant to this Ordinance shall not be considered conclusive for purposes of enrollment, the eligibility for which is governed by the Constitution of the Klamath Tribes and the Klamath Tribes Enrollment Ordinance.

(b) This section does not prohibit a party to a parentage proceeding being adjudicated by the Tribal Court from joining the issue of paternity for purposes of determining possible eligibility for enrollment in accordance with Klamath Tribal law and procedures.

RULES OF PROCEDU RE AND EVIDENCE

29.34 Rules of Civil Procedure and Evidence.

To the extent not in conflict with the procedures of this Ordinance, the Klamath Tribes Rules of Civil Procedure and Evidence shall apply to all proceedings herein.

29.35 Special Rules of Evidence and Procedure.

(a) In any proceeding to establish, enforce, or modify a support obligation, extrinsic evidence of authenticity is not required for the admission of a computer printout of the Manager that may reflect the employment records of a parent, the support payment record of an obligor, the payment of public assistance, the amounts paid, the period during which public assistance was paid, the persons receiving or having received assistance and any other pertinent information, if the printout bears a seal purporting to be that of the Manager and is certified as a true copy by original, facsimile, or scanned signature of a person purporting to be an employee of the Manager. Printouts certified in accordance with this section constitute prima facie evidence of the existence of the facts stated therein.

(b) The Child Support Enforcement Office may subpoena financial records and other information needed to establish paternity or to establish, modify or enforce a support order. Service of the subpoena may be by certified mail.

(c) Persons or entities that fail to comply with a subpoena issued under this section without good cause are subject to a civil penalty.

(d) The physical presence of the parties may not be required for the establishment, enforcement, or modification of a support order or order determining parentage.

(e) A verified petition, affidavit, or document substantially complying with federally mandated forms and documents incorporated by reference in any of them, not excluded under the hearsay rule if given in person, are admissible in evidence if given under oath by a party or witness residing in the territory of another Tribe or State.

(f) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record is evidence of the facts asserted in it, and is admissible to show whether payments were made.

(g) Copies of bills for testing parentage and for prenatal and postnatal health care of the mother and child furnished to the adverse party at least 20 days before trial are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary and customary.

(h) Documentary evidence transmitted from another Tribe or State to the Klamath Tribes by facsimile, or other means that does not provide an original writing may

not be excluded from evidence on an objection based on the means of transmission.

(i) In a proceeding under this Ordinance, the Court may permit a party or witness residing in another the territory of another Tribe or State to be deposed or to testify by telephone, audiovisual means or other electronic means at a designated tribunal or other location in that Tribe or State. The Court shall cooperate with tribunals of other Tribes or States in designating an appropriate location for the deposition or testimony.

(j) A privilege against disclosure of communications between spouses does not apply in a proceeding under this Ordinance.

(k) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this Ordinance.

CHILD SUPPORT GUIDELINES

29.36 Establishing Child Support Guidelines.

Klamath Tribes Child Support Guidelines shall be prepared by the Klamath Tribes Child Support Enforcement Office and presented for review and approval by the Klamath Tribes Tribal Council. The guidelines shall be reviewed and considered for updating at least once every three years to ensure that their application results in the determination of appropriate child support amounts. The guidelines shall make provision for imputed income and establish any specific bases for deviation from the guidelines.

(a) In establishing the guidelines, the Office shall take into consideration the following:

1. All earnings, income and resources of each parent, including real and personal property;
2. The earnings history and potential of each parent;
3. The reasonable necessities of each parent;
4. The educational, physical and emotional needs of the child for whom the support is sought;
5. Preexisting support orders and current dependents;
6. Non-cash contributions including fuel, clothing and child-care;
7. Other criteria that the Office determines to be appropriate.

(b) All child support shall be computed as a percentage of the combined Gross Income of both parents.

(c) The guidelines may anticipate certain circumstances of deviation from the standard formula upon consideration of, but not limited to the following:

1. Costs of a health benefit plan incurred by the obligor or the obligee;
2. Social security or apportioned Veteran's benefits paid to the child, or to a representative payee administering the funds for the child's use and benefit, as a result of the obligor's disability or retirement;
3. Survivors' and Dependents' Education Assistance under 38 U.S.C. Chapter 35 paid to the child, or to a representative payee for the benefit of the child as a result of the obligor's disability or retirement.

29.37 Guidelines Presumed Correct.

(a) There is a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award that would result from the application of the guidelines is the correct amount of the child support obligation in any proceeding for the establishment or modification of a child support obligation.

(b) Rebutting the presumption requires a written finding on the record that the application of the guidelines would be unjust, inequitable, unreasonable, inappropriate under the circumstances in a particular case, or not in the best interest of the child. The following factors shall be considered in a challenge to strict adherence to the guidelines:

1. Evidence of other available resources of a parent;
2. Number and needs of other dependents of a parent;
3. Net income of a parent remaining after withholdings required by law or as a condition of employment.
4. Special hardships of a parent, including but not limited to, medical circumstances of a parent and extraordinary visitation transportation costs affecting his or her ability to pay child support;
5. The needs of the child, including extraordinary child care costs due to special needs;
6. Evidence that a child who is subject to the support order is not living with either parent or is a "child attending school."

29.38 Income.

(a) Standard for determination of income. All income and resources of each parent's household shall be disclosed and considered when determining the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support

obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(b) Verification of income. Tax returns for the proceeding two years and current pay stubs shall be provided to verify income and deductions. Other sufficient information shall be required for income and deductions that do not appear on tax returns or paystubs. The Office shall have authority to conduct lawful discovery in accordance with the methods set forth in this Ordinance, the Klamath Tribes Child Support Enforcement Rules and Procedures, and the Klamath Tribes Rules of Civil Procedure, to verify income of the parents.

(c) Income includes the following:

1. Salaries;
2. Wages;
3. Commissions;
4. Deferred compensation;
5. Contract-related benefits;
6. Dividends;
7. Gifts;
8. Prizes
9. Royalties;
10. Per capita payments, including payments received as a share of profits due to membership in an Indian tribe, including, but not limited to gaming revenue distributions;
11. Gambling winnings;
12. Interest;
13. Trust income;
14. Severance pay
15. Annuities;
16. Capital gains;
17. Pension or retirement program benefits;
18. Workers' compensation;
19. Unemployment benefits;
20. Spousal maintenance actually received;
21. Bonuses;
22. Social security benefits; and
23. Disability insurance benefits.

(d) The following are excluded as sources of income that shall be disclosed, but shall not be included in gross income:

1. Income from a spouse or significant other who is not the parent of the child;

2. Income from other adults in the household;
3. Public assistance payments, including Temporary Assistance for Needy Families, Supplemental Security Income, General Assistance, and food stamps;
4. Foster care payments;
5. Child care assistance benefits.

29.39 Income Deductions.

Deductions will be made from the obligor's total income to assess monthly income from which the child support obligation will be based:

(a) Mandatory union or professional dues;

(b) Court-ordered spousal maintenance payments to the extent actually paid;

(c) Court ordered child support.

29.40 Imputed Income.

Income will be imputed to an obligor parent when the parent is voluntarily unemployed or voluntarily and unreasonably underemployed. The Child Support Guidelines shall set forth the standards for determining and applying imputed income.

29.41 Rebuttable Presumption of Inability to Pay Child Support When Receiving Certain Assistance Payments.

(a) A parent who is eligible for and is receiving cash payments under Title IV-A of the Social Security Act, a tribal or state general assistance program, or the federal Supplemental Security Income program shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue unless the presumption is rebutted.

(b) Each month, the Social Services Department shall identify those persons receiving cash payments under the programs listed in subsection (a) that are administered by the Social Services Department and provide that information to the Manager. If benefits are received from programs listed in subsection (a) of this section that are administered by another tribe, state, or federal agency, the obligor shall provide the Manager with written documentation of the benefits.

(c) Within 30 days following identification of persons under subsection (b) of this section, the Office shall provide notice of the presumption to the obligee and

obligor and shall inform all parties to the support order that, unless a party objects as provided in subsection (d) of this section, child support shall cease accruing beginning with the support payment due on or after the date the obligor first begins receiving the cash payments and continuing through the last month in which the obligor received the cash payments. The Office shall serve the notice on the obligee by certified mail, return receipt requested, and shall serve the notice on the obligor by first class mail to the obligor.

(d) A party may object to the presumption by sending an objection to the Office within 30 days after the date of service of the notice. The objection must describe the resources of the obligor or other evidence that might rebut the presumption of inability to pay child support. Upon receiving an objection, the Office shall present the case to the Tribal Court for determination as to whether the presumption has been rebutted.

(e) If no objection is made, or if the Tribal Court finds that the presumption has not been rebutted, the Office shall discontinue billing the obligor for the period of time described in subsection (c) of this section and no arrearage shall accrue for the period during which the obligor is not billed.

(f) Within 30 days after the date the obligor ceases receiving cash payments under a program described in subsection (a) ofthis section, the Office shall provide notice to all parties to the support order:

1. Specifying the last month in which a cash payment was made;
2. Stating that the payment of those benefits has terminated and that by operation of law billing and accrual of support resumes.

(g) Receipt by a child support obligor of cash payments under any of the programs listed in subsection (a) ofthis section shall be sufficient cause to allow the Office or the Tribal Court to issue a credit and satisfaction against child support arrearage for months that the obligor received the cash payments, absent good cause to the contrary.

29.42 Child Support Payments.

(a) Each child support order shall specify that the support payments be made either to the Child Support Enforcement Office, or to the person or agency to whom is receiving the payments for the child.

(b) In any case where the obligee receives public assistance from the Klamath Tribes or other tribal or state agency, or has previously received public assistance for

which assignment has been made and has not been completely satisfied, payments shall be made to the Child Support Enforcement Office.

(c) The parties affected by the child support order shall immediately inform the Child Support Enforcement Office of any change of address, employment, or of other conditions that may affect the administration of the order.

29.43 Health Insurance.

(a) In any order for child support, either the custodial or non-custodial parent, or both, shall be required to maintain or provide health insurance coverage, including medical and dental, for the child that is available at a reasonable cost.

I. Insurance premiums for the child shall be added to the base child support obligation. Ifthe insurance policy covers a person other than the child, only that portion of the premium attributed to the child shall be allocated and added to the base child support obligation.

2. If the obligee pays the medical insurance premium, the obligor shall pay the obligor's allocated share of the medical insurance premium to the obligee as part of the base child support obligation.

(b) Health insurance coverage required under this section shall remain in effect until the child support order is modified to remove the coverage requirement, the coverage expires under the terms of the order, or the child reaches the age of majority or is emancipated, unless there is express language to the contrary in the order.

(c) A parent who is required to extend health insurance coverage to a child under this section is liable for any covered health care costs for which the parent receives direct payment from an insurer.

(d) This section shall not be construed to limit the authority of the Child Support Enforcement Office, or the Court, to enter or modify support orders containing provisions for payment of uninsured health expenses, health care costs, or insurance premiums which are in addition to and not inconsistent with this section.

(e) A parent ordered to provide health insurance coverage shall provide to the other parent or the Child Support Enforcement Office proof of such coverage, or proof that such coverage is not available at a reasonable cost within twenty days of the entry of the order or immediately upon notice of unavailability.

(t) Every order requiring a parent to provide health care or insurance coverage is subject to direct enforcement as provided under this Ordinance.

29.44 Medical Expenses.

Reasonable and necessary medical, dental, orthodontic, optometric, psychological, or any other physical or mental health expenses of the child incurred by either parent and not reimbursed by insurance may be allocated in the same proportion as the parents' Adjusted Gross Income as separate items that are not added to the base child support obligation. Ifreimbursement is required, the other parent shall reimburse the parent who incurs the expense within thirty (30) days of receipt of documentation of the expense.

29.45 Child-Care Expenses.

The Office or the Court may include in a child support order payment of child care expenses. Such payment shall be allocated and paid monthly in the same proportion as base child support where such expenses are necessary for either or both parents to be employed, seek employment, or attend school or training to enhance employment mcome.

INCOME WITHHOLDING AND GARNISHMENT

29.46 Payment of Support by Income Withholding.

(a) Except as provided in section 29.47, all child support orders established by the Klamath Tribes Child Support Enforcement Office and the Klamath Tribes Tribal Court shall include a provision requiring the obligor to pay support by income withholding regardless of whether support enforcement services are being provided through the Klamath Tribes Child Support Enforcement Office.

(b) The Child Support Enforcement Office shall initiate income withholding by sending the noncustodial parent's employer a notice using the standard Federal income withholding form.

(c) When an arrearage exists and notice of the delinquent amount has been given to the obligor, the Tribal Court, upon application, shall issue a withholding order upon the ex parte request of a person holding support rights or the Child Support Enforcement Office Manager.

(d) In the case of each noncustodial parent against whom a support order is or has been issued or modified, or is being enforced, so much of his or her income must be withheld as is necessary to comply with the order.

(e) In addition to the amount to be withheld to pay the current month's obligation, the amount withheld must include an amount to be applied toward liquidation of any overdue support.

(f) The total amount to be withheld for current month's obligations and overdue support shall not exceed the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 *V.S.C.* 1673(b)).

(g) The only basis for contesting a withholding is an error in the amount of current or overdue support, or in the identity of the alleged noncustodial parent.

(h) Improperly withheld amounts shall promptly be refunded.

(i) Income withholding shall be promptly terminated in cases where there is no longer a current order for support and all arrearages have been satisfied.

29.47 Exceptions To Income Withholding Requirement.

(a) The Manager or the Court shall grant an exception to income withholding required under section 29.46 where:

I. Either the custodial or noncustodial parent demonstrates, and the tribunal enters a written finding, that there is good cause not to require income withholding (Good cause shall include, but not be limited to, consideration of whether the obligor has paid in full any arrears owed, and has complied with the terms of previous withholding exceptions); or,

2. A signed written agreement is reached between the noncustodial and custodial parent, which provides for an alternative arrangement, and is reviewed and entered into the record by the tribunal

(b) Where immediate income withholding is not in place, the income of the noncustodial parent shall become subject to withholding, at the earliest, on the date on which the payments which the noncustodial parent has failed to make under a child support order are at least equal to the support payable for one month.

29.48 Employer Notification Requirement.

Employers must notify the Klamath Tribes Child Support Enforcement Office promptly when the noncustodial parent's employment is terminated with the employer. Notification shall include the noncustodial parent's last day of employment, last known address, and the name and address of the noncustodial parent's new employer if known.

Such notification shall occur regardless of whether termination of employment was voluntary or involuntary.

29.49 Employer Penalties.

(a) Any employer who discharges a noncustodial parent from employment, refuses to employ, or takes disciplinary action against any noncustodial parent because of withholding pursuant to a child support order shall be fined in the amount of one-thousand dollars ($1,000.00).

(b) An employer that fails to withhold income in accordance with the provisions of the income withholding order shall be liable for the accumulated amount the employer should have withheld from the noncustodial parent's income.

29.50 Processing Withholding Orders.

The Child Support Enforcement Office is responsible for receiving and processing income withholding orders from states, tribes, and other entities, and ensuring that orders are properly and promptly served on employers within the Klamath Tribe's jurisdiction.

29.51 Allocation of Withheld Amounts.

The Child Support Enforcement Office shall allocate withheld amounts across multiple withholding orders to ensure that in no case shall allocation result in a withholding for one of the support obligations not being implemented.

29.52 Garnishment of Per Capita Payments.

(a) Per capita payments may be garnished and applied to child support arrearages unless a child support order has specified the amount of arrearages owed and the obligor is current with an arrearage payment schedule approved by the Office or the Court. Action for garnishment of per capita payments may be brought by any party to the proceeding and shall be done in accordance with this section, Klamath tribal law, or the law of any other applicable jurisdiction.

(b) Requests for garnishment of Klamath Tribes per capita payments shall be presented to the Tribal Court and shall include the following:
   I. A sworn statement by the party, stating the facts authorizing issuance of the garnishment order;
   2. A description of the terms of the order requiring payment of support and/or arrearages, and the amount past due, if any; and,

3. A sworn statement that written notice has been provided to the obligor and the Office at least fifteen days prior to the party filing the request for garnishment.

(c) If an obligor is subject to two or more attachments for child support on account of different obligees, and the amount of the per capita payment to be garnished is not sufficient to respond fully to all of the attachments, the obligor's per capita payment available for garnishment shall be apportioned among the various obligees equally.

(d) Upon receipt of a request for garnishment of a Tribal Member's per capita payment that complies with this section, the Court shall issue a garnishment order indicating the amount to be garnished. The Clerk of the Court shall forward a copy of the order to all parties to the proceeding within five days of the entry of the order.

(e) Garnishment of Klamath Tribal member per capita payments is limited to 50% of the per capita payment pursuant to the Klamath Tribes Revenue Allocation Plan. This limit shall remain in effect unless and until the Revenue Allocation Plan is amended to provide for a different amount, which revised amount shall be complied with.

MODIFICATION AND TERMINATION

29.53 Grounds for Modification and Termination.

A child support order may be modified or terminated in accordance with the following:

(a) Substantial change of circumstances. Any party to the proceedings may initiate a request with the Manager for modification or termination of a child support order based upon a substantial change of circumstances. Such proceeding shall be in accordance with the procedures established by the Manager.

1. Except as provided for in subparagraph (2) of this section, if a child support award, or modification of award, is granted based upon substantial change in circumstances, twenty-four months must pass before another request for modification is initiated by the same party based upon a substantial change of circumstances.
2. The Child Support Enforcement Office may initiate proceedings at any time to modify an order of child support in cases of substantially changed circumstances if public assistance money is being paid to or for the benefit of the child.

3. Voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.

(b) Emancipation and death. Unless otherwise agreed in writing or expressly provided in the order, provisions for the support of a child are terminated by emancipation of the child, by the death of the parent obligated to support the child, or by the death of the child.

(c) Marriage and re-marriage to each other. Unless expressly provided by an order of the Child Support Enforcement Office, or the Court, the support provisions of the order are terminated upon the marriage to each other of parties to a paternity order, or upon remarriage to each other of the parties to the child support proceeding. Any remaining provisions of the order, including provisions establishing paternity, remain in effect unless otherwise expressly provided in the order.

(d) Compliance with support guidelines. A support order may be modified one year or more after it has been entered without showing a substantial change of circumstances in order to add an adjustment in the order of support consistent with updated Klamath Tribes child support guidelines.

(e) Child is eighteen. A child support order automatically terminates when a child reaches eighteen years of age unless the order provides that continued support is necessary to assist the child through completion of High School.

(f) Child support orders may only be modified as to installments accruing subsequent to the request for modification unless the request for modification is based upon an automatic termination provision.

29.54 Request to Modify Child Support Order.

Any time the Support Enforcement Office is providing support enforcement services in accordance with this Ordinance, the obligor, the obligee, the party holding the support rights or the Manager may submit a request to modify the existing order pursuant to this section.

(a) The request shall be in writing in a form prescribed by the Manager, and shall:
I. set out the reasons for modification;
2. state the telephone number and address of the party requesting modification;
3. state, to the extent known, whether there is pending in this state or any other jurisdiction any type of support proceeding involving the child;

4. state whether there exists a support order, in any tribal or state jurisdiction, involving the child, other than the order the party is moving to modify;
S. provide any other information requested by the Manager;
6. provide a certification as to the truth of the information provided in the request under penalty of perjury.

(b) The requesting party shall serve the request upon all parties to the proceeding, including the obligor, the obligee, the party holding the support rights and the Manager.

(c) The nonrequesting parties have 30 days to resolve the matter by stipulated agreement or to serve the requesting party and all other parties by regular mail with a written response setting forth objections to the request, and a request for hearing.

(d) Upon receipt of a written response submitted by a nonrequesting party setting forth objections to the request for modification and requesting a hearing, the Manager shall forward the request for modification to the Tribal Court for determination.

(e) When the moving party is the Manager and no objections and request for hearing have been served upon the Manager within 30 days of perfecting service of the request on all parties, the Manager may enter an order granting the modification request.

(f) When the requesting party is other than the Manager, and no objections and request for hearing have been served upon the moving party or the Manager within 30 days of perfecting service, the requesting party may submit to the Manager a true copy of the request, certificates of service for each party served, along with a certification that no objections or request for hearing have been served on the requesting party. Upon receipt of the copy of the request, certificates of service and certification from the requesting party, the Manager shall issue an order granting the modification request.

(g) A request for modification made under this section does not stay the Manager from enforcing and collecting upon the existing order unless so ordered by the Court.

29.55 Incremental Adjustment.

If an adjustment to a child support order is modified to increase the award by more than thirty percent and the change would cause a significant hardship, the adjustment may be

may be implemented in two stages, the first at the time of the entry of the order and the second six months from the entry of the order.

COMPLIANCE AND ENFORCEMENT

29.56 Failure to Comply With Support Order.

(a) If an obligor fails to comply with a support order, a petition or motion may be filed by a party to the proceeding to initiate a contempt action in the Court. If the Court finds there is reasonable cause to believe the obligor has failed to comply with a support order, the Court may issue an order to show cause requiring the obligor to appear at a certain time and place for a hearing, at which time the obligor may appear to show cause why the relief requested should not be granted. A copy of the petition or motion shall be served on the obligor along with the order to show cause.

(b) If the obligor contends at the hearing that he or she lacked the means to comply with the support order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the order.

(c) The Court retains continuing jurisdiction and may use a contempt action to enforce a support order until the obligor satisfies all duties of support, including arrearages that accrued pursuant to the support order.

ARREARAGES

29.57 Arrearages.

Arrearages shall include any monies, in-kind or traditional support recognized by the Child Support Enforcement Office to be owed to or on behalf of a child to satisfy a child support obligation or to satisfy in whole or in part arrears or delinquency of such obligation, whether denominated as child support, spousal support, or maintenance. Arrearages also include medical and child-care support obligations.

29.58 Compromise and Charge-off.

(a) The Child Support Enforcement Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to the Klamath Tribes up to the total amount of public assistance paid to or for the benefit of the persons to whom the support was incurred.

(b) The Child Support Enforcement Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to any other tribe or state up to the total amount of public assistance paid to or for the benefit of the persons to whom the support was incurred in accordance with agreements entered into between the Klamath Tribes and the tribe or state to which the child support arrearage collection rights have been assigned.

(c) Upon concurrence of the Child Support Enforcement Office, the Office may execute offers of compromise of disputed claims or may grant partial or total charge-off of child support arrears owed to a parent obligee agreeing to compromise or partial or total charge-off.

(d) The obligor may execute a written extension or waiver of any statute that may bar or impair the collection of the debt and the extension or waiver shall be effective according to its terms.

29.59 Charge-Off Requests

Charge-off requests shall be in writing and in accordance with the rules and procedures established by the Office.

29.60 Factors.

In considering an offer of compromise, or request for partial or total charge-off, the Child Support Enforcement Office shall consider the following factors:

(a) Error in law or bona fide legal defects that materially diminish chances of collection;

(b) Collection of improperly calculated arrears;

(c) Substantial hardship;

(d) Costs of collection action in the future that are greater than the amount to be charged off;

(e) Settlement from lump sum cash payment that is beneficial to the tribe or state considering future costs of collection and likelihood of collection;

(t) Tribal custom or tradition.

29.61 Substantial Hardship.

When considering a claim of substantial hardship, the Office should consider, but not be limited to the following factors:

(a) The child on whose behalf support is owed is reunited with the obligor parent because the formerly separated parents have reconciled or because the child has been returned to the parent from foster care or care of another.

(b) The obligor parent is aged, blind or disabled and receiving Supplemental Security income, Social Security, or similar benefits.

(c) The mother of the child is seeking charge-off of debt accrued on behalf of a child who was conceived as a result of incest or rape and presents evidence of rape or incest acceptable to KTCSE.

(d) Payment of the arrears interferes with the obligor's payment of current support to a child living outside the home.

(e) The obligor has limited earning potential due to dependence on seasonal employment that is not considered in the child support order, illiteracy or limited English speaking proficiency, or other factors limiting employability or earning capacity.

(f) The obligor's past efforts to pay child support and the extent of the obligor's participation in the child's parenting.

(g) The size of the obligor's debt.

(h) The obligor's prospects for increased income and resources.

29.62 Violation of Charge-Off Agreement.

When the obligor violates the terms of a conditional charge-off agreement, the Office, after notice and opportunity for a hearing, may enter an order providing:

(a) Any amount charged off prior to the violation shall remain uncollectible;

(b) Re-establishment of collection for further amounts that would have been charged off if not for the violation;

(c) That the obligor may not reinstate the terms of the charge-off agreement by renewed compliance with its terms, unless the Office agrees to reinstate the conditional charge-off upon a finding of good cause for the violation.

RECOGNITION, ENFORCEMENT AND MODIFICATION OF FOREIGN CHILD SUPPORT ORDERS; EXERCISE OF JURISDICTION IN SIMULTANEOUS PROCEEDINGS

29.63 Full Faith and Credit.

The Klamath Tribes recognize and shall enforce child support orders issued by other Tribes, Tribal organizations, States and foreign governmental entities in accordance with the requirements of the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. 1738B, whether such orders are administrative or judicial in nature.

29.64 Requests for Establishment, Recognition and Enforcement.

All requests for establishment, recognition and enforcement of child support orders and associated proceedings shall be presented by a party to the case, or a Tribe or State tribunal, to the Klamath Tribes Child Support Enforcement Office for processing.

29.65 Simultaneous Proceedings.

(a) The Child Support Enforcement Office and Klamath Tribal Court may exercise jurisdiction to establish a support order if the application for assistance is filed with the Child Support Enforcement Office after a petition or comparable pleading is filed in another Tribe or State tribunal only if:

1. The application for assistance is filed with the Child Support Enforcement Office before the expiration of the time allowed in the other Tribe or State tribunal for filing a responsive pleading challenging the exercise of jurisdiction by the other Tribe or State;
2. The contesting party timely challenges the exercise of jurisdiction in the other Tribe or State; and
3. If relevant, the Klamath Tribes is the home Tribe of the child.

(b) The Klamath Tribes Child Support Enforcement Office and Tribal Court may not exercise jurisdiction to establish a support order if the application for assistance is filed before a petition or comparable pleading is filed in another Tribe or State if:

1. The application, petition or comparable pleading in the other Tribe or State is filed before the expiration of the time allowed for filing a responsive pleading challenging the exercise of jurisdiction by the Klamath Tribes;

2. The contesting party timely challenges the exercise of jurisdiction in the Klamath Tribes; and,
3. If relevant, the other Tribe or State is the home tribe or state of the child.

29.66 Continuing, Exclusive Jurisdiction to Modify Child Support Order.

(a) The Klamath Tribes shall have continuing, exclusive jurisdiction over a child support order entered by the Klamath Tribes for the benefit of a child who is an enrolled member of the Klamath Tribes, or eligible for enrollment with the Klamath Tribes, until all of the parties who are individuals have filed written consents with the tribunal of another Tribe or State to modify the order and transfer continuing, exclusive jurisdiction.

(b) The Court may not exercise its continuing, exclusive jurisdiction to modify the order if the order has been lawfully modified by a tribunal of another Tribe or State. The Klamath Tribes shall recognize the continuing, exclusive jurisdiction of a tribunal of another Tribe or State that has lawfully issued a child support order.

(c) If a Klamath Tribes child support order is lawfully modified by a tribunal of another Tribe or State, the Klamath Tribes loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued and may only:
1. Enforce the order that was modified as to amounts accruing before the modification;
2. Enforce nonmodifiable aspects of that order;
3. Provide other appropriate relief for violations of that order that occurred before the effective date of the modification.

(d) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

29.67 Initiating and Responding Tribunal of the Klamath Tribes.

(a) The Klamath Tribes Child Support Enforcement Office shall serve as the initiating tribunal to forward proceedings to another Tribe or State and as a responding tribunal for proceedings initiated in another Tribe or State.

(b) The Child Support Enforcement Office may serve as an initiating tribunal to request a tribunal of another Tribe or State to enforce or modify a support order issued by the Klamath Tribes.

(c) The Klamath Tribes Child Support Enforcement Office, provided it has continuing, exclusive jurisdiction over a support order, shall act as the responding tribunal to enforce or modify the order. If a party subject to the continuing, exclusive jurisdiction of the Klamath Tribes does not reside in the issuing Tribe or State jurisdiction, in subsequent proceedings, the Klamath Tribes tribunal may seek assistance to obtain discovery and receive evidence from a tribunal of another Tribe or State.

(d) If the Klamath Tribes lacks continuing, exclusive jurisdiction over a child support order, or a spousal support order, it may not serve as a responding tribunal to modify a child support or spousal support order of another Tribe or State.

29.68 Determination of Controlling Order.

(a) If a proceeding is brought under this Ordinance, and one tribunal has already issued a child support order, the order of that tribunal controls and must be so recognized.

(b) If a proceeding is brought under this Ordinance, and two or more child support orders have been issued by tribunals of this Tribe or another Tribe or State with regard to the same obligor and child, the following rules shall be used to determine which order to recognize for purposes of continuing, exclusive jurisdiction:

1. If only one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, the order of that tribunal controls and must be recognized.
2. If more than one of the tribunals would have continuing, exclusive jurisdiction under this Ordinance, an order issued by a tribunal in the current home tribe or State of the child controls, and must be recognized, but if an order has not been issued in the current home Tribe or State of the child, the order most recently issued controls and must be recognized.
3. If none of the tribunals, except the Klamath Tribes, would have continuing, exclusive jurisdiction under this Ordinance, the Klamath Tribes shall issue a child support order, which controls and must be recognized.

29.69 Child Support Orders For Two or More Obligees.

In responding to multiple registrations or requests for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another Tribe or

State, such orders shall be enforced in the same manner as if multiple orders had been issued.

29.70 Application of Law of the Klamath Tribes.

Except as otherwise provided in this Ordinance, a responding tribunal of the Klamath Tribes:

(a) Shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in the Klamath Tribes and may exercise all powers and provide remedies available in those proceedings; and

(b) Shall determine the duty of support and the amount payable in accordance with the law and support guidelines of the Klamath Tribes.

29.71 Duties as Initiating Tribunal.

(a) Upon the receipt of an application or petition authorized by this Ordinance, the Child Support Enforcement Office shall forward three copies of the application or petition and its accompanying documents:
1. To the responding tribunal in the responding Tribe or State; or
2. If the identity of the responding tribunal is unknown, to the information agency of the responding Tribe or State with a request that the application or petition and documents be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) As the Initiating tribunal, the Child Support Enforcement Office and/or Klamath Tribal Court shall issue any certificates or other documents, make findings, specify the amount of support sought, and provide any other documents necessary to satisfy the requirements of the responding Tribe or State.

29.72 Duties and Powers as Responding Tribunal.

(a) When the Klamath Tribes Child Support Enforcement Office receives an application, petition or comparable pleading from an initiating tribunal, the Child Support Enforcement Office shall take appropriate action, in accordance with the provisions of this Ordinance, to assist the initiating tribunal, which may include initiation of proceedings to accomplish one or more of the following:
1. Issue or enforce a support order, modify a child support order or take action to establish parentage;

2. Registration of initiating tribunal 's order with the Klamath Tribes Tribal Court for recognition and enforcement;
3. Order an obligor to comply with a support order, specifying the amount and the manner of compliance;
4. Order income withholding;
5. Enforce orders by civil contempt;
6. Set aside property for satisfaction of the support order;
7. Place liens and order execution;
8. Order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment and telephone number at the place of employment;
9. Order the obligor to seek appropriate employment by specified methods;
10. Award reasonable attorney's fees and other fees and costs;
11. Garnish per capita payments; and
12. Grant any other available remedy.

(b) The Klamath Tribes responding tribunal shall include in a support order issued pursuant to this section, or in the documents accompanying the order, the calculations on which the support order is based.

(c) Ifthe Klamath Tribes tribunal issues an order pursuant to this section, it shall send a copy of the order by first-class mail to the applicant/petitioner and the respondent, any other party, and to the initiating tribunal, if any.

29.73 Inappropriate Tribunal.

Ifan application, petition, or comparable pleading is received by the Klamath Tribes Child Support Enforcement Office and the Office deems it is an inappropriate tribunal, it shall forward the pleading and accompanying documents to an appropriate tribunal in another Tribe or State and notify the applicant/petitioner by first-class mail where and when the application or pleading was sent.

29.74 Credit for Payments.

Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another Tribe or State must be credited against the amounts accruing or accrued for the same period under a support order issued by the Klamath Tribes.

29.75 Employer's Receipt of Income-Withholding Order of Another Tribe or State.

An income-withholding order issued in another tribe or jurisdiction may be sent by first-class mail to the obligor's employer without first filing a request for assistance with the Klamath Tribes Child Support Enforcement Office.

29.76 Employer's Compliance With Income-Withholding Order of Another Tribe or State.

(a) Upon receipt of the income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued by another jurisdiction that appears regular on its face as if it had been issued the Klamath Tribes.

(c) Except as otherwise inconsistent with section 29.46(f), the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order that specify:

1. The duration and the amount of periodic payments of current child support, stated as a sum certain;
2. Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
3. The person or agency designated to receive payments and the address to which the payments are to be forwarded;
4. The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal and the obligee's attorney, stated as sums certain;
5. The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

29.77 Administrative Enforcement of Order.

(a) A party seeking assistance to enforce a support order or an income-withholding order, or both, issued by a tribunal of another tribe or jurisdiction shall send the documents required for registering the order set forth at section 29.79 to the Klamath Tribes Child Support Enforcement Office.

(b) Upon receipt of the documents, the support enforcement agency shall register the order with the Court, and consider, if appropriate, use of any administrative procedure authorized by the laws of the Klamath Tribes to enforce a support order or an income-withholding order, or both.

29.78 Contest by Obligor.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued by another Tribe or State and received directly by a Tribal employer in the same manner as if a tribunal of the Klamath Tribes had issued the order.

(b) The obligor shall give notice of any contest to:
1. The support enforcement agency providing services to the obligee.
2. Each employer that has directly received an income-withholding order; and
3. The person or agency designated to receive payments in the income-withholding order, or if no person or agency is designated, to the obligee.

REGISTRATION FOR ENFORCEMENT AND MODIFICATION

29.79 Registration of order for enforcement; procedure.

(a) A support order or income-withholding order of another Tribe or State may be registered in the Klamath Tribes by sending the following documents and information to the Klamath Tribes Child Support Enforcement Office for registering;
I. A letter of transmittal to the Child Support Enforcement Office requesting registration and enforcement;
2. Two copies of all orders to be registered, including any modification of an order;
3. A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;
4. The name of the obligor and, if known:
   t. The obligor's address and social security number;
   11. The name and address of the obligor's employer and any other source of income of the obligor;
   iii. A description and the location of property of the obligor in this state not exempt from execution; and
   1v. The name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.
5. Any other information requested by the Child Support Enforcement Office.

(b) Upon receipt of a request for registration and necessary supporting documentation, the Child Support Enforcement Office shall cause the order to be

registered, together with one copy of the supporting documents and information, regardless of their form.

29.80 Effect of registration for enforcement.

(a) A support order or income-withholding order issued by another tribe or state is registered when the order is filed in the Tribal Court.

(b) A registered order issued in another tribe or jurisdiction is enforceable in the same manner and is subject to the same procedures as an order issued by the Court.

(c) Except as otherwise provided for in this Ordinance, a tribunal of the Klamath Tribes shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

29.81 Choice of Law.

The law of the issuing Tribe or State governs the nature, extent, amount and duration of current payments and other obligations of support and the payment of arrearages under the order.

29.82 Notice of Registration of Order.

(a) When a support order or income-withholding order issued in another Tribe or State is registered, the Child Support Enforcement Office shall notify the nonregistering party. Notice must be given by first-class, certified or registered mail or by any means of personal service authorized by the law of the Klamath Tribes. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) The notice must inform the nonregistering party:

1. That a registered order is enforceable as of the date ofregistration in the same manner as an order issued by a tribunal of the Klamath tribes;
2. That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after the date of mailing or personal service of the notice;
3. That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and
4. Of the amount of any alleged arrearages.

(c) Upon registration of an income-withholding order for enforcement, the Child Support Enforcement Office shall notify the obligor's employer pursuant to the income-withholding laws of the Klamath Tribes.

29.83 Procedure to Contest Validity or Enforcement of Registered Order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in the Klamath Tribes shall request a hearing before the Tribal Court within 20 days after the date of mailing or personal service of notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, to contest the remedies being sought or the amount of any alleged arrearages.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the Court shall schedule the matter for hearing and give notice to the parties, including the Child Support Enforcement Office, by first-class or electronic mail of the date, time and place of the hearing.

(d) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

1. The issuing tribunal lacked personal jurisdiction over the contesting party;
2. The order was obtained by fraud;
3. The order has been vacated, suspended, or modified by a later order;
4. The issuing tribunal has stayed the order pending appeal;
5. There is a defense under the law of the Klamath Tribes to the remedy sought;
6. Full or partial payment has been made;
7. The statute of limitation precludes enforcement of some or all of the arrearages;
8. The order was issued in violation of the Indian Child Welfare Act.

(e) If a party presents evidence establishing a full or partial defense to the validity or enforcement of the order, the Court may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence and issue other appropriate orders. All remedies available may be used to enforce an uncontested portion of the registered order under the laws of the Klamath Tribes.

(f) If the contesting party does not establish a defense to the validity or enforcement of the order, the Court shall issue an order confirming the order.

29.84 Confirmed Order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

29.85 Registration For Modification

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another Tribe or State shall register that order with the Klamath Tribes in accordance with the procedures of this Ordinance if the order has not been registered. A request for modification in accordance with the terms of this Ordinance may be submitted at the same time as the request for registration, or later. The request for modification must specify the grounds.

29.86 Effect of Registration for Modification

(a) The Klamath Tribes may enforce a child support order of another Tribe or State registered for purposes of modification, in the same manner as if the order had been issued by the Klamath Tribes, but the registered order may be modified only after notice and hearing, the Klamath Tribes Child Support Enforcement Department or Tribal Court finds, in accordance with the provisions of this Ordinance, that:

I. The following requirements are met:

1. The child, the individual obligee and the obligor do not reside in the issuing tribe or nation;

ii. The requesting party who is a nonresident of the Tribe seeks modification; and

m. The respondent is subject to the personal jurisdiction of the Klamath Tribes; or

2. The child or a party who is an individual is subject to the personal jurisdiction of the Court and all of the parties who are individuals have filed a written consent in the issuing tribunal for the Klamath Tribes to modify the support order and assume continuing, exclusive jurisdiction over the order.

(b) Modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order

issued by a tribunal of the Klamath Tribes and the order may be enforced and satisfied in the same manner.

(c) The Klamath Tribes may not modify any aspect of a child support order that may not be modified under the law of the issuing Tribe or State. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be so recognized under the provisions of this Ordinance, establishes aspects of the order that are nonmodifiable.

(d) On issuance of the order modifying a child support order issued in another Tribe or State, a tribunal of the Klamath Tribes becomes the tribunal having continuing, exclusive jurisdiction.

DISTRIBUTION OF CHILD SUPPORT COLLECTIONS

29.87 Prompt disbursement of collections.

The Klamath Tribes Child Support Enforcement Office shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The Office shall furnish to a requesting party or tribunal of another jurisdiction a certified statement by the custodian of the record of the amounts and dates of all payments received.

29.88 Distribution of child support collections.

(a) The Child Support Enforcement Office shall, in a timely manner:

1. Apply collections first to satisfy current support obligations, except that any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Support Enforcement Office must be applied to satisfy child support arrearages.
2. Pay all support obligations to the family unless the family is currently receiving or formerly received assistance from the Tribal TANF program and there is an assignment of support rights to the Tribe's TANF agency, or the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from another state or tribal IV-D agency.

(b) Current recipient of Klamath Tribal TANF. If the family is currently receiving assistance from the Tribal TANF program and has assigned support rights to the Tribe and:

1. There is no request for assistance in collecting support on behalf of the family from a State or other Tribal IV-D agency, the Child Support Enforcement Office may retain collections on behalf of the family, not to

exceed the total amount of Tribal TANF paid to the family. Any remaining collections shall be paid to the family.

2. There is a request for assistance in collecting support on behalf of the family from a State or other Tribal IV-D agency, the Child Support Enforcement Office may retain collections, not to exceed the total amount of Tribal TANF paid to the family. Any collections exceeding the total amount of Klamath Tribal TANF paid to the family shall be distributed in one of the following manners:
   (i) The Child Support Enforcement Office may send any remaining collections, as appropriate, to the requesting State IV-D agency for lawful distribution, or to the requesting Tribal IV-D agency for lawful distribution; or
   (ii) The Child Support Enforcement Office may contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to determine appropriate distribution under 45 CFR 309.115, and distribute collections as directed by the other agency.

(c) Former recipient of Klamath Tribal TANF. If the family formerly received assistance from the Klamath Tribal TANF program and there is an assignment of support rights to the Tribe, and:

1. There is no request for assistance in collecting support from a State or other Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must pay current support and any arrearages owed to the family to the family and may then retain any excess collections, not to exceed the total amount of Tribal TANF paid to the family. Any remaining collections must be paid to the family.
2. There is a request for assistance in collecting support from a State or other Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must:
   1. Send all support collected, as appropriate, to the requesting State or other Tribal IV-D agency for lawful distribution; or,
   11. Contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to determine appropriate distribution under 45 CFR 309.1 15, and distribute collections as directed by the other agency.

(d) Requests for assistance from State or other Tribal IV-D agency. Ifthere is no assignment of support rights to the Klamath Tribes as a condition of receipt of Klamath Tribal TANF and the Child Support Enforcement Office has received a request for assistance in collecting support on behalf of the family from a state or

another Tribal IV-D agency under 45 CFR 309.120, the Child Support Enforcement Office must:

1. Send all support collected, as appropriate, to the requesting State or other Tribal IV-D agency for lawful distribution; or,
2. Contact the requesting State IV-D agency to determine appropriate distribution under section 457 of the Act or the other Tribal IV-D agency to determine appropriate distribution under 45 CFR 309.115, and distribute collections as directed by the other agency.

29.89 Federal income tax refund offset collections.

Any collections received based on Federal income tax refund offset under section 464 of the Act and distributed by the Child Support Enforcement Office must be applied to satisfy child support arrearages.

MISCELLANEOUS

29.90 Stays.

Child support orders issued by the Child Support Enforcement Office and/or the Tribal Court may not be stayed pending appeal unless there is substantial evidence showing that the obligor would be irreparably harmed and the obligee would not.

29.91 Mistake of fact.

Except as otherwise expressly provided in this Ordinance, a parent may be prospectively relieved from application of the terms of an administrative order issued by the Child Support Enforcement Office, or an order of the Tribal Court, upon proof of a mistake of fact, the truth of which would render the order void or otherwise invalid, when such mistake is brought forward within one year of its discovery and could not have been discovered before such time with reasonable diligence.

29.92 Cessation of Collection Efforts.

An obligee may request the Child Support Enforcement Office to cease child support collection efforts if it is anticipated that physical or emotional harm will be caused to the parent or caretaker of the child, or to the child for whom support was to have been paid.

29.93 Confidentiality of Records.

Child support records, including paper an electronic records, are confidential and may be disclosed or used only as necessary for the administration of the program. Office

employees who disclose or use the contents of any records in violation of this section are subject to discipline, up to and including dismissal from employment and civil penalty. Program administration includes, but is not limited to:

(a) Extracting and receiving information from other databases as necessary to perform the Office's responsibilities;

(b) Comparing and sharing information with public and private entities as necessary to perform the Office's responsibilities, to the extent not otherwise prohibited by applicable Federal law or Klamath Tribes Child Support Enforcement Program Rules and Procedures;

(c) Exchanging information with tribal or state agencies administering programs under Title XIX and Part A of Title IV of the Social Security Act as necessary for the Office and the tribal and state agencies to perform their responsibilities under state and federal law.

29.94 No Waiver of Sovereign Immunity.

No provision in this Ordinance expressly or impliedly waives the sovereign immunity of the Klamath Tribes, the Klamath Tribes Judiciary, or its officials, agents or employees, nor is intended to operate as consent to suit.

29.95 Effective Date.

This Ordinance shall be effective upon adoption and approval of the General Council in accordance with General Council Resolution.

29.96 Amendment or Repeal.

This Ordinance, and any section, part and word hereof, may be amended or repealed by a Resolution adopted by majority vote of the Klamath Tribes Tribal Council in accordance with the Constitution of the Klamath Tribes.

29.97 Severability.

Should any provision set forth in this Plan, or the application thereof to any person or circumstance, be held invalid for any reason whatsoever by a court of competent jurisdiction, the full remainder of such provision or the application of the provision to another person or circumstance shall not be effected thereby.

Certification

We, the undersigned, Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a General Council meeting held on the d..31!i day of febw.all Y, 200_2 with a quorum present, the General Council took action and duly adopted this Plan by a vote of 55 for, '-/ opposed, and I/ abstentions by General Council Resolution 200?-00/

Jo . k
Chairman
The Klamath Tribes

Torina Case
Secretary
The Klamath Tribes

LEGISLATIVE HISTORY

1. Title 4, Chapter 29 originally adopted and approved by General Council on February d?f:!_, 2008 pursuant to General Council Resolution No. 2008-00!_.

The Klamath Tribes

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EXECUTIVE COMMITTEE RESOLUTION 99-66

RESOLUTION SUBMITTING TO THE GENERAL COUNCIL FOR FINAL ACTION: (1} ORDINANCES IMPLEMENTING *THE* KLAMATH TRIBAL COURTS, AS ESTABLISHED BY ARTICLE V OF THE CONSTITUTION AND BY-LAWS FOR THE KLAMATH TRIBES (2} THE REPEAL OF THE CHILD WELFARE ORDINANCE; AND (3) PHASED-IN APPROACH FOR IMPLEMENTING THE KLAMATH TRIBAL COURTS.

WHEREAS the Klamath Tribes are a sovereign Indian tribal government, recognized as such by the Secretary of the Interior of the United States of America ("Secretary"); and

WHEREAS the Constitution and By-Laws for the Klamath Tribe ("Constitution") was duly approved, adopted, and most recently amended on August 17, 1996 by the membership of the Klamath Tribes; and

WHEREAS Article I of the Constitution provides that the General Council shall be comprised of all eligible voters of the Klamath and Modoc Tribes and Yaahooskin Band of Snake Indians; and

WHEREAS the General Council is the governing body of the Klamath Tribes by the authority of Article VI of the Constitution; and

WHEREAS Section I of Article VI of the Constitution authorizes the General Council to adopt ordinances providing for the maintenance of law and order; and

WHEREAS, pursuant to Article VII of the Constitution, the Tribal Executive Committee is elected by the General Council to act on its behalf for the execution of the day-to-day government and business of the Klamath Tribes; and

WHEREAS Section I of Article V of the Constitution establishes the Klamath Tribes Judiciary, consisting of the Klamath Supreme Court and the Klamath Tribal Court, Klamath Juvenile Court, Klamath Peacemaker Court and such other lower courts that the Tribes may establish from time to time (collectively, "Tribal Courts"); and

WHEREAS to enhance and to promote the effective exercise of the sovereign powers of the Klamath Tribes over their territory, including persons, activities, and resources within that territory, the Executi ve Committee finds that it is in the best interest of the Tribes to implement Article V of the Constitution by enacting ordinances governing the administration, practices, and procedures of the Klamath Tribal Courts; and

WHEREAS to implement fully Article V of the Constitution and to enhance and to promote the effective exercise of the sovereign powers of the Klamath Tribes over its children, the Executive Committee finds that it is in the best interest of the Tribes to enact a Juvenile Ordinance governing the administration, practices, and procedures of the Juvenile Court in child custody matters; and

WHEREAS, by Executive Committee Resolution No. 99-08, dated March 23, 1999, the Executive Committee of the Klamath Tribes approved of various ordinances pertaining to the administration, procedures, and practices of the Klamath Tribal Courts; and

WHEREAS to reduce duplication and to update tribal law regarding the care and protection of children, by Executive Committee Resolution 99-08, dated March 23, 1999, the Executive Committee detennined that it is in the best interest to repeal the Child Welfare Ordinance and to replace it with an updated Juvenile Ordinance; and

WHEREAS Section 1X of Article V of the Constitution, which establishes the Klamath Tribes Judiciary, calls for General Council approval of ordinances implementing the Klamath Tribal Courts and, accordingly, the Executive Committee believes that such ordinances should be submitted to the General Council for approval and ratification; and

WHEREAS the Executive Committee finds that it is in the best interest of the Klamath Tribes to implement the Klamath Tribal Courts under an orderly, phased-in approach that will accommodate those steps necessary for the operation of the Tribal Courts including, but not limited to the provision of adequate funding, the election of a Tribal Court Judge, the provision of essential infrastructure and staff for the Tribal Courts, and the coordination of affected departments, commissions, and agencies within the Klamath Tribes; and

WHEREAS the Executive Committee believes that, under the phased-in approach, priority should be given to implementation of the Juvenile Ordinance and that, until further authorized by the Executive Committee or the General Council, the Klamath Tribal Courts should not be authorized to accept or hear any matters except those arising under or pertaining to the Juvenile Ordinance.

NOW, THEREFORE, BE IT RESOLVED, that the following ordinances, attached hereto and approved by the Executive Committee pursuant to Executive Committee Resolution 99-08, dated March 23, 1999, shall be submitted to the General Council for consideration and final approval:

(1) Tribal Court Ordinance, to be codified as Chapter 11 of Title 2 of the Klamath Tribal Code;

(2) Rules of Civil Procedure, to be codified as Chapter 12 of Title 2 of the Klamath Tribal Code;

(3) Rules of Evidence, to be codified as Chapter 14 of Title 2 of the Klamath Tribal Code;

(4) Juvenile Ordinance, to be codified as Chapter 15 of Title 2 of the Klamath Tribal Code; and

(5) Rules of Appellate Procedure, to be codified as Chapter 16 of Title 2 of the Klamath Tribal Code.

BE IT FURTHER RESOLVED that the Executive Committee, as set forth in Executive Committee Resolution No. 99-08, dated March 23, 1999, recommends that the General Council approve and ratify the repeal of the Child Welfare Ordinance and replacement ofit with the Juvenile Ordinance; *provided* that such repeal and replacement shall become effective at such time that the Executive Committee determines by resolution that the Juvenile Court is established and prepared to begin accepting matters authorized under the Juvenile Ordinance.

BE IT FURTHER RESOLVED that Executive Committee hereby recommends to the General Council that the development and general functioning of the Klamath Tribal Courts shall be implemented pursuant to an orderly, phased-in approach under the direction of the Executive Committee, with an initial priority being given to those steps needed for the Juvenile Court to begin adjudicating the matters authorized under the Juvenile Ordinance.

BE IT FURTHER RESOLVED, in accordance with the phased-in approach for implementing the Klamath Tribal Courts, the Executive Committee recommends to the General Council that, until further authorized by the Executive Committee or the General Council, the Klamath Tribal Courts should not be authorized to accept or hear any matters except those arising under or pertaining to the Juvenile Ordinance.

BE IT FINALLY RESOLVED that all of the foregoing actions and recommendations of the Executive Committee be submitted promptly to the General Council for consideration and final action.

CERTIFICATION

We, the undersigned, as the duly elected Chairman and Secretary of the Klamath Tribes, do hereby certify that at a regular meeting of the Executive Committee of the Klamath Tribes held on the 23rd day of November, 1999, where a quorum was present, the Executive Committee duly adopted the foregoing resolution by a vote of 8 for and 0 against, with 1 abstaining.

Allen Foreman, Chairman
The Klamath Tribes

Torina Case, Secretary
The Klamath Tribes

KLAMATH TRIBES

CHILD WELFARE ORDINANCE

Klamath Tribal Code S s.01

(a) Purpose

The purpose of this ordinance is to protect the children and families of the Klamath Tribes by establishing procedures in child welfare matters.

(b) Policy

rn child welfare matters it is the policy of the Klamath Tribes that:

(1) There is no resource that is more vital to the continued existence and integrity of the Klamath Tribes than its children;

(2) rt is important to promote and strengthen the unity and security between the Klamath child and his or her natural family, to prevent the unwarranted removal of Klamath children from their homes, and to promote and strengthen the stability of Klamath families;

(3) If removal of the child from the family is necessary, then the primary considerations in placement of a Klamath child are to insure that the child is raised within the Klamath culture, that the child is raised within his/her family if possible, and that the child is raised as an Indian;

(4) If reunification of the immediate family is not possible, then long term placement without termination of parental rights is the strongly preferred approach of the Tribes;

(5) Cooperative intergovernmental relations are to be encouraged between the Klamath Tribes and the State of Oregon and other states and tribes in child welfare matters involving Klamath families and children;

(6) supportive child welfare and family services that respect the traditions and the cultural values of the

Tribes are to be made available to Klamath children and families;

(7) The right of Klamath children to know and learn their culture and heritage by experiencing that culture on a daily basis is to be preserved;

(8) To fully implement the provisions of the Klamath Tribes-state of Oregon Indian Child Welfare Agreement.

(c) Authority of Klamath Tribes Oyer Child Welfare Matters

The Tribes shall exercise the authority of the Indian Child Welfare Act of 1979 and it's amendments (if any) for the protection of the children identified in the Act and the Tribal-state Agreement entered into with the State of Oregon.

(1) The Child Welfare Placement board of the Klamath Tribes has the authority to start the process of enrollment of eligible children with the approval of the biological parents, to provide services, to place children, to approve and license foster homes, to monitor and to direct the ICWA outreach Specialist, to work with other governments and agencies affecting Klamath children and families, and to intervene in child custody proceedings in other forums.

(2) The Child Welfare Placement Board and ICWA Specialist shall make regular monthly reports (either written or oral) to the Klamath Tribes Executive Committee.

(d) Definitions

(1) "Active efforts" is the level of services that the agency seeking to remove a Klamath child from his/her home must provide to the Klamath family in an effort to prevent the removal of the child. At a minimum, "active efforts" must include case planning specifically tailored and designed to meet the current and ongoing needs of the individual Klamath family and Klamath child in order to improve the conditions in the parents' home so that the removal of the child from the home can be prevented or if the child has been removed

from the home so that the child may be returned to his/her home.

(2) "Executive Committee" shall mean the Executive Committee of the Klamath Tribes.

(3) "Extended familyi• means a person who has reached the age of eighteen years old and who is the child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin or stepparent. The Klamath Tribes may also exercise it cultural custom of recognizing other relatives, no matter the degree of relationship into the definitions of extended family as defined by the Indian Child Welfare Act of 1979.

(4) "ICWA outreach Specialist" is a tribal employee in the Tribal counseling and Family service Program who servs as the contact person for the Tribes on child welfare matters; provides services to tribal children and families on child welfare matters; and serves as the staff member of the Child Welfare Placement Board of the Tribes.

(5) "Indian Foster Home" is a foster home in which at least one parent who has reached the age of 18 years is an enrolled member of a federally recognized tribe.

(6) "Klamath child" is any unmarried person who is under age eighteen and is either (a) a member or is eligible to be a member of the Klamath Tribes or (b) is the biological child of a person who is a member of or eligible to be a member of the Klamath Tribes, and is not enrolled in another tribe.

(7) "Klamath Indian Foster Home" is a foster home in which at least one parent who has reached the age of 18 years is enrolled or eligible to be enrolled in the Klamath Tribes.

(8) "Placement Board" is the Child Welfare Placement Board composed of at least five (5) tribal members and the

Tribes' ICWA Specialist. It is established according to the provisions of the Klamath Tribes' Committee Ordinance and subject to the provisions of that ordinance except as provided herein.

(9) "Tribal-State Agreement" is the agreement entered into by the state of Oregon and the Klamath Tribes pursuant to Section 1919 of the Indian Child Welfare Act of 1979, 25 u.s.c. § 1919 and O.R.S. §190.110(2).

_(e) Child Welfare Placement Board

The Child Welfare Placement Board shall consist of six (6) members enrolled tribal members which shall be three (3) women and three (3) men.

These individuals shall:

1. be of good character and habits;
2. have a suitable temperament;
3. possess knowledge of the Klamath Tribes and its cultural heritage, customs and traditions;
4. be at least 18 years of age;
5. maintain abstinence form alcohol and drugs while serving on the Placement Board.

The Board shall be appointed by the Tribal Chairman for a two (2) year term and individuals may be reappointed. The Board will follow other rules as provided for in the Tribes' Committee Ordinance.

(f) Authority of ICWA outreach Specialist and Tribal Counseling and Family Service Program

The ICWA outreach Specialist and Tribal Counseling and Family Service Program staff shall perform the delegated child welfare functions stated in this ordinance, in addition to other tasks assigned/delegated by appropriate authority. The ICWA Outreach Specialist and Tribal Counseling and Family Service staff are tribal personnel and shall be subject to all tribal management rules and regulations in the same manner as other tribal employees.

(g) Duties of the ICWA Outreach Specialist

The ICWA outreach Specialist shall be responsible for the following:

(1) providing tribal services to Klamath children and their families;

(2) advising the Placement Board, Executive Committee and other jurisdictions of the needs of Klamath families and children for child welfare services and advocating the provision of such services from tribal, state, federal, and private resources;

(3) assisting other Klamath tribal programs and programs affecting Klamath children and families;

(4) gathering information on foster homes, shelter care facilities, and adoptive homes, and recommending approval to the Placement Board on the licensing and certifying of such homes and facilities;

(5) carrying out all duties as prescribed in Sections (q) and (r); and

(6) applying for Indian Child Welfare Act grants;

(7) informing the Bureau of Indian Affairs of the officially designated agent for service of the Klamath Tribes in child custody proceedings;

(8) performing other child welfare duties as deemed necessary by the Placement Board or Executive Committee, or General Manager; and,

(9) appearing in other forums as the Klamath Tribal official representative, including but not limited to appearances pursuant to the Tribal-State Agreement.

(h) Authority to Approve and License Foster Homes

(1) The Placement Board is authorized to license foster homes of tribal members within the state of Oregon.

(2) In licensing and certifying a home for foster care pursuant to the Tribes• authority, the ICWA Outreach Specialist and Tribal counseling and Family service Program staff shall use the criteria established by the Klamath Tribes. Such criteria need not be reduced to writing and should be flexible enough to allow for variation when dictated by the situation; provided, however, that the baseline criteria for foster homes and foster parents set out in this ordinance, sections (j), (k), and (1), must be applied as is.

(3) The foster care inspector is authorized to make a complete investigation to determine the adequacy of the foster care home. The inspector is authorized to examine not only the potential foster care parents and any other tribal member who is familiar with the applicants and is familiar with the type of care they provide to their children, but also any other sources of information including state, federal, or tribal agencies.

(i) Procedures for Approval of Foster Homes

(1) The required information about the foster home and the foster family should be gathered by the Social Services staff.

(2) Either the ICWA Specialist or prospective foster parents may file an application for license of a foster home. The Tribal counseling and Family Service Program develop an application form and make copies available to interested tribal members.

(3) The Placement Board and Tribal counseling and Family Service Program shall make every effort to complete the license processing for foster homes applications within ninety (90) days of receipt of application at Tribal Office.

(4) The Klamath Tribes may recognize state foster home licensing as meeting foster home requirements of the Klamath Tribes.

(j) Foster Care Home Baseline Requirements

(1) The home shall be constructed, arranged and maintained so as to provide for the health and safety of all occupants. The ICWA Outreach Specialist and Tribal Counseling and Family service Program staff may, upon twenty-four (24) hours notice, inspect a foster home/care dwelling at any time.

(2) Heating, ventilation, and light shall be sufficient to provide a comfortable, airy atmosphere. FUrnishings and housekeeping shall be adequate to protect the health and comfort of the foster child.

(3) Comfortable beds shall be provided for all members of the family. Sleeping rooms must provide adequate opportunities for rest. All sleeping rooms must have a window of a type that may be opened readily and may be used for evacuation in case of fire.

(4) Play space shall be available and free from hazards which might be dangerous to the life or health of the foster child.

(k) Foster Family Baseline Requirements

(1) All members·of the household must be in such physical and mental health that will not adversely effect either the health of the child or the quality and manner of his or her care.

(2) Members of the foster family shall be of good character and habits. A foster family shall not be licensed if any member of the family living in the home or any person living in the home has ever been convicted of a sex offense or has received felony convictions within the last three (3) years. Exceptions concerning non-sexual felony convictions may be made if adequate information is provided indicating that a change of character has occurred.

(3) The person in charge of the foster home shall be of suitable temperament to care for the children, shall

understand the special needs of the child as an Indian person and shall be capable of bringing the child up as an Indian person who is well adjusted and able to get along both within the tribal community and in the surrounding non-Indian community as well.

(4) Foster parent(s) shall be responsible, mature individual(s) who are, in the view of most community members, of good character. Foster parent(s) must be at least eighteen (18) years old, but there is no upper age level provided the Foster parent has the physical and emotional stamina to deal with the care and nurturing of a foster child.

(5) The foster parent(s) must be willing, when necessary, to cooperate with the biological parents or other members of the child's family and must be willing to help the family re-establish the necessary family ties. The foster parent(s) must be willing to cooperate with the Child Welfare Placement Board, the Tribal Counseling and Family Service Program staff and the Children's Service Division of the State of Oregon.

(6) A foster home need not necessarily have two foster parents. A foster home with a single foster parent may be licensed provided that foster parent displays the outstanding qualities necessary to raise a foster child.

(7) The foster parent(s) must have an income sufficient to care for all individuals in the foster home. The state stipend can be considered when determining the financial ability of the foster care parents.

(8) Any time a pre-school foster child is placed in a foster home there must be at least one (1) foster parent present at all times. For school age children the foster parent(s) must show the arrangements which will be made for those periods of time when both foster parents are employed and the child is out of school. Infants and young children shall never be left alone without competent supervision.

(9) Without specific approval by the Placement Board, a foster home shall not be licensed whenever any member of the family is mentally ill or on convalescent status from a mental hospital or is on parole or probation or is an inmate of a penal or correctional institution.

(l) Tribal Expectations of Foster Parents

(1) The daily routine of a foster child shall be such as to promote good health, rest and play habits.

(2) The responsibility for a foster child's health care shall rest with the foster parents. In case of sickness or accident to a child, immediate notice shall be given to the foster care inspector or tribal social services staff. Foster care parent(s) may consent to surgery or other treatment in a medical emergency.

(3) The foster parent(s) shall not subject the child or any parent of the child to verbal abuse, derogatory remarks about himself, his natural parents or relatives, or to threats to expel the child from the foster home. No child shall be deprived of meals, mail or family visits as a method of discipline. When discipline or punishment must be administered, it shall be done with understanding and reason. The method of punishment will be that which is accepted by the people of the Klamath Indian community. At no time will corporal punishment be administered as a form of discipline.

(4) The foster parent(s) shall sign an agreement with the Tribes which shall include a copy of Sections (j), (k), and (1) of this Ordinance. The agreement shall clearly state that the foster parent(s) understands that the child or children are placed with the family for foster care and not for adoption. The agreement shall further state that the family will accept Klamath Tribes' decision to remove the child from the foster family.

(5) The foster parent(s) shall notify Tribal Social Services of accidents, medical, out of state visits and other matters affecting the well being of the foster child.

(m) Letter/Certification of Approval/Approval Agreement

certification of the Klamath Tribal foster home shall not be final until a letter of approval is issued by the Tribes and a foster care agreement is signed by the foster parent(s) and the Tribes. This agreement shall include:

(1) the date of approval;

(2) the number of foster children or the specific placement for which the home was approved;

(3) that the home is approved for a specific period of time (generally not to exceed one year) unless there are changes in the home or residence in which case the Agreement expires as of the date of the move;

(4) the expiration date of the approval; and,

(5) the provisions of Sections (j), (k), and (1) of this Ordinance.

(n) cancellation of Approval of Foster Home

The foster home approval shall be canceled if any of the following occur:

(1) the foster family changes residence;

(2) there is any material change in the condition of the home or the family such that the home no longer meets the tribal approval standards;

(3) the foster home declines to continue to be a foster home; or,

(4) one year has elapsed since the home was approved.

(o) List of Approved Homes

The Child Welfare Placement Board shall provide the state with a list of tribal foster homes and shall update the list on a quarterly basis.

(p) Decision to Intervene in Child custody Proceedings

In determining whether the Tribes should intervene in a child custody proceeding, the ICWA outreach Specialist and Placement Board shall consider the following factors:

(1) Whether the proceeding will take place outside Oregon, whether funds are available to allow the Tribes to appear in the proceeding, and whether a representative of another Indian Tribe or other organization is able to intervene on behalf of the Tribes;

(2) Whether tribal participation would be in the best interest of the child and the Tribes and the family; and,

(3) Whether the child is a Klamath child as defined by this ordinance and the tribal enrollment ordinance.

(q) Authority to Intervene in Court Proceedings

The ICWA Outreach Specialist, after consultation with the Placement Board, is authorized to make the decision whether or not to intervene in a child custody court proceeding. The ICWA outreach Specialist is authorized to sign the intervention motion, appear in court, and sign other documents submitted to the court.

(r) Notice of Child Custody Proceeding

The Child Welfare Placement Board is designated to receive notice of child custody proceedings involving a Klamath child. Upon receipt of such notice, the ICWA Specialist shall acknowledge receipt, verify the enrollment or eligibility for enrollment of the child, request the relevant information from the state or other agency, and investigate the circumstances of the child.

In the event that the Tribes decides to intervene in the case, the Tribes will make every effort to file a motion to intervene within twenty {20) days of receipt of written notice.

(s) Review of Case by Placement Board

(1) As soon as possible, the ICWA Outreach Specialist shall present a report and recommendation on the case to the Placement Board regarding what action the Tribes might take in the case.

(2) Within ten (10) days after receiving the notice, the ICWA outreach Specialist shall make every reasonable effort to report to the agency in writing of the Tribes' decision regarding the following:

(A) Whether the child referred to in the notice is a Klamath child;

(B) Whether the Tribes will intervene in the proceeding;

(C) Recommendations as to case planning and placement of the child.

(3) The ICWA outreach specialist shall immediately apply for enrollment of any parents and children involved in a custody proceeding who are eligible for enrollment in the Klamath Tribes but are not then enrolled as members, except if eligible for enrollment in another federally recognized tribe and if the parents agree to enrollment of the child.

(4) The ICWA outreach Specialist shall participate in the state or other agency process and assist in development of the child welfare plan for the child and his or her family.

(t) Preparing/Monitoring the Child Welfare Plan

In the monitoring and evaluation of any case plan involving a Klamath child by tribal staff or the Placement Board, the plan should be evaluated in light of these underlying principles:

(1) If removal of the child from the family is necessary, then the primary considerations in placement of a Klamath child are to insure that the child is raised within the Klamath culture, that the child is raised within his/her family if possible, and that the child is raised as an Indian;

(2) If reunification of the immediate family is not possible, then long term placement without termination of parental rights is the preferred approach, where the preferred approach does not necessarily mean that the Tribes is totally opposed to adoption and such adoption is based on each individual case;

(3) Supportive child welfare and family services that respect the traditions and the cultural values of the Tribes are to be made available to Klamath children and families;

(4) The right of Klamath children to know and learn their culture and heritage by experiencing that culture on a daily basis is to be preserved; and,

(5) Active efforts by governmental agencies involved must be made before a Klamath child is removed from his/her home or before a determination is made that the child cannot be returned to his/her family home. At a minimum, the agency's actions must demonstrate that the agency has engaged in working with the Klamath family to design and implement the necessary services and programs to improve the conditions in the family home in order to prevent the removal of the child or in instances in which the child has been removed, to return the child to the family home and that these efforts have been fully implemented by the agency and the family and that these efforts have failed. There must be documentation of these efforts and the reasons that the efforts have failed before the Placement Board can approve removal of the child from the home or determining that the child cannot be returned to the home.

(6) In all instances, removal of the child from his/her home is the final alternative.

(u) Placement Preferences

(1) Pursuant to the Tribes' authority as affirmed at 25 U.S.c. § 1915(c), and the Tribal-State Agreement, Section

V, the Tribes hereby adopts the following placement preferences for use by tribal and state courts in placing a Klamath child outside the home of his or her parent(s) or custodian:

(2) For foster care or pre-adoptive placement, in order of priority:

(A) A member of the Klamath child's extended family;

(B) A Klamath Indian foster home licensed or approved by the Klamath Tribes.

(C) An Indian foster home licensed or approved by the Klamath Tribes.

(D) An Indian foster home certified by the state;

(E) A non-Indian foster home licensed, approved, or certified by the state or the Tribes and agreed to on a case by case basis;

(F) An institution for children approved by the Klamath Tribes or operated by an Indian organization which has a program suitable to meet the Klamath child's special needs.

(G) In cases where Klamath children are placed in non-Klamath foster homes, a mandatory culture training will be provided by the Klamath Tribes.

(3) For adoptive placements in order of priority:

(A) a member of the Klamath child's extended family;

(B) other members of the Klamath Tribes; or

(C) other Indian families.

(4) In the case of either adoptive or foster care placement of a Klamath child, the Executive Committee may by resolution, upon recommendation of the Placement Board, alter the placement preferences set forth in this section,

provided that such placement is the least restrictive setting appropriate to the particular needs of the child.

(v) Confidentiality

All information gathered by the Klamath Tribal Social Services staff regarding foster families, Klamath child welfare cases, and services to Klamath families shall be confidential. This information may be shared with the Placement Board, Executive committee, state, federal, or tribal agencies involved with the Klamath child or family provided that those agencies have a mechanism for keeping the information confidential. The Tribes shall comply with the confidentiality requirements of the Federal Privacy Act, 5 u.s.c. §552(a) as provided by the State-Klamath Agreement, Section II, E. The restrictions on disclosure of information contained in Executive Committee Resolution, 91-030 are waived to the extent necessary for the ICWA Specialist, the Child Welfare and the Tribal Counseling and Family Service Program staff and the Placement Board to carry out their duties under this ordinance.

(w) Anonvmity

In voluntary adoptive placements the ICWA Placement Board and Tribal Counseling and Family Service Program shall honor the parent's request for anonymity but such request shall not override the basic right of a Klamath child to be raised within Klamath culture or Native American culture nor shall it override the Tribes' rights to notice and participation in planning for a Klamath child.

(x) Conflict of Interest

The Tribal counseling and Family Service Program staff and members of the Placement Board may not participate in any child welfare matters or proceedings that involve a member of his/her immediate family. For purposes of this provision, the term "immediate family" shall be defined as provided in the Klamath Committee Ordinance, Section 10, page 3 or the appropriate section and page when and if that ordinance is amended.

(y) Persons Qualified to be Expert Witness

The ICWA outreach Specialist shall on issues of tribal customs of child rearing, parenting and the role of extended family members in raising children and to testify as expert witnesses prepare a list of persons qualified as a general matter to perform psychological, social and drug and alcohol evaluations of Klamath children or parents. These lists shall be submitted to the Placement Board and Executive Committee for approval. After approval, these lists will be provided to the State of Oregon, and as appropriate to other state, and tribal, or federal agencies.

(z) Severability

In the event that any provision of this ordinance is held to be unconstitutional by a court of competent jurisdiction, such provision shall be severed from the ordinance and the remaining provisions shall remain in full force and effect. In the event that the Tribal-State Agreement is terminated, all references to said Agreement shall be severed and the remainder of this ordinance shall remain in full force and effect.

(aa) Sovereign Immunity

Nothing in this ordinance shall be construed to have waived the sovereign immunity of the Klamath Tribes.

(bb) Amendments to Child Welfare Ordinance

The Klamath Tribes Executive committee may make amendments, if necessary, to this ordinance and will present such changes to the General Council at the General council meeting following the changes.

CERTIFICATION OF ADOPTION

Pursuant to action of the Klamath General council on this 27th day of February, 1993, the attached Klamath Tribes Child Welfare Ordinance was adopted, for an interim period to begin immediately and to terminate upon final adoption by the General Council, by the members of the Klamath Tribes by a vote of 58 in favor, five (5) opposed and 12 abstentions.

Charles E. Kimbel Sr.
Tribal Chairman, Klamath Tribes

Barbara Kirk
Tribal Secretary, Klamath Tribes

Public Law 280

Excerpt from the Tribal and State Jurisdiction to Establish and Enforce Child Support Administration for Children and Families, Office of Child Support Enforcement, 2005

Public Law 280 In 1953, at the height of the termination and assimilation era,[1] Congress passed Public Law 280, which significantly affected Tribal jurisdiction by introducing State criminal authority into Indian country. Historically, State courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and non-Indians. Jurisdiction was limited to the Tribes or Federal government. Public Law 280 initially provided for the mandatory transfer to five States[2] of jurisdiction over criminal offenses committed by or against Indians in the area of Indian country listed opposite the named States or territory. It also gave those States jurisdiction over civil causes of actions between Indians or to which Indians were parties, which arose in those areas of listed Indian country. In 1958 Congress added Alaska as a sixth mandatory State.[3] There was no requirement that the Tribes consent to such transfer of jurisdiction to the listed States. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court declined to answer whether Public Law 280 conferred exclusive or concurrent jurisdiction on States. However, the consensus of lower Federal courts, many State courts, and the Solicitor's Office within the Department of the Interior is that Indian nations retain concurrent jurisdiction under Public Law 280.[4] A major consequence of Public Law 280 is that Indian nations lose exclusive jurisdiction over non-major offenses committed by one Indian against another Indian.

Other States not listed among the mandatory States had the option of assuming Public Law 280 jurisdiction. Congress granted permission for such States to assume civil or criminal jurisdiction "at such time and in such manner" as the people of the State by affirmative legislative action, should decide to assume. If such a State had a constitution or statutes disclaiming jurisdiction in Indian country, Public Law 280 authorized the State to amend those laws, if necessary, in order to remove any legal impediment to the assumption of civil or criminal jurisdiction. The Tribes exempted from the State assumption of jurisdiction were Tribes that had legal systems and organizations perceived as functioning in a "satisfactory manner."

By 1958, as a result of amendments to Public Law 280 and implementing State legislation, 16 States had acquired Public Law 280 jurisdiction.[5] However, said jurisdiction in most of these States was limited to (1) less than all of the Indian reservations in the State, (2) less than all of the geographic areas within an Indian reservation, or (3) less than all subject matters of the law.

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which limited the extension of Public Law 280 jurisdiction. No State can now acquire Public Law 280 jurisdiction over Indian country unless the Tribe consents by a majority vote of the adult Indians voting at a special election. The amendments also provide explicitly for partial assumption of jurisdiction. It is therefore possible for a State to have Public Law 280 jurisdiction but not with every Tribe located in the State or not over every subject area. The ICRA also authorized the United States to accept a "retrocession" or return of jurisdiction, full or partial, previously acquired by a State under Public Law 280, but only at the request of

the State. Tribes could not insist upon retrocession. Several States, such as Nebraska, Washington, Wisconsin, and Minnesota, have retroceded their Public Law 280 jurisdiction over various Tribes.

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[1] The Termination Era ran from approximately 1945 to 1961.

[2] California, Minnesota (except for Red Lake Reservation), Nebraska, Oregon (except for Warm Springs Reservation), and Wisconsin (except for Menominee Reservation).

[3] An exception within Alaska is the Metlakatla Reservation.

[4] *See* Jimenez & Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 AU L. Rev. 1627 (1998).

[5] Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

Full Faith & Credit of Tribal & State Protection Orders

(excerpt from publication of National Council of Juvenile & Family Court Judges)

Full Faith and Credit

Since 1994, the federal Violence Against Women Act (VAWA) (18 U.S.C. § 2265) has required every jurisdiction in the United States to recognize and enforce valid protection orders.

These jurisdictions include:

☐ A state and its political subdivisions;

☐ A tribal government;

☐ The District of Columbia; and

☐ A commonwealth, territory, or possession of the U.S. (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and U.S. Virgin Islands).

What Are the Elements of an Enforceable Order?

A protection order from another jurisdiction that has these elements must be afforded a presumption of enforceability:

☐ The respondent has been given notice and an opportunity to be heard, or, in the case of an *ex parte* order, the respondent will be given notice and an opportunity to be heard within a reasonable time, consistent with the requirements of due process.

☐ The issuing court had personal and subject matter jurisdiction to issue the order.

☐ The order has not expired.

Query: Must Tribal protection orders be registered (i.e., filed with the State Court as a "foreign judgment") in order to be enforced? (Answer: NO)

ORS 24.105:
Definitions for ORS 24.105 to 24.125, 24.135 and 24.155 to 24.175. In ORS 24.105 to 24.125, 24.135 and 24.155 to 24.175 "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

ORS 24.190re: FOREIGN RESTRAINING ORDERS

24.190 Foreign restraining orders. (1) For the purposes of this section:
(a) "Foreign restraining order" means a restraining order that is a foreign judgment as defined by ORS 24.105.
(b)(A) "Restraining order" means an injunction or other order issued for the purpose of preventing:
(i) Violent or threatening acts or harassment against another person;
(ii) Contact or communication with another person; or
(iii) Physical proximity to another person.
(B) "Restraining order" includes temporary and final orders, other than support or child custody orders, issued by a civil or criminal court regardless of whether the order was obtained by filing an independent action or as a pendente lite order in another proceeding. However, for a civil order to be considered a restraining order, the civil order must have been issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection. (Note that this definition is very broad.)
(2)(a) Except as otherwise provided in paragraph (b) of this subsection, immediately upon the arrival in this state of a person protected by a foreign restraining order, the foreign restraining order is enforceable as an Oregon order without the necessity of filing and continues to be enforceable as an Oregon order without any further action by the protected person.
(b) A foreign restraining order is not enforceable as an Oregon order if:
(A) The person restrained by the order shows that:
(i) The court that issued the order lacked jurisdiction over the subject matter or lacked personal jurisdiction over the person restrained by the order; or
(ii) The person restrained by the order was not given reasonable notice and an opportunity to be heard under the law of the jurisdiction in which the order was issued; or
(B) The foreign restraining order was issued against a person who had petitioned for a restraining order unless:
(i) The person protected by the foreign restraining order filed a separate petition seeking the restraining order; and
(ii) The court issuing the foreign restraining order made specific findings that the person was entitled to the order.
(3)(a) A person protected by a foreign restraining order may present a true copy of the order to a county sheriff for entry into the Law Enforcement Data System maintained by the Department of State Police. Subject to paragraph (b) of this subsection, the county sheriff shall enter the order into the Law Enforcement Data System if the person certifies that the order is the most recent order in effect between the parties and provides proof of service or other written certification that the person restrained by the order has been personally served with a copy of the order or has actual notice of the order. Entry into the Law Enforcement Data System constitutes notice to all law enforcement agencies of the existence of the restraining order. Law enforcement agencies shall establish procedures adequate to ensure that an officer at the scene of an alleged violation of the order may be informed of the existence and terms of the order. The order is fully enforceable as an Oregon order in any county or tribal land in this state.
(b) The Department of State Police shall specify information that is required for a foreign restraining order to be entered into the Law Enforcement Data System.

(c) At the time a county sheriff enters an order into the Law Enforcement Data System under paragraph (a) of this subsection, the sheriff shall also enter the order into the databases of the National Crime Information Center of the United States Department of Justice.

(4) Pending a contempt hearing for alleged violation of a foreign restraining order, a person arrested and taken into custody pursuant to ORS 133.310 may be released as provided in ORS 135.230 to 135.290. Unless the order provides otherwise, the security amount for release is $5,000.

(5) ORS 24.115, 24.125, 24.129, 24.135, 24.140, 24.150 and 24.155 do not apply to a foreign restraining order.

(6) A person protected by a foreign restraining order may file a certified copy of the order and proof of service in the office of the clerk of any circuit court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of the circuit court in which the foreign judgment is filed, and may be enforced or satisfied in like manner. The court may not collect a filing fee for a filing under this section. [1999 c.250 §1; 2003 c.737 §§74,75; 2011 c.595 §117]

FAQ's re: Tribal /State Law Family Law Issues

(Many Thanks for answers to:
Brent Leonhardt, Attorney for Confederated Tribes of the Umatilla Indian Reservation)

- **Protective Orders:** Can a state court issue a protective order (Family Abuse Prevention Act (FAPA), Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), Sexual Abuse Protective Order (SAPO), civil Stalking order) against a tribal member living on a tribal reservation within Oregon?

Answer: for tribes subject to Oregon's civil PL 280 jurisdiction, yes. This includes CTUIR. For those not subject to Oregon's civil PL 280 jurisdiction it may turn on whether the events giving rise to the basis for the order occurred in Indian country (arguably no jurisdiction) or outside of Indian country (arguably jurisdiction even if the person happens to live on rez).

Can a tribe issue a protective order against a non-tribal member?

Answer: Yes, if the other typical requirements for significant contacts exist. 18 usc 2265e.

Does it make a difference where the incident(s) occurred (i.e., tribal vs. non-tribal land)?

Answer: As long as it was in Indian country, no. 18 USC 2263e.

How do state courts find out if a tribal court has entered a protective order--and vice-versa?

Answer: Check NCIC for some tribal court orders (CTUIR has direct access now, and all of our protection orders are in the federal criminal database system), for others contact the tribal court and tribal police (I would contact both to make sure). Tribes have more limited access to databases, and it depends on whether the state allows a given tribal court to obtain the information (I don't think Oregon does for a non-criminal justice agency or for non-criminal justice purposes). CTUIR court can through the TAP program provided they are reflected in the federal criminal database system (NCIC).

And is there any progress or change re: tribes' ability to have tribal protective orders entered into LEDS or NICS? (I'm aware of issues with state law enforcement refusing to enforce tribal protective orders since they cannot be verified via LEDS/NICS--are there issues with tribal police enforcing state court protective orders? Any change in this over last year?)

Answer: State law requires sheriffs to enter the order if they are presented to them provided they meet federal full faith and credit requirements and there is proof of service. However, there has been discussion as to whether the person who is protected has to be the one to provide it to the Sheriff. This is disturbing to CTUIR. We had started working on this issue and a potential fix, but what was being considered would have further endangered the victim (requiring an affidavit from them approving its entry into the system). At that point we pushed to get direct federal access that has resulted in the new federal Tribal Access Program at USDOJ. Through that, CTUIR is able to put all orders in NCIC. State law enforcement should not be refusing to enforce tribal orders if they meet full faith and credit requirements any more than they refuse to enforce state of Washington orders. I'm not aware of tribal police refusing to enforce state protection orders provided the orders in question meet federal full faith and credit requirements.

- **Other Family Law issues (not including juvenile court matters):** Do tribes issue dissolution/custody/parenting time/paternity/child support judgments?

  If so, must both parties be tribal members?

  Are these enforceable/enforced by state courts?

  Are there any restrictions on state courts issuing dissolution/custody/parenting time/paternity/child support judgments involving tribal members (including property issues)?

  Do tribes enforce family law state court judgments?

Answer: It depends, and analysis can be complex just like all non-Indian tribal civil jurisdiction questions. Having said that, this is an excellent resource on family law issues and jurisdiction in Indian country: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&ved=0ahUKEwjztp2W4O7NAhVW5WMKHf21Cxg4ChAWCD4wBQ&url=http%3A%2F%2Fwww.acf.hhs.gov%2Fsites%2Fdefault%2Ffiles%2Focse%2Fim_07_03a.doc&usg=AFQjCNF351fY0b5SOKyO4aUMZJ8yQfPc2Q

MEMORANDUM

TO: UTCR Committee

FROM: Amy Benedum, JFCPD Program Analyst
On behalf of: Oregon Tribal/State Judicial Forum

SUBJECT: Proposed Change to UTCR 3.170

DATE: August 1, 2016

The Indian Child Welfare Act, 25 U.S.C. §1911(c), gives Indian tribes the right to intervene in and participate in any state child custody proceeding involving an Indian child from that tribe. Intervention has been held in numerous cases to be critical for a Tribe to present its position and protect its interest in tribal member children. Unfortunately, while the ICWA confers this right on Tribes, it does not provide any funding to carry it out. It is difficult for many Tribes to find or allocate the resources necessary to participate in every ICWA case that is identified; no dedicated sources of funding exist.

This problem is particularly acute for out-of-state ICWA cases. Indian tribes from other states seeking to exercise their rights by intervening and participating in Oregon child custody proceedings encounter a high burden due to provisions in UTCR 3.170, which requires non-Oregon attorneys to associate with Oregon attorneys and pay a fee to appear *pro hac vice*. The expense for out-of-state Tribes can be substantial, and as a result Tribes sometimes decide not to intervene in an out-of-state ICWA case because they cannot afford the expense of hiring a local attorney in addition to their tribal attorney and paying a $500 fee to the Oregon State Bar. This result undermines the intent and purpose of the ICWA, which is designed to encourage tribal participation in ICWA proceedings.

A partial solution to this issue came from *State ex rel. Juv. Dept. v. Shuey*, 119 Or App 185, 199, 850 P.2d 378 (1993), which concluded that a Tribe can intervene in a state court ICWA proceeding without legal counsel and that the Tribe's critical interest in participating in such proceedings outweighs and preempts the State's interest in having legal counsel represent parties in judicial proceedings. While this ruling is a partial solution to the problem of affording out-of-state legal counsel, it raises other issues. An Indian tribe is most often represented in ICWA proceedings by tribal social workers or case workers. Those employees may know the facts of the case, but they do not know court procedure or the law, and they are at a serious disadvantage in arguing procedural or legal issues before the court. Non-lawyer participation makes the court's job more difficult because of the lack of knowledge. Two years ago, the Indian Law Section of the Oregon State Bar proposed a change to UTCR 3.170 to address the issue, as they believed that Oregon courts would be better served by having a lawyer versed in Indian law and knowledgeable about the Tribe participate in the case, even if that lawyer may not be completely knowledgeable about local legal practice.

The Indian Law Section proposed two changes to UTCR 3.170 to overcome the burden of out-of-state Tribes participating in child custody cases in Oregon. First, their proposed rule change would allow out-of-state legal counsel to participate in a narrow range of ICWA proceedings without associating with local legal counsel. Tribes may still choose to associate with local legal counsel, but they are no longer required to do so. Second, the Section proposed that the application fee of $500 set out at 3.170(6) be waived because it is unnecessary and burdensome. It was the Section's belief that the fee is an improper burden on the right of a Tribe to intervene in a child custody proceeding under the ICWA.

The Tribal/State Judicial Consortium supports these proposed rule changes to UTCR 3.170. It is clear that the intent of the ICWA is to have Indian tribes intervening in state court proceedings involving their tribal children, and any burdens to that intervention found in state law should be changed. The Tribal/State Judicial Consortium believes that these proposed rule changes will increase participation in Oregon ICWA proceedings by out-of-state tribes, and would raise the level of practice in such proceedings by having legal counsel, rather than social service staff, represent the intervening Tribe's interests.

The Tribal/State Judicial Consortium recommends that UTCR 3.170 be amended by adding the following subsection 9:

(9) An applicant is not required to associate with local counsel pursuant to subsection (1)(c) of this section or pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that:

(a) The applicant seeks to appear in an Oregon court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. §1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. §1901 *et seq.,*

(b) The applicant represents an Indian tribe, parent, or Indian custodian, as defined by 25 U.S.C. §1903; and

(c) The Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law.

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Oregon Family Law: Change, Challenge, Opportunity

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Presenter:

Holly Rudolph, Forms Manager, Communication, Education & Court Management Division, OJD

Holly moved to Portland from the Philadelphia area after graduating summa cum laude from Rutgers University, and worked in the healthcare field for over twelve years before attending Lewis and Clark Law School. Holly works for the Office of the State Court Administrator coordinating development of interactive forms for self-represented litigants as well as court forms for the eCourt program. Holly has produced several writings on equine law, including a presentation for the National Equine Law Conference in Lexington, KY. Holly has been a member of the Recent Graduate Council since its inception and currently serves as President. Holly lives in the Portland area with her son Jacob, and their cats Gozer and Zool. In her spare time, she enjoys running, riding horses, camping, kayaking, watching movies or playing touch rugby with her son, and cooking with friends.

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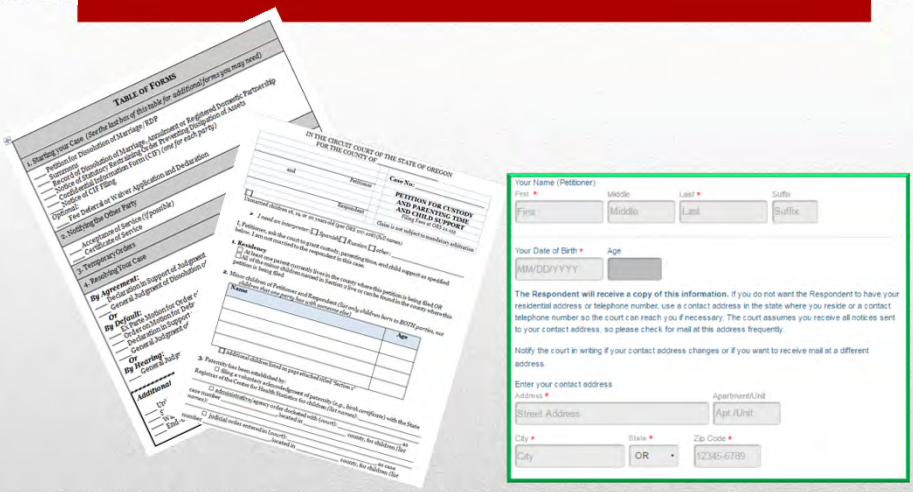

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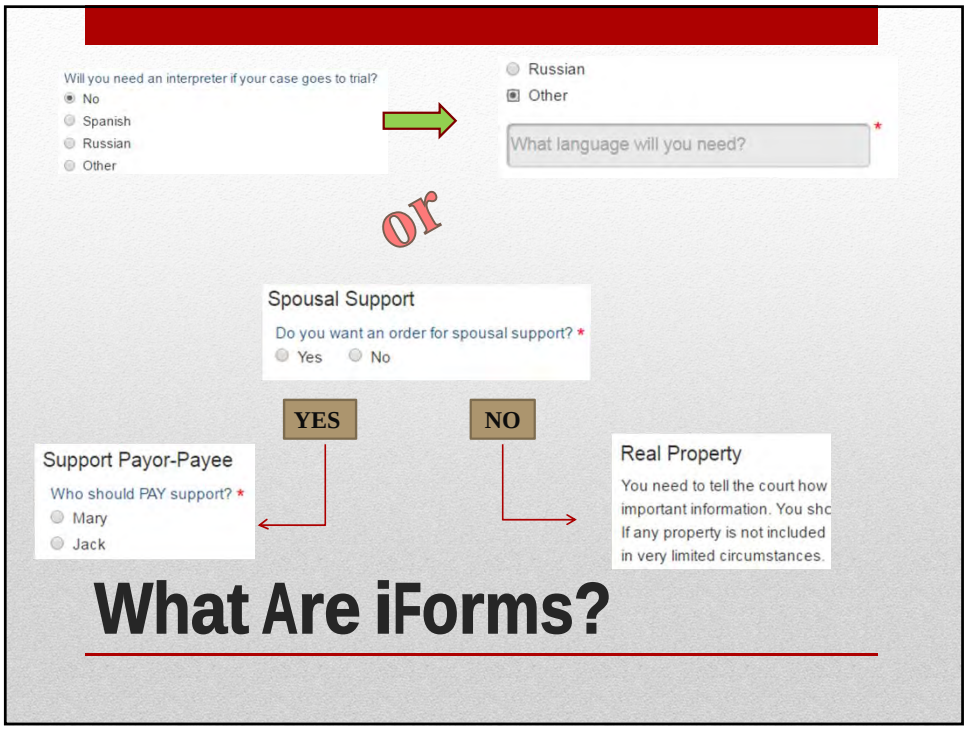
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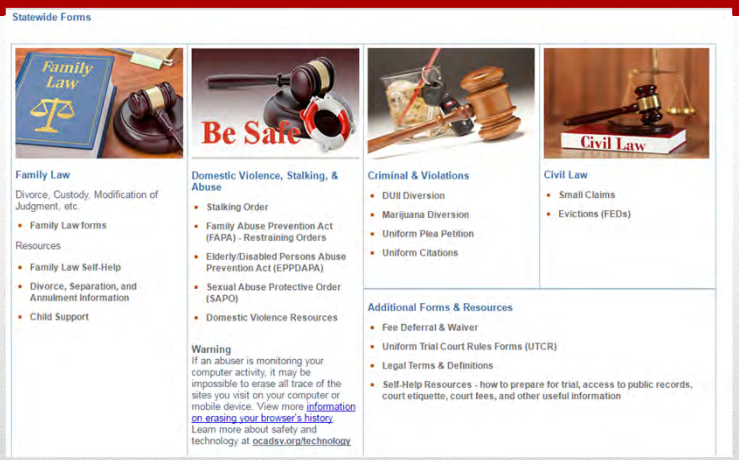

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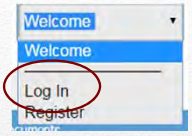

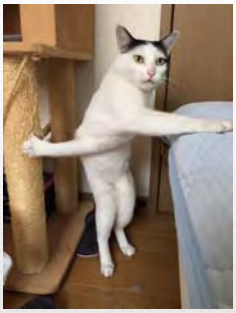

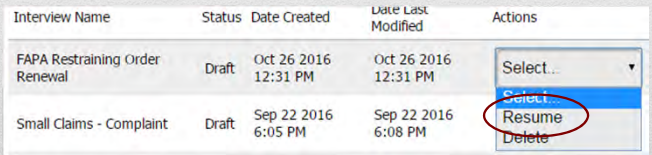

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Lisa Mayfield, J.D., is a private practice mediator who serves as a court-connected panel mediator for Marion County.

Together, Lauren and Lisa co-chair the Mediation Subcommittee of the State Family Law Advisory Committee.

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