

Oregon ICWA

Origin, Differences, and
Current Shortcomings

OICWA: Origin

- Took over an ICWA case for a few months in 2017. Very disturbed and concerned about how handled by Child Welfare, Attorneys, and Court.
- Many heated meetings, including involving Governor's Office.
- Realized issue was not case specific. Read DHS/Child Welfare Audits. Systemic problems for at least a decade. Unfortunately, audits did not address the most disproportionately impacted – Indian children.

OICWA: Origin

Met with DHS Director and Child Welfare Director. March 2018 letter requested creation of Child Welfare Compliance Group within Child Welfare:

“All of this strongly suggests systemic racism and failures in the Child Welfare Program when it comes to ICWA cases. Since Oregon is presently working diligently to address other major systemic problems in the child welfare system through adoption and implementation of the Child Welfare Plan, now is the perfect opportunity to seriously address systemic problems as they relate to the handling of ICWA cases...”

OICWA: Origin

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- Focus is on a data driven strategic management approach looking at all stages of ICWA cases (analysis and assessment, planning, executing, and monitoring).
 - Among immediate suggestions was creation of a stand alone ICWA statute so judges, attorneys, and caseworkers better understand what is actually required by ICWA and the 2016 regulations.
 - Once group was created, a subgroup was established to draft an Oregon ICWA statute. After the Compliance Group completed a draft, went to House (Rep. Sanchez) and further developed with Addie Smith to correlate with Oregon's existing child dependency system. Then went to legislative counsel and stopped being stand alone – a bit confusing. Still to be addressed: adoptions.

OICWA: Differences from ICWA

- “Continued Custody” defined to include both physical and legal, as well as current and past. This addresses Baby Veronica case.
- Parentage includes establishment or recognition under tribal law or tribal custom.
- Jurisdiction. PL-280 can have exclusive due to domicile or tribal ward if tribal/state agreement creates.

OICWA: Differences from ICWA

- Definition of “best interest of Indian child” includes preferred placements, and ties to tribe and culture.
- Transfer. Denial for “good cause” must have a hearing, be based on clear and convincing evidence, and in writing. Lists what cannot be considered (including general “best interest of the child” standard).

OICWA: Differences from ICWA

- All proceedings should be treated as ICWA proceedings if there is “reason to know” a child is an Indian child until court determines child is not an Indian child.
- Court must ask on the record each individual present if they have reason to know if child is Indian child, and instruct each party to let court know if they receive info that provides reason to know.

OICWA: Differences from ICWA

- Active efforts determinations must be documented in detail in writing and on the record. (Shelter care, Dispositional/Jurisdictional, Permanency, foster placements, guardianship, TPR)
- Qualified Expert must testify to continued custody likely result in serious emotional/physical harm as well as prevailing social and cultural standards and child rearing practices of tribe. (Dispositional/Jurisdictional hearing, foster placement, guardianship, TPR)
- QEW is qualified if a tribe has designated them as such. Otherwise, priority is:
 - Member of the tribe, recognized as knowledgeable about rearing practices.
 - Sub. experience delivering child and family services to Indians and extensive knowledge of child's tribe's practices.
 - Sub. experience delivering child and family services to Indians and extensive knowledge of similar tribes to child's tribe.

OICWA: Current/Most Frequent ICWA Shortcomings

- Not treating case as ICWA when reason to know from the beginning.
- Inadequate (incomplete ancestry assessment) or improper notice (sent to wrong place, wrong person, etc.), and failing to respond to tribal inquiries or responses for more information.
- Court failing to treat tribe as a party (routinely failing to ask if tribe has questions/evidence to present, failure to provide notice of hearings, not listing as a party in documents, asking questions of tribal caseworker rather than attorney, thinking attorney is a caseworker, etc.)/treat as an after thought rather than central focus of a case.

OICWA: Current/Most Frequent ICWA Shortcomings

- Failure to provide timely discovery or notice to prepare for hearings/trials.
- Not working closely with/collaborating with tribe on placement, kinship reports, case planning, etc.
- Not actually engaging in active efforts.
- Not following ICWA placement preferences. (Tribal families are large and parents may not know who their people or family are.)
- (NOTE: ICWA Compliance Group findings is about 75% failure at every step of an ICWA case.)



HB 4214

Oregon Indian Child Welfare
(Policy Regarding Indian Children)

Definitions

Section 4 - Parentage

A man's parentage of an Indian child:

- 1) Established by tribal law
- 2) Recognized in accordance with tribal custom
- 3) Openly proclaimed by the man to the court, to the Indian's child's family, to DHS or an OR licensed adoption agency

Definitions

Section 8 – Determination of Indian child's tribe

If a child is eligible for membership in more than one tribe and the tribes are unable to agree on the designation of the tribe, the court shall after a hearing, designate the tribe with which the child has more significant contacts taking into consideration factors listed.

(c)(B)(2)(a-f)

In addition to designated tribe, the court may permit the other tribe to participate in an advisory capacity or as a party.



Jurisdiction

Section 9 – Determination of Domicile and Residence

The juvenile court must determine residence and domicile of the Indian child and whether the Indian child is a ward of tribal court. The juvenile court shall communicate with tribal courts to extent necessary to make a determination.



Jurisdiction

Section 12 – Jurisdiction

Under 419B.100 juvenile court's jurisdiction is concurrent unless the tribe is not subject to Public Law 280 (Confederated Tribes of Warm Springs, the Confederated Tribes of Umatilla and the Burns Paiute Tribe). Non Public Law 280 tribes have exclusive jurisdiction if the child is a ward of the tribal court or resides or is domiciled within the reservation.



Jurisdiction

Section 12 – Jurisdiction

Public Law 280 tribes may limit the juvenile court's jurisdiction by entering into a tribal-state agreement.

The juvenile court shall decline to exercise jx if the tribe has entered into an agreement and the agreement provides that the tribe has default jx.

If the court declines jx, the court shall coordinate with the tribal court, allow Indian child's parent, custodian to participate in communications with the tribe, provide opportunity to represent facts and legal arguments before court makes a decision regarding jx, create record communication, notify parties in advance and provide access to record communication



Motion to Transfer to Tribal Court: Objection

Section 13 – Any time during a proceeding, the Indian child's parent, custodian or tribe may petition to transfer the proceeding to tribal court

Upon receipt of the Motion, the juvenile court shall contact the tribe and request a timely response regarding whether the tribe intends to decline the transfer.

If a party objects for good cause, the court shall set a hearing, the objecting party has the burden of proof by clear and convincing evidence good cause exists to deny the transfer.

The juvenile court may not consider stage of proceeding, prior proceedings, whether transfer could affect placement, child's cultural connections with tribe, socioeconomic conditions of tribe or negative perceptions of tribal social or judicial systems or whether the transfer serves the best interests of the Indian child.

The court shall document basis for denial in written order.



Inquiry; Notice

Section 15 – Emergency inquiry; inquiry;
reason to know child is Indian child

At the commencement of any hearing...the court shall ask on the record, each individual present on the matter whether the individual knows or has reason to know that the child is an Indian child.

The court shall instruct each party to inform the court immediately if the party later receives information that provides reason to know the child is an Indian child.

Emergency notification must be met prior to taking child into protective custody ORS 419B.150



Inquiry; Notice

Section 16 – Formal Notice

If there is reason to know a child is an Indian child and notice is required, the party providing notice must file with the court, an original or a copy of each notice together with proof service and include among other information set out in the statute a statement that the child's parent, Indian custodian or tribe has the right, upon request, to an additional 20 days to prepare for the proceeding.

No hearing requiring notice may be held until at least 10 days after receipt of notice. Upon request the court shall grant up to 20 days to prepare for hearing.

Does not apply to emergency removal proceedings.



Hearings

Section 17 – Qualified Expert Witness

Section 18 – Active Efforts “efforts that are affirmative, active, thorough, timely and intended to maintain or reunite an Indian child with the Indian child’s family”



Active Efforts

Must be in detail in writing and on the record

Include assisting parent or custodian through steps of case plan and with accessing or developing resources necessary to satisfy case plan

Include assistance in manner consistent with prevailing social and cultural standards and way of life of Indian child's tribe

Be conducted in partnership with the tribe and parents, custodian, extended family and be tailored to facts and circumstances of the case



Active Efforts

May include- list of factors (5)(a-k)

- a. Comprehensive assessment
- b. Identifying services
- c. Identifying representatives of the tribe
- d. Diligent search extended family members
- e. Culturally appropriate family preservation strategies
- f. Steps to keep siblings together
- g. Regular visits
- h. Identify community resources
- i. Monitor progress
- j. Consider alternative options
- k. Provide post reunification services



Right to Appear & Right to Counsel

Section 19

A tribe that is a party to a proceeding may be represented by any individual, regardless of whether the individual is licensed to practice law

Section 20

The court shall appoint counsel to represent the Indian child

The court shall appoint suitable counsel to represent the Indian child's parent or Indian custodian (determined by OPDS)



Improper placements or terminations of parental rights involving Indian children

Section 22

A petition to invalidate the placement, guardianship, or termination of parental rights may be filed in any court of competent jurisdiction by, an Indian child, parent, custodian or tribe who is or was under jurisdiction juvenile court per ORS 419B

The court shall invalidate the placement of an Indian child if the court determines that any provision of the act has been violated.

The proceeding that led to the violation must be vacated and if the child was removed, the court shall order the child immediately be returned and issues relitigated.

The child must be returned unless the court determines by clear and convincing evidence that to do so would subject child to substantial and immediate danger or threat of substantial or immediate danger.



Preferred Placement

Section 23 – Placement preferences

Child must be placed in the least restrictive setting that most closely approximates a family, taking into consideration sibling attachment, reasonable proximity to Indian child's home, in accordance with order of preference established by tribe.

A party may move the court for authority to make a placement contrary to preferences. Motion must detail good cause reasons. If objection filed, court shall set a hearing. Moving party must prove by clear and convincing evidence good cause exists. Court's determination must be in writing and based on preferences child, sibling attachment, extraordinary physical, mental or emotional needs of child and whether despite diligent search, placement preference is unavailable. Court may not base decision on socioeconomic conditions tribe, perceptions tribal social services or judicial system, distance or bonding between child and nonpreferred placement.

Indian Child Welfare in Existing Oregon Juvenile Code

Sections 24-60

Walks through amendments to specific statutes

Statutory Highlights





Protective Custody

ORS 419B.185(3)(b)

The Court may not enter an order taking a child or ward into protective custody unless after a hearing the court finds in writing:

Notice requirement met;

Removal in child's best interest;

Preponderance evidence protective custody necessary to prevent imminent physical damage or harm to child;

If emergency necessitating protective custody changes, the court shall promptly hold a hearing to determine whether protective custody should continue and immediately terminate if no longer necessary. A protective order may not be continued for more than 30 days unless court has set case for jx hearing, determines restoring child to parent would subject child to imminent physical damage or harm, unable to transfer case to tribe or unable to set the case for a hearing for a reason other than scheduling or availability of counsel and reason has been documented in writing on the record.

Hearings

ORS 419B.305

- (1) Jurisdictional hearing on petition within 60 days
- (2) If the court has found that protective custody is necessary to prevent imminent physical damage or harm to Indian child, no later than 30 days after petition is filed the court shall hold a jx hearing on petition unless: child has been returned to parent, court orders child returned to parent, court continues protective order 30 days per ORS 419B.185, court grants parent or tribe extension time to prepare to participate (20 days).

The court may not schedule a jx hearing unless inquiry and notice requirements met.

ORS 419B.310

Jx burden of proof for Indian child is by “clear and convincing competent evidence”.



Permanency Hearings

ORS 419B.476

If the court finds DHS did not provide active efforts to make it possible for child to safely return home, the court may not change the plan to something other than reunification and the court may not set a date for a subsequent permanency hearing until DHS has provided active efforts for the number of days active efforts were not previously provided.



Settlement Conference

ORS 419B.890

Prior to scheduling a settlement conference on jx, guardianship, termination parental rights, petitioner shall provide notice to Indian child's tribe.

The court shall provide notice to Indian child's tribe that includes description of the settlement process, the procedure to schedule the settlement conference and the date that the hearing will occur if settlement is not reached.



Reports

Section 61

DHS and OJD are required to report to the Legislative Assembly on even numbered years information related to Indian children involved in dependency proceedings.