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Filed: January 29, 2026

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of T. A. G., II, a Child.

Department of Human Services,

Respondent on Review,

and

K. C. and Cowlitz Indian Tribe,

Respondents on Review,

v.

T. G., aka T. J. G.,

Petitioner on Review.

(CC 19JU05952) (CA A186627 (Control), A186628) (SC S072305)

On petition for review filed October 7, 2025;* considered and under advisement on January 6, 2026.

Tiffany Keast, Deputy Public Defender, Oregon Public Defense Commission, Salem, filed the petition for petitioner on review. Also on the petition was Shannon Storey, Chief Defender, Juvenile Appellate Section.

No appearance *contra*.

Before Flynn, Chief Justice, and Duncan, Garrett, DeHoog, James, and Masih, Justices.**

PER CURIAM

The petition for review is denied.

DeHoog, J., concurred and filed an opinion.

*Appeal from Multnomah County Circuit Court,
Linda Hughes, Judge.

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342 Or App 548, 577 P3d 893 (2025).

**Bushong, J., did not participate in the consideration or decision of this case.

1 PER CURIAM

2 The petition for review is denied.

1 DeHOOG, J., concurring.

2 I concur in the court's denial of father's petition for review of the Court of
3 Appeals' decision in this case. Further, in addition to other aspects of that decision, I
4 agree with the Court of Appeals' rationale that ORS 419B.656 (juvenile court acceptance
5 of tribal customary adoption) does not authorize a juvenile court to relitigate a tribe's
6 internal determination that tribal customary adoption is in the best interests of an Indian
7 child or its determination of the parameters of such an adoption. *See Dept. of Human*
8 *Services v. T. G.*, 342 Or App 548, 561-62, 577 P3d 893 (2025) (juvenile court may not
9 "decide for itself whether and to what extent the tribal customary adoption should modify
10 a parent's parental rights"); *see also* ORS 419B.656(3)(b) (requiring that the juvenile
11 court "afford full faith and credit to a tribal customary adoption order or judgment *that is*
12 *accepted under this subsection*" (emphasis added)).

13 I write solely to highlight one issue that the Court of Appeals declined to
14 consider due to father's belated and summary raising of the issue: whether, and to what
15 extent, the juvenile court must consider whether a tribe's internal tribal customary
16 adoption process complied with a parent's federal due process rights *before* the court
17 accepts and affords full faith and credit to the tribe's decision. As the text emphasized
18 above indicates, although the juvenile court is required to afford a tribal customary
19 adoption "full faith and credit," ORS 419B.656(3)(b), its obligation to do so arises under
20 that statutory provision only upon its acceptance of a tribal customary adoption -- the
21 statute does not purport to compel the juvenile court to accept a tribal customary adoption
22 in the first instance as a matter of full faith and credit or anything else. Thus, the nature

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1 of the juvenile court's inquiry into the process afforded a parent by a tribe, and
2 particularly whether the court must satisfy itself that the tribe's process complied with the
3 parent's federal due process rights before accepting a tribal customary adoption, is an
4 open question that, in my view, this court may wish to consider in another case.

5 I respectfully concur in the denial of the petition for review.

FILED: August 13, 2025

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of T. A. G. II, a Child.

Department of Human Services,
Petitioner-Respondent,

and

K. C. and Cowlitz Indian Tribe,
Respondents,

v.

T. G., aka T. J. G.,
Appellant.

Multnomah County Circuit Court
19JU05952

Petition Number
113766

A186627 (Control)
A186628

Linda Hughes, Judge pro tempore.

Argued and submitted on June 18, 2025.

Tiffany Keast, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Shannon Storey, Chief Defender, Juvenile Appellate Section, Oregon Public Defense Commission.

Inge D. Wells, Assistant Attorney General, argued the cause for respondent Department of Human Services. Also on the brief were Dan Rayfield, Attorney General, and Benjamin Gutman, Solicitor General.

Justin Derhammer argued the cause for respondent Cowlitz Indian Tribe. Also on the brief was Alana Martin, Cowlitz Indian Tribe.

Erica Hayne Friedman and Youth, Rights & Justice filed the brief for respondent K. C.

Before Ortega, Presiding Judge, Lagesen, Chief Judge, and Joyce, Judge.

ORTEGA, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

No costs allowed.

Costs allowed, payable by

1 ORTEGA, P. J.

2 In this juvenile dependency case, father appeals from the juvenile court's
3 order accepting the Cowlitz Indian Tribe's order of a tribal customary adoption of child,
4 ORS 419B.656, and the juvenile court's judgment of adoption, ORS 419B.656 and ORS
5 109.350. On appeal, father argues that the juvenile court's actions were in violation of
6 the Oregon Indian Child Welfare Act (ORICWA), the federal Indian Child Welfare Act
7 (ICWA), and the Due Process Clause of the Fourteenth Amendment to the United States
8 Constitution. *See* Indian Child Welfare Act of 1978, 25 USC §§ 1901 - 1963; Oregon
9 Indian Child Welfare Act, Or Laws 2020, ch 14, §§ 1 - 66 (Spec Sess 1) (codifying new
10 provisions at ORS chapter 419B.600 to ORS 419B.665 and amending portions of ORS
11 chapters 350, 418, 419A, and 419B). Essentially, father asserts that the juvenile court
12 was required to hold a contested evidentiary hearing on the criteria in ORS 419B.656,
13 which governs acceptance of a tribe's order for tribal customary adoption, and to also
14 require the proponents of the tribal customary adoption to prove beyond a reasonable
15 doubt that conduct or circumstances existed that warrant termination of father's parental
16 rights.¹ We conclude that neither state nor federal law required the evidentiary hearing
17 that father argues for on appeal. Accordingly, we affirm.

18 Father's child, T, was born in [REDACTED] and is affiliated with the Cowlitz

¹ Substantially the same issue is currently pending before the Supreme Court in *Dept. of Human Services v. M. G. J.*, 329 Or App 101 (2023) (nonprecedential memorandum opinion), *rev allowed*, 372 Or 63 (2024).

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1 Indian Tribe via his maternal lineage. The Oregon Department of Human Services
2 (ODHS) removed T from his parents shortly after his birth and petitioned for the juvenile
3 court to take jurisdiction. In September 2020, the court entered a judgment establishing
4 jurisdiction over T. As to father, the court based its jurisdiction on father's admissions
5 that his "pattern of using controlled substances interferes with his ability to safely parent
6 the child," and his "pattern of involvement in criminal activity and current incarceration
7 interfere with his ability to safely parent and be a custodial resource for his child." The
8 court granted the tribe's request to intervene as a party in September 2021.

9 In July 2022, the juvenile court changed T's plan from reunification to
10 guardianship, and then, in January 2024, changed T's plan from guardianship to tribal
11 customary adoption, a plan supported by the tribe, T's mother, and T. The court found
12 that father "has not followed through with ODHS." The court continued the plan at
13 review hearings in June and September of that year.

14 On the same date as the September review hearing, the tribe filed with the
15 court a copy of the tribe's Indian Child Welfare Committee's Tribal Customary Adoption
16 Process, which was also circulated to the parties. And, on November 14, 2024, the tribe
17 filed with the court the notice it provided to the parties on November 7, notifying them
18 that the Cowlitz Indian Child Welfare Committee had set a meeting for December 6,
19 2024, to consider T's tribal customary adoption. The notice stated, "Legal parties in the
20 underlying case may send documents to the Cowlitz Indian Tribe's Indian Child Welfare
21 Committee to consider during the Customary Adoption Process. Please review Section

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1 1-6 of the Indian Child Welfare Committee's Tribal Customary Adoption Process for
2 information and limitations pertaining to the submission of documents." Father
3 submitted documents for the committee to consider.

4 On December 6, 2024, the committee adhered to the Indian Child Welfare
5 Committee's Tribal Customary Adoption Process, considered all the submitted
6 information, and voted unanimously to order that T's resource parents "shall have the
7 physical, legal, and financial responsibility" for T. In issuing its order of tribal customary
8 adoption for T, the committee determined that returning T to his parents "would likely
9 result in serious detriment" and that customary adoption was in T's best interests. The
10 order "suspended/modified" both parents' parental rights by transferring the physical,
11 legal, and financial responsibility for T to his tribal customary adoption parents (TCA
12 parents). However, the order also recognized "the vital importance of the connection
13 between tribal children and tribal family" and outlined other rights, which included that
14 TCA parents have the discretion to allow visitation with T's birth parents consistent with
15 T's best interest, that TCA parents and birth parents are to annually confirm or update the
16 means to communicate with each other, that TCA parents are to provide annual updates
17 to birth parents about T, and that T retains all rights of inheritance of birth parents. On
18 December 19, the tribe filed the order of tribal customary adoption with the juvenile
19 court.

20 On January 2, 2025, the day before the scheduled hearing in the juvenile
21 court, father filed an objection to the acceptance of the tribal customary adoption. He

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1 argued that the court was required to hold a contested evidentiary hearing such as would
2 be required to establish a permanent guardianship under ORS 419B.365, ICWA, and the
3 Due Process Clause. Father asserted that the tribal customary adoption takes away his
4 parental rights, akin to a permanent guardianship, without a meaningful opportunity to
5 confront the information provided to the tribe and at a lower standard of proof than
6 required by Oregon law or ICWA.

7 At the hearing the next day, the court remarked that it had received father's
8 objections filed on January 2, "which was very untimely, might I just say, because this
9 has been a plan for quite some time, and you were aware of that." After arguments on the
10 merits of father's request for a contested hearing "that meets the standards required for
11 Indian children for a permanent guardianship before the Court can put in place the Tribal
12 Customary Adoption," the court again expressed frustration that father's objection was
13 filed the day prior, when the plan had been set an entire year earlier, in January 2024,
14 with an intervening review hearing in September 2024 at which time the January 2025
15 hearing had been set. Moving to the merits, the court ruled that Oregon law states that
16 the court shall accept the tribal customary adoption order and that it would move forward
17 with finalizing it. Father did not argue that any of the criteria enumerated in the statute
18 for accepting a tribal customary adoption had not been met.

19 After considering the documents before it, the juvenile court entered an
20 order accepting the tribal customary adoption. Among other things, the court found that
21 the adoption was in T's best interests under ORS 419B.612, that the tribal customary

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1 adoption home study met the requirements of ORS 419B.656(2)(b), that the
2 circumstances in ORS 419B.656(2)(c) were not present, and that the order of tribal
3 customary adoption conforms with ORS 419B.656(3)(a)(C). The court then entered a
4 judgment of tribal customary adoption, and terminated its wardship of T.

5 Father now appeals from the order and judgment, raising three assignments
6 of error.

7 In his first assignment of error, father asserts that the juvenile court erred in
8 rejecting his objections as untimely. He asserts that he could not have brought his
9 objections sooner because he was objecting to the process for accepting the tribal
10 customary adoption. We disagree with father's framing. Although the juvenile court
11 expressed understandable frustration with father's late objection to the tribal customary
12 adoption process--a process that had been moving forward for an entire year--the court
13 did not base its ruling on untimeliness, but rather on its reading of ORS 419B.656(3) as
14 requiring it to accept the order for tribal customary adoption if the criteria in the statute
15 were met. Father's objections did not address those criteria. Because father's assignment
16 of error does not address the basis for the court's ruling, we reject it.

17 In his second and third assignments of error, father argues that the juvenile
18 court erred in accepting the order for tribal customary adoption and entering the judgment
19 because it was in violation of ORICWA, ICWA, and due process.² Father's arguments, as

² ODHS asserts that father failed to preserve his argument that ICWA preempts ORS 419B.656. Because we conclude ICWA does not apply in the manner argued by father, we do not reach any issues of preemption and, thus, also do not address

1 presented, raise issues of statutory interpretation, which we review for legal error
2 *Dept. of Human Services v. S. E. K. H.*, 283 Or App 703, 706, 389 P3d 1181 (2017). We
3 thus apply our usual statutory construction methodology outlined in *State v. Gaines*, 346
4 Or 160, 171-72, 206 P3d 1042 (2009), and we consider the text of the statute, in context,
5 along with any helpful legislative history to "give effect to the intent of the legislature."
6 *State v. Giron-Cortez*, 372 Or 729, 736, 557 P3d 505 (2024).

7 We first address father's arguments that are based in state law and provide
8 an overview of tribal customary adoption. In 2021, the Oregon Legislature enacted the
9 legislation that made tribal customary adoption an available permanency plan in a
10 dependency proceeding involving an Indian child. Or Laws 2021, ch 398, § 65a. A tribal
11 customary adoption, as defined in ORS 419B.656(1), means "the adoption of an Indian
12 child, by and through the tribal custom, traditions or law of the child's tribe, and which
13 may be effected without the termination of parental rights." Under ORS 419B.476(2)(e),
14 a juvenile court shall, at a permanency hearing for an Indian child whose case plan is
15 something other than reunification,

preservation on that issue. The tribe asserts that father failed to preserve his argument that the tribal customary adoption is a termination of parental rights and cannot be ordered without meeting the standards in ICWA. We conclude, however, that that issue was sufficiently preserved by father's argument that ORICWA, ICWA, and due process required an evidentiary hearing akin to permanent guardianship, because the same standards apply. *See* ORS 419B.365(2) ("The grounds for granting a permanent guardianship are the same as those for termination of parental rights."). Finally, we agree with mother that, to the extent the appeal raises such issues, father did not preserve any argument that the juvenile court's findings on the criteria in ORS 419B.656 were insufficient or based on insufficient evidence.

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1 "make a finding whether, after the department's consultation with the child's
2 tribe, and, if the tribe appears at the hearing, the court's direct consultation
3 with the tribe, tribal customary adoption, as described in ORS 419B.656, is
4 an appropriate permanent placement for the child if reunification is
5 unsuccessful."

6 If the court determines that tribal customary adoption should be the child's permanency
7 plan, the court must determine "whether one of the circumstances in ORS 419B.498(2) is
8 applicable"--that is, circumstances under which ODHS may not file a petition for
9 termination of parental rights.³ ORS 419B.476(5)(g). One of those circumstances is "[i]f
10 the child is an Indian child, the court finds that tribal customary adoption, as described in
11 ORS 419B.656, is an appropriate permanent plan for the child and the Indian child's tribe
12 consents to the tribal customary adoption." ORS 419B.498(2)(b)(C). Once the plan for
13 the child is tribal customary adoption, "the court shall request that the tribe file with the

³ As applicable here, ORS 419B.498(2) provides:

"(2) The department shall file a petition to terminate the parental rights of a parent in the circumstances described in subsection (1) of this section unless:

"* * * * *

"(b) There is a compelling reason, which is documented in the case plan, for determining that filing such a petition would not be in the best interests of the child or ward. Such compelling reasons include, but are not limited to:

"* * * * *

"(C) If the child is an Indian child, the court finds that tribal customary adoption, as described in ORS 419B.656, is an appropriate permanent plan for the child and the Indian child's tribe consents to the tribal customary adoption[.]"

1 court a tribal customary adoption order or judgment evidencing that the tribal customary
2 adoption has been completed." ORS 419B.476(7)(d)(A).⁴

3 In addition, ORS 419B.656(2) imposes certain requirements once the court
4 changes the child's permanency plan based on its determination that tribal customary
5 adoption is in the best interests of the Indian child, as provided in ORS 419B.612,⁵ and

⁴ ORS 419B.476(7)(d) also provides timing requirements for the court with respect
to the tribe's completion of the tribal customary adoption and filing of the order with the
court. Because father does not challenge the tribal customary adoption based on those
requirements, we do not address them here.

⁵ ORS 419B.612 provides:

"In a child custody proceeding involving an Indian child, when
making a determination regarding the best interests of the child under ORS
109.266 to 109.410 or 419B.600 to 419B.654, ORS chapter 419B, the
Indian Child Welfare Act (25 U.S.C. 1901 et seq.) or any regulations or
rules regarding ORS 109.266 to 109.410 or 419B.600 to 419B.654, ORS
chapter 419B, or the Indian Child Welfare Act, the court shall, in
consultation with the Indian child's tribe, consider the following:

"(1) The protection of the safety, well-being, development and
stability of the Indian child;

"(2) The prevention of unnecessary out-of-home placement of the
Indian child;

"(3) The prioritization of placement of the Indian child in accordance
with the placement preferences under ORS 419B.654;

"(4) The value to the Indian child of establishing, developing or
maintaining a political, cultural, social and spiritual relationship with the
Indian child's tribe and tribal community; and

"(5) The importance to the Indian child of the Indian tribe's ability to
maintain the tribe's existence and integrity in promotion of the stability and
security of Indian children and families."

1 the tribe consents. At that point, ODHS is required to provide the tribe with a written
2 report on the child containing specified information and the court is required to "accept a
3 tribal customary adoptive home study conducted by the Indian child's tribe if the home
4 study" includes the features set out in ORS 419B.656(2)(b)(A) to (D). The statute further
5 provides that the court may not accept a tribal customary adoption "if any adult living in
6 the proposed adoptive placement has a felony conviction for child abuse or neglect,
7 spousal abuse, crimes against a child, including child pornography, or a crime involving
8 violence." ORS 419B.656(2)(c).

9 Once the tribe completes the tribal customary adoption, ORS 419B.656 also
10 sets out the process for the juvenile court to accept the tribal customary adoption and
11 enter a judgment of adoption for the child, which terminates the court's wardship over the
12 child. Under ORS 419B.656(3):

13 "(a) The juvenile court shall accept an order or judgment for tribal
14 customary adoption that is filed by the Indian child's tribe if:

15 "(A) The court determines that tribal customary adoption is an
16 appropriate permanent placement option for the Indian child;

17 "(B) The court finds that the tribal customary adoption is in the
18 Indian child's best interests, as described in ORS 419B.612; and

19 "(C) The order or judgment:

20 "(i) Includes a description of the modification of the legal
21 relationship of the Indian child's parents or Indian custodian and the child,
22 including contact, if any, between the child and the parents or Indian
23 custodian, responsibilities of the parents or Indian custodian and the rights
24 of inheritance of the parents and child;

25 "(ii) Includes a description of the Indian child's legal relationship
26 with the tribe; and

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1 "(iii) Does not include any child support obligation from the Indian
2 child's parents or Indian custodian.

3 "(b) The court shall afford full faith and credit to a tribal customary
4 adoption order or judgment that is accepted under this subsection."

5 Once the tribal customary adoption is accepted by the court as provided
6 above, ORS 419B.656(4) and (5) set out the procedure by which the juvenile dependency
7 proceeding shall conclude. The court is to proceed as provided in ORS 109.350 and enter
8 a judgment of adoption,⁶ and also "include a statement that any parental rights or
9 obligations not specified in the judgment are transferred to the tribal customary adoptive
10 parents and a description of any parental rights or duties retained by the Indian child's
11 parents, the rights of inheritance of the child and the child's parents and the child's legal
12 relationship with the child's tribe." ORS 419B.656(4)(d). The court's jurisdiction over
13 the Indian child terminates once the court enters the judgment of adoption. ORS
14 419B.656(4)(f); ORS 419B.328(2)(d). The statute also expressly provides that "[a] tribal
15 customary adoption under this section does not require the consent of the Indian child or

⁶ ORS 109.350(1) provides:

"If, upon a petition for adoption or readoption duly presented and consented to, the court is satisfied as to the identity and relations of the persons, that the petitioner is of sufficient ability to bring up the child and furnish suitable nurture and education, having reference to the degree and condition of the parents, and that it is fit and proper that such adoption or readoption be effected, a judgment shall be made setting forth the facts, and ordering that from the date of the judgment the child, to all legal intents and purposes, is the child of the petitioner."

ORS 109.350(2) sets out what the judgment of adoption must include if the child is an Indian child.

1 the child's parents," ORS 419B.656(4)(e), and that "[a]ny parental rights or obligations
2 not specifically retained by the Indian child's parents in the juvenile court's adoption
3 judgment are conclusively presumed to transfer to the tribal customary adoptive parents,"
4 ORS 419B.656(5).

5 Father argues that the text, context, and legislative history of ORS
6 419B.656 support his reading of the statute that the juvenile court "must receive evidence
7 and independently assess that evidence to itself determine whether the [tribal customary
8 adoption] satisfies the ORS 419B.656 criteria and ultimately whether to accept the [tribal
9 customary adoption] and enter an adoption judgment." Father further argues that where
10 the tribal customary adoption deprives a parent of all parental rights, as he maintains
11 happened in this case, the court may accept the tribal customary adoption "only upon
12 proof beyond a reasonable doubt that the parental rights of the Indian child's parent
13 should be terminated according to Oregon statute and, as required by ICWA, testimony
14 by a qualified expert that continued custody of the child by the parent is likely to result in
15 serious emotional or physical damage."

16 We reject father's reading of ORS 419B.656. It is evident from the text and
17 context of that statute that the legislature did not intend that a tribal customary adoption
18 would require the juvenile court to receive evidence that proves a circumstance sufficient
19 to terminate parental rights. The legislature expressly provided that ODHS is not to file
20 a petition to terminate parental rights when the court determines that the appropriate
21 permanency plan is tribal customary adoption and the tribe consents. ORS

1 419B.476(5)(g); ORS 419B.498(2)(b)(C). The legislature also expressly provided that
2 any parental rights of the birth parents that are not specifically retained transfer to the
3 tribal customary adoptive parents, ORS 419B.656(5), without requiring proof of
4 circumstances sufficient to terminate parental rights, ORS 419B.656(3) and ORS
5 419B.656(4)(d), and without requiring the birth parent's consent, ORS 419B.656(4)(e).
6 Notably, nothing in the statute itself authorizes a court to terminate parental rights under
7 state law. Rather, the judgment of adoption sets out the rights or obligations retained by
8 the birth parents pursuant to the tribal customary adoption completed by the tribe, a
9 separate sovereign, and gives full faith and credit to that determination.

10 We also do not read ORS 419B.656 to require more than what father was
11 afforded in this case on the issue of whether the criteria were met. A juvenile court is
12 required to accept a tribal customary adoption if "the court determines that tribal
13 customary adoption is an appropriate permanent placement option for the Indian child,"
14 "[t]he court finds that the tribal customary adoption is in the Indian child's best interests,
15 as described in ORS 419B.612," and the order of tribal customary adoption includes the
16 required information. ORS 419B.656(3)(a). Additionally, the court was required to
17 accept the tribe's home study, as long as it included the required features. ORS
18 419B.656(2)(b). The record before the juvenile court at the hearing was sufficient to
19 make those findings, and father did not offer any evidence at the hearing on those criteria,
20 nor did father argue that the criteria were not met. It is unclear to us what father is
21 asserting on appeal was required below for the court to find the ORS 419B.656 criteria,

1 given the record in *this* case. All that father argued to the juvenile court was for an
2 evidentiary hearing that meets the standards for permanent guardianship for an Indian
3 child. However, that type of hearing is not required by ORICWA on the acceptance of a
4 tribal customary adoption.

5 Thus, analyzing the text in its context, the statute gives effect to the
6 legislature's intent to establish a permanency option that recognizes the importance of
7 tribal self-governance. In ORICWA, the legislature expressly stated its policy is "to
8 protect the health and safety of Indian children and the stability and security of Indian
9 tribes and families by promoting practices designed to prevent the removal of Indian
10 children from their families and, if removal is necessary and lawful, to prioritize the
11 placement of an Indian child with the Indian child's extended family and tribal
12 community." ORS 419B.600. The legislature further "recognize[d] the inherent
13 jurisdiction of Indian tribes to make decisions regarding the custody of Indian children."
14 *Id.*; *see also* ORS 419B.663 ("The juvenile court shall give full faith and credit to the
15 public acts, records and judicial proceedings of an Indian tribe applicable to an Indian
16 child custody proceeding."). Tribal customary adoption furthers that policy because it is
17 a permanency option that is completed by the Indian child's tribe according to the "tribal
18 custom, traditions or law of the child's tribe." ORS 419B.656(1). The legislature's
19 decision to create a separate permanency option that dictates a separate process taking
20 place within the Indian child's tribe's jurisdiction supports the conclusion that the
21 legislature intended to empower tribes and tribal courts to be the active decisionmaker in

1 the tribal customary adoption of an Indian child, with the state juvenile court accepting,
2 and giving full faith and credit to, that decision as long as it meets the requirements of
3 ORS 419B.656. In adhering to that process in this case, the juvenile court did not err
4 under ORICWA.

5 Having concluded that the juvenile court did not violate ORICWA, we turn
6 to father's arguments that are grounded in federal law. We understand father to be
7 essentially making two separate, but related, arguments: that we must read ORICWA to
8 require the same protections as a termination of parental rights proceeding under
9 ORICWA or ICWA because failing to do so would result in a violation of father's due
10 process rights; and, alternatively, that the juvenile court's acceptance of the tribal
11 customary adoption violated ICWA because it effectively terminated father's parental
12 rights in the absence of the required proof and, thus, ICWA preempts conflicting state
13 law.

14 We reject both of father's arguments for the primary reason that they do not
15 address the full faith and credit a state court is required to give to the tribe's sovereign
16 role in determining the parameters of T's tribal customary adoption. It was not, and is
17 not, the role of an Oregon juvenile court to second-guess those parameters under a state
18 involuntary process for permanent guardianship or termination of parental rights. Our
19 conclusion is supported by the text and context of ICWA. And, to the extent father's
20 arguments are grounded in due process and not the requirements in ICWA, father has not
21 provided us with a legal basis on which we could conclude that he was constitutionally

1 entitled to the type of evidentiary hearing that he seeks.

2 ICWA was enacted for the purpose of protecting tribal communities and
 3 families from and rectifying a pattern of harmful state court interference in relationships
 4 essential to the maintenance of tribal sovereignty. *See* 25 USC § 1901 (recognizing "that
 5 there is no resource that is more vital to the continued existence and integrity of Indian
 6 tribes than their children" and "that the States * * * have often failed to recognize the
 7 essential tribal relations of Indian people and the cultural and social standards prevailing
 8 in Indian communities and families"). To that end, an Indian child's parent's rights
 9 cannot be terminated without meeting the requirements in 25 USC section 1912(f), which
 10 provides that

11 "[n]o termination of parental rights may be ordered in such proceeding in
 12 the absence of a determination, supported by evidence beyond a reasonable
 13 doubt, including testimony of qualified expert witnesses, that the continued
 14 custody of the child by the parent or Indian custodian is likely to result in
 15 serious emotional or physical damage to the child."

16 The problem with father's argument here is that the reference to "such proceeding" in
 17 ICWA is a reference to "any involuntary proceeding in State court." 25 USC § 1912(a).
 18 By its plain terms, ICWA does not apply to proceedings in tribal court, which includes
 19 the tribal committee in this case.⁷ 25 USC § 1912(a); *see also* 25 CFR § 23.103(b)(1)

⁷ A "tribal court" is defined to include an administrative body such as the Cowlitz Indian Tribe's Indian Child Welfare Committee. 25 USC § 1903(12) ("[T]ribal court' means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, 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."); *see also* ORS 419B.603(13) ("Tribal court' means a court with jurisdiction over Indian child custody proceedings and that is either a Court of

1 (stating that "ICWA does not apply to * * * [a] Tribal court proceeding").

2 Here, it was the tribe, through its own tribal process, that

3 "suspended/modified" father's parental rights to T in the tribal customary adoption order.

4 Simply stated, ICWA does not apply to the change in father's parental rights of T

5 accomplished through the tribe's tribal customary adoption. The state proceeding, under

6 ORS 419B.656, to accept and give full faith and credit to a tribal customary adoption

7 does not allow the juvenile court to decide for itself whether and to what extent the tribal

8 customary adoption should modify a parent's parental rights. That is a decision for the

9 tribe. Consequently, a state involuntary proceeding terminating father's parental rights is

10 not implicated. However, giving full faith and credit to the tribe's decision to modify

11 father's parental rights is consistent with ICWA, which provides:

12 "The United States, every State, every territory or possession of the United
13 States, and every Indian tribe shall give full faith and credit to the public
14 acts, records, and judicial proceedings of any Indian tribe applicable to
15 Indian child custody proceedings to the same extent that such entities give
16 full faith and credit to the public acts, records, and judicial proceedings of
17 any other entity."

18 25 USC § 1911(d); *accord* ORS 419B.663 ("The juvenile court shall give full faith and

19 credit to the public acts, records and judicial proceedings of an Indian tribe applicable to

20 an Indian child custody proceeding."). The purpose of such a mandate would be eroded

21 if the juvenile court relitigated the conclusive proceedings of a tribe on the parameters of

Indian Offenses, a court established and operated under the code or custom of an Indian tribe or any other administrative body of a tribe that is vested with authority over Indian child custody proceedings.").

1 T's tribal customary adoption. We thus reject the foundational premise underlying
2 father's arguments.

3 Apart from arguing for the juvenile court to conduct its own termination of
4 parental rights hearing, either based on ORICWA or ICWA, which we conclude do not
5 apply in that manner, father fails to adequately explain what additional process he was
6 due based on the Due Process Clause. For the first time, in his reply brief, father argues
7 that the juvenile court could not give full faith and credit to an order that violated his due
8 process rights, and summarily asserts that the tribe's specific process violated his rights.
9 However, father refers to only the process afforded under ICWA as the one he was due
10 without explaining why that is so based on due process jurisprudence. Thus, we do not
11 further address father's arguments.

12 In sum, we affirm the juvenile court's order accepting the tribe's customary
13 tribal adoption and judgment of tribal customary adoption.

14 Affirmed.

Verified Correct Copy of Original 1/24/2025

FILED MULTNOMAH COUNTY CLERK
25 JAN 19 AM 5:45

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

19JU05952

Juvenile Department

Judge: Hughes, Linda

In the Matter of

Case No.

T [REDACTED]

ORDER ACCEPTING ORDER OF
TRIBAL CUSTOMARY ADOPTION

A Child.

This matter came on for hearing on January 3, 2025, before the Honorable Linda Hughes, Judge Pro Tem. ODHS appeared through Amber Garaventa, caseworker, and Aaron S. Lohman, Assistant Attorney General. Kelsey Cross, mother of the above-named child, [] appeared in person [] appeared by phone [] did not appear. The mother's attorney, Natalie Hollabaugh, appeared at the hearing. Thomas Gutz, father of the above-named child, [] appeared in person [] appeared by phone [] did not appear. The father's attorney, Dawn Andrews, appeared at the hearing. The tribe appeared through Justin Derhammer and Alana Martin, attorneys for the tribe. Three of the tribe's Indian Child Welfare Committee Members also appeared at the hearing. Also present was Kristy Barrett, child's attorney.

Pursuant to ORS 419B.656(3)(a) the juvenile court shall accept an order or judgment for tribal customary adoption that is filed by the Indian child's tribe if the criteria set forth in ORS 419B.656(3)(a)(C) are met. On December 19, 2024, the Indian child's tribe filed an Order of Tribal Customary Adoption for the above-named child. The juvenile court has reviewed the attached Order of Tribal Customary Adoption attached here as Exhibit #1. The court's findings or determinations outlined below are based on the Order of Tribal Customary Adoption and/or the Tribal Customary Adoption Home Study reviewed by the court.

Verified Correct Copy of Original 1/24/2025.

1 The court announced its decision on the record.

2 THE COURT FINDS:

3 1. A proper inquiry under the Oregon Indian Child Welfare Act and ORS 419B.636
4 has been conducted and T [REDACTED] is an Indian child within the meaning of the Oregon
5 Indian Child Welfare Act, ORS 419B.636.

6 2. The child is an Indian child within the meaning of the Oregon Indian Child
7 Welfare Act, ORS 419B.603(5).

8 3. The court has jurisdiction over the child, the subject matter and the parties and the
9 court's exercise of jurisdiction is proper.

10 4. The Cowlitz Indian Tribe supports the plan of tribal customary adoption for the
11 purpose of adoption for this Indian child. On January 11, 2024, the permanency plan for the
12 child was changed to Tribal Customary Adoption.

13 5. Tribal Customary Adoption is an appropriate permanent placement option for the
14 Indian child.

15 6. Tribal Customary Adoption is in the Indian child's best interest pursuant to ORS
16 419B.612.

17 7. ODHS has provided the Indian child's tribe and proposed tribal customary
18 adoptive parent(s) with a written report on the Indian child including all the information required
19 by ORS 419B.656(2)(a).

20 8. The tribal customary adoption home study meets the requirements of ORS
21 419B.656(2)(b) as follows:

22 a. Includes federal criminal background checks, including reports of child
23 abuse, that meet the standards applicable under the ^{laws} of this state for all other proposed
24 adoptive placements. ₊₊₊

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1 b. Uses the prevailing social and cultural standards of the Indian child's tribe
2 as the standards for evaluation of the proposed adoptive placement.

3 c. Includes an evaluation of the background, safety and health information of
4 the proposed adoptive placement, including the biological, psychological and social factors or
5 the proposed adoptive placement and assessment of the commitment, capability and suitability of
6 the proposed adoptive placement to meet the Indian child's needs.

7 d. The proposed adoptive placement is the Indian child's current foster care
8 placement.

9 9. The circumstances outlined in ORS 419B.656(2)(c) are not present.

10 10. The court has reviewed the Order of Tribal Customary Adoption and finds that it
11 includes a full description of the modification of the legal relationship of the Indian child's
12 parents and the child, including contact, if any, between the child and the parents, the
13 responsibilities retained by the parents and the rights of inheritance of the parents and the child.

14 11. The court has reviewed the Order of Tribal Customary Adoption and finds that it
15 conforms that with ORS 419B.656(3)(a)(C) including a full description of the following:

16 a. The modification of the legal relationship of the Indian child's parents and
17 the child, including contact, if any, between the child and the parents.

18 b. The responsibilities retained by the parents.

19 c. The rights of inheritance of the parents and the child.

20 d. The attached Order of Tribal Customary Adoption includes a description
21 of the Indian child's legal relationship with the tribe.

22 12. The attached Order of Tribal Customary Adoption does not include any child
23 support obligation from the Indian child's parents/Indian custodian.

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IT IS THEREFORE ORDERED that the Order of Tribal Customary Adoption dated December 6, 2024, is accepted by this court and made a part of the record of the case in this above-entitled matter.

DATED this 3 day of January 2025.

Ulida Hughes
Circuit Court Judge
PRO TEM

Submitted by:
Aaron S. Lohman, OSB#143764
Assistant Attorney General
Of Attorneys for Petitioner

Verified Correct Copy of Original 1/24/2025.

CERTIFICATE OF SERVICE

I certify that on December 23, 2024, I caused to be served the foregoing proposed Order Accepting Order of Tribal Customary Adoption, by the methods noted below, a true and exact and full copy thereof to:

Natalie Hollabaugh E-Mail
Youth Rights & Justice
natalie.j@youthrightsjustice.org
Attorney for Mother

Dawn Andrews E-Mail
Metro Public Defenders
dandrews@mpdlaw.com
Attorney for Father

Kristy Kay Barrett E-Mail
Sage Legal Centre
kristy@sagepd.org
Attorney for Child

Cowlitz Indian Tribe E-Mail
Alana Martin
Amartin@cowlitz.org
Justin Derhammer
jderhammer@cowlitz.org
Attorneys for Tribe


Aaron S. Lohman, OSB#143764
Assistant Attorney General

FILED MULTNOMAH COUNTY
25 JAN 20 11:45

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

Juvenile Department

19JU05952
Judge: Hughes, Linda

In the Matter of

[REDACTED]

A Child.

Case No. [REDACTED]
Petition No. [REDACTED]

JUDGMENT OF TRIBAL CUSTOMARY
ADOPTION

This matter came on for hearing on January 3, 2025, before the Honorable Linda Hughes, Judge Pro Tem. ODHS appeared through Amber Garaventa, caseworker, and Aaron Lohman, Assistant Attorney General. Kelsey Cross, mother of the above-named child, [] appeared in person appeared by phone [] did not appear. The mother's attorney, Natalie Hollabaugh, appeared at the hearing. Thomas Gutz, father of the above-named child, [] appeared in person appeared by phone [] did not appear. The father's attorney, Dawn Andrews, appeared at the hearing. The tribe appeared through Justin Derhammer and Alana Martin, attorneys for the tribe. Three of the tribe's Indian Child Welfare Committee Members also appeared at the hearing. Also present was Kristy Barrett, child's attorney.

The court's findings or determinations are based on the Order of Tribal Customary Adoption submitted by the tribe, the Order Accepting the Tribe's Order of Tribal Customary Adoption and the Tribal Customary Adoption Home Study reviewed by the court.

The court announced its decision on the record.

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Verified Correct Copy of Original 1/24/2025.

1 THE COURT FINDS:

2 1. A proper inquiry under the Oregon Indian Child Welfare Act and ORS 419B.636
3 has been conducted and the court has reason to know that T [REDACTED] is an Indian child
4 within the meaning of the Oregon Indian Child Welfare Act, ORS 419B.636.

5 2. The child is an Indian child within the meaning of the Oregon Indian Child
6 Welfare Act, ORS 419B.603(5).

7 3. The court has jurisdiction over the child, the subject matter and the parties and the
8 court's exercise of jurisdiction is proper.

9 3. The Cowlitz Indian Tribe supports the plan of tribal customary adoption for the
10 purpose of adoption for this Indian child. On January 11, 2024, the permanency plan for the
11 child was changed to Tribal Customary Adoption.

12 4. On December 19, 2024, the Cowlitz Indian Tribe filed with this court a copy of
13 the tribe's Order of Tribal Customary Adoption. On January 3, 2025, this court signed an Order
14 Accepting the Tribe's Order of Tribal Customary Adoption. A copy of both orders is attached
15 and incorporated herein as Exhibit A.

16 5. The child's birth name is T [REDACTED] and his date of birth is [REDACTED]
17 [REDACTED] He is affiliated with the Cowlitz Indian Tribe and the child's name after adoption will
18 be T [REDACTED]

19 6. The names and addresses of the biological parent(s) are: Thomas Gutz, father,
20 [REDACTED]; and Kelsey
21 Cross, [REDACTED].

22 7. The names and addressed of the adoptive parents are: Adam and Marlene
23 Foreman, [REDACTED]

24 8. The name and contact information for any agency(ies) having files or information
25 relating to the adoption include: ODHS East Branch, 11826 NE Glisan St., Portland, OR 97220.

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1 9. The child is an enrolled member of the Cowlitz Indian Tribe.

2 10. The residence and domicile of the Indian child is Cowlitz County, WA. The
3 Indian child is not a ward of tribal court.

4 11. ODHS has complied with the notice requirements under the Oregon Indian Child
5 Welfare Act, ORS 419B.639.

6 12. The adoptive placement complies with the placement preferences of the Oregon
7 Indian Child Welfare Act under ORS 419B.654.

8 13. The court is satisfied as to the identity and relations of the persons, that the
9 proposed tribal customary adoptive parent(s) are of sufficient ability to bring up the Indian child
10 and furnish suitable nurture and education and the requirements of Oregon Indian Child Welfare
11 Act have been met.

12 14. The court finds that it is fit and proper that the Tribal Customary Adoption be
13 effected.

14 IT IS THEREFORE ORDERED THAT:

15 1. The Order of Tribal Customary Adoption is hereby effectuated.

16 2. Any parental rights or obligations not specifically retained by the Indian child's
17 parents in the Order of Tribal Customary Adoption are presumed to transfer to the tribal
18 customary adoptive parents.

19 3. Upon entry of this judgment, the court shall provide to the United States Secretary
20 of the Interior copies of this judgment and any document signed by a consenting parent
21 requesting anonymity.

22 4. Upon the entry of this judgment the court's jurisdiction over the Indian child
23 terminates as provided in ORS 419B.328(2)(d).

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THE COURT FURTHER ORDERS that ODHS and its counsel are authorized to disclose
a copy of this judgment as necessary to facilitate the child's adoption.

Jan 3, 2025

Linda Hughes
Circuit Court Judge,
PRO TEM

Submitted by:

Aaron S. Lohman, OSB#143764
Assistant Attorney General
Of Attorneys for Petitioner

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CERTIFICATE OF READINESS under UTCR 11.100

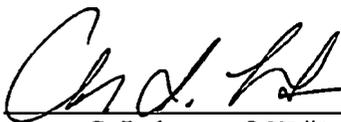
I certify this proposed order or judgment is ready for judicial signature because:

- 1. Each party, with the exception of an unrepresented child, has stipulated to the order or judgment, as shown by each party's signature on the document being submitted;
- 2. Each party, with the exception of an unrepresented child, has communicated approval of the order or judgment to me.
- 3. I have served a copy of this order or judgment on the 23rd day of December, 2024, on each party entitled to service and:
 - a. No objection has been served on or communicated to me.
 - b. I received objections as attached.
 - c. After conferring about objections, [role and name of party] agreed to independently file any remaining objection.

This service provided for at least 6 days' notice for attorneys and 10 days' notice for self represented parties. I informed any self-represented party of that party's option and timeframe to object. Documented in the Certificate of Service

- 4. Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.
- 5. Other: open court

Date: 1/2/2025



 Aaron S. Lohman, OSB#143764
 Assistant Attorney General



COWLITZ INDIAN TRIBE

19JU05952
Judge: Hughes, Linda

ICW Committee Action 24-10

Short Title: Customary Adoption TG

WHEREAS, the Cowlitz Indian Tribe is acknowledged as a sovereign Indian nation by the United States government; and

WHEREAS, the Cowlitz Tribal Council is the governing body of the Cowlitz Indian Tribe as authorized by the Tribe's Constitution and By-laws; and

WHEREAS, pursuant to Resolution 23-138, the Cowlitz Indian Tribal Council has delegated its authority to the Indian Child Welfare Committee ("ICW Committee") to authorize customary adoptions, consistent with the laws and regulations of the Tribe and the state whose court has jurisdiction of the child welfare case; and

WHEREAS, the minor child, T [REDACTED] ("the Minor"), is an enrolled member of the Cowlitz Indian Tribe; and

WHEREAS, Thomas Gutz Sr. and Kelsey Nicole Cross are the birth parents (collectively hereafter referred to as "Birth Parents") of T [REDACTED] and

WHEREAS, A dependency case was filed in the Circuit Court in Multnomah County, Oregon, filed as Case Number 19JU05952; and

WHEREAS, pursuant to the Indian Child Welfare Act, 25 USC §§ 1901 et. Seq., ("ICWA") the Cowlitz Indian Tribe has lawfully intervened in a child dependency proceeding involving the Minor, 19JU05952; and

WHEREAS, the Minor was placed with Adam and Marlene ~~Foreman~~ ^{FOREMAN WA} on 08/13/2019, who are the Minor's Maternal relatives; and

WHEREAS, it has been determined that the return of the Minor to the Birth Parents would likely result in serious detriment to the child; and

WHEREAS, the Circuit Court in Multnomah County, Oregon has changed the permanency goal of the dependency case to Tribal Customary Adoption; and

WHEREAS, Adam and Marlene ~~Foreman~~ ^{FOREMAN WA} have expressed a desire to be the Tribal Customary Adoption Parents ("TCA Parents") of the Minor, and Adam and Marlene Foreman will hereafter collectively be referred to as the "TCA Parents"; and

WHEREAS, pursuant to applicable laws of the Tribe, the Indian Child Welfare Committee's Tribal Customary Adoption Process, and Oregon State Law, the ICW Committee has met, reviewed vital and legally required information regarding the concerned individuals, and



COWLITZ INDIAN TRIBE

determined that Tribal Customary Adoption of the Minor by the TCA Parents is in the best interests of the Minor, Birth Parents, TCA Parents, and the Cowlitz Indian Tribe; and

WHEREAS, ICW Committee will retain all rights and responsibilities for amending the Tribal Customary Adoption of the Minor as necessary to comply with Tribal law, Tribal process, or state law or to correct any scrivener's errors.

NOW THEREFORE BE IT RESOLVED, the parental rights of Thomas Gutz Sr. and Kelsey Cross are suspended/modified as follows:

1. **The Birth Parents:** Thomas Gutz Sr. and Kelsey Cross ("Birth Parents") are no longer physically, legally, or financially responsible for T [REDACTED] ("Minor"). All such responsibilities are hereby transferred to Adam and Marlene ~~Forman~~ ^{Forman}, who will hereafter be collectively referred to as the Tribal Customary Adoption Parents ("TCA Parents"). However, in accordance to the customs and traditions of the Cowlitz Indian Tribe and the vital importance of the connection between tribal children and tribal family, the Minor, Birth Parents, and TCA Parents have the following rights:

A. Contact with Minor

a. The TCA Parents may allow visitation with the Birth Parents consistent with the best interests of the Minor. The TCA Parents have the sole discretion to determine the best interests of the Minor regarding visitation with the Birth Parents.

b. On or before the day that the Circuit Court in Multnomah County, Oregon enters a judgment of adoption, the Birth Parents and the TCA Parents must share a means to receive communication from the other. The Birth Parents and TCA Parents can individually choose the means of communication. The means of communication can include but are not limited to electronic mail or postal mail; however, the means of communication cannot force either the Birth Parents or the TCA Parents to establish or share social media accounts or reveal personally identifying information (such as addresses or phone numbers).

c. The Birth Parents and TCA Parents are required to confirm or update their means to receive communication annually, before the last day of January each year, through the last known means of communication.

d. Until the Minor reaches the age of eighteen (18), absent a reasonable emergency or an act of god, the TCA Parents must send the Birth Parents at least one photo of the Minor and a short summary of important events and changes from the prior year, before the last day of February each year. If a reasonable emergency or an act of god delays



COWLITZ INDIAN TRIBE

sending the communication required, the TCA Parents must send the summary and photo as soon as practicable.

1. The TCA Parents may, at their sole discretion, send photos or summaries more often than required.

e. The Birth Parents may send updates to the TCA Parents about changes to their status or circumstances when the Birth Parents confirm or update their means of communication (once per year); however, the TCA Parents have the sole discretion to decide what, if anything, to share with the Minor.

f. If a Birth Parent fails to confirm or update the means of communication, the TCA Parents are not required to send the photo and short summary of important events and changes unless or until the Birth Parent updates or confirms a means of communication. Once a Birth Parent confirms or updates a means of communication, the TCA Parents must resume sending a photo and summary of important events and changes before the end of the February of the calendar year that follows.

g. The TCA Parents must provide the Minor with the last known means of communication for each Birth Parent when the Minor reaches the age of eighteen (18).

B. Inheritance:

a. To the extent permitted by law, the Minor retains all rights of inheritance of the Birth Parents, including without limitation, any inheritance rights of any real or personal property held in trust by the United States.

C. Other Benefits

a. Nothing in this order is to be construed to deny any benefit or privilege to the Minor, to which the Minor is or may be entitled to as a member of the Cowlitz Indian Tribe.

2. The TCA Parents: Rights and responsibilities of the TCA Parents; Marlene and Adam Forman are now the legal parents of T [REDACTED] Adam and Marlene Forman have all the rights and responsibilities of a biological parent of the Minor subject to the modifications below:

- a. The legal name of the Minor can be changed.
- b. The TCA Parents must inform the Minor of his Cowlitz Indian Tribe heritage, culture, ancestry, and traditions. The TCA Parents agree to provide any information provided by the Cowlitz Indian Tribe to Minor and review such information with Minor.



COWLITZ INDIAN TRIBE

c. The TCA Parents must make reasonable efforts to have the Minor participate in cultural activities sponsored by the Cowlitz Indian Tribe, other Tribes, and Native American organizations, including without limitation, Canoe Journey, Potlaches, Pow Wows, after school programs, and youth events.

d. The TCA Parents must make reasonable efforts to have the Minor participate in ceremony, traditions, and events sponsored or hosted by the Cowlitz Indian Tribe.

e. The TCA Parent must keep the Cowlitz Indian Tribe informed of the Minor's current contact information, including an address and telephone number where the Minor can be reached. The contact information will remain confidential between TCA Parents and the Cowlitz Indian Tribe.

f. In order to preserve familial and cultural ties, the TCA Parents must make reasonable efforts to secure and maintain contact between the Minor and the Minor's siblings and extended family.

1. The Birth Parents must make reasonable attempts to provide the TCA Parents with a list of siblings and extended relatives of the Minor and provide any known contact information.

g. At least six (6) months before, but no later than thirty (30) days before, the Minor's eighteen (18) birthday, the TCA Parents must facilitate a meeting between the Minor and the Indian Child Welfare Program, or a successor of the Indian Child Welfare Program, to discuss the rights and benefits of Tribal Membership.

h. The TCA Parents may not take any steps to disenroll the Minor.

BE IT FINALLY RESOLVED, that the ICW Committee retains all rights and responsibilities for amending the Tribal Customary Adoption of Minor as necessary to comply with Tribal law, Tribal process, or state law, or to correct any scrivener's errors.

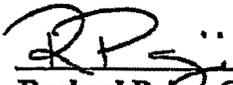
—CERTIFIED—

The foregoing vote was conducted by the Indian Child Welfare Committee, pursuant to the authority delegated by the Cowlitz Indian Tribe's Tribal Council Resolution 21-4, as amended by Tribal Council Resolution 23-138,

on December 6, 2024

by a vote of 5 for, 0 opposed and 0 abstain.


Debbie Hassler, Committee Chairperson


Racheal Paige, Committee Member

Verified Correct Copy of Original 1/24/2025

APPENDIX D - 1

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of T. A. G., II, a Child.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Respondent,
Respondent on Review,

and

K. C. and Cowlitz Indian Tribe,

Respondents,
Respondents on Review,

v.

T. G., aka T. J. G.,

Appellant,
Petitioner on Review.Multnomah County Circuit Court
Case No. 19JU05952

Petition No. 113766

S072305A186627 (Control)
A186628CONFIDENTIAL PETITION FOR
REVIEW UNDER ORS 419A.255

**APPELLANT'S PETITION FOR REVIEW
EXPEDITED JUVENILE DEPENDENCY CASE (NOT TPR)**

Petition to review the decision of the Court of Appeals
on an Appeal from the Judgment of the Circuit Court for Multnomah County
Honorable Linda Hughes Pro Tem,

Affirmed With Opinion: August 13, 2025
Author of Opinion: Ortega, Presiding Judge
Before Ortega, Presiding Judge, Lagesen, Chief Judge, and Joyce, Judge.

APPENDIX D - 2

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Juvenile Appellate Section

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Attorneys for Respondent
Cowlitz Indian Tribe

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25 USC § 1903(1)(ii) 8

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APPELLANT’S PETITION FOR REVIEW

INTRODUCTION

In this juvenile dependency appeal, to which the federal Indian Child Welfare Act and Oregon Indian Child Welfare Act apply, appellant and petitioner-on-review father respectfully petitions this court to allow review and reverse the Court of Appeals decision to affirm the judgment of tribal customary adoption. The Court of Appeals affirmed in a written precedential opinion. *Dept. of Human Services v. T.G.*, 342 Or App 548, ___ P3d ___ (2025). Att 1-19. Father incorporates his briefing in the Court of Appeals into this petition.¹ ORAP 9.20(4).

After the Court of Appeals issued its decision in this case, this court issued its decision in another case involving tribal customary adoption (“TCA”): *Dept. of Human Service v. M.G.J.*, 374 Or 228, ___ P3d ___ (2025). In *M.G.J.*, this court held that pursuant to the TCA statute, ORS 419B.656, an Oregon court with an open juvenile dependency case may enter a tribe’s TCA order and an adoption judgment into the Oregon court’s case register notwithstanding that no court has held an evidentiary hearing and no party has

¹ Father filed separate notices of appeal of the trial court’s order and judgment and filed opening briefs that were substantively the same in each case. Thereafter, the Court of Appeals issued an order consolidating the two appeals.

demonstrated beyond a reasonable doubt that the parent of the Indian child is unfit. In so holding, this court implicitly rejected the mother's arguments that construing ORS 419B.656 in that manner violated ICWA and due process and raised equal protections concerns.

This appeal gives this court the opportunity to clarify its holding in *M.G.J.* as to whether an Indian family is entitled to fewer substantive and procedural protections than a non-Indian family when the Oregon court enters a TCA in the Oregon dependency case register thereby severing the parental rights of an Indian child's parent without the parent's consent.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

I. Trial-level proceedings

This case involves father's son T. In August 2019, the department filed a dependency petition regarding T. ER 64.² The following month, the department filed an amended petition. ER 65. One year later, in September 2020, the trial court entered a judgment of jurisdiction and disposition. ER 70.

² References to "ER" are to the excerpt of record filed with father's opening brief in Court of Appeals case number A186627.

In July 2022, the court changed T's permanency plan from reunification to guardianship; then, in January 2024, the court changed the permanency plan from guardianship to tribal customary adoption.³ ER 73, 75.

Eleven months later, on December 6, 2024, the Cowlitz Indian Tribe's Indian Child Welfare Committee ("the Committee") issued a document entitled "Short Title: Customary Adoption TG" ("tribe's TCA document"). ER 59-62. In that document, the Committee "resolved" that father and mother "[are] no longer physically, legally, or financially responsible for T[]" and that "[a]ll such responsibilities are hereby transferred to * * * the Tribal Customary Adoptive Parents ('TCA Parents')." ER 60. The tribe's TCA document stated that "the TCA Parents [] are now the legal parents of" T, "have all the rights and responsibilities of a biological parent," and are entitled to change T's last name. ER 61. The document further stated that the "TCA Parents may allow visitation with the Birth Parents consistent with the best interests of [T]," and that "[t]he TCA Parents have the sole discretion to determine the best interests of [T] regarding visitation with the Birth Parents." ER 60. The "TCA Parents"

³ This court may take judicial notice of the fact that the trial court so ruled, as that fact is not subject to reasonable dispute, in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned[.]" *viz.*, the electronic trial court file (eTCF). OEC 201(b) (setting forth that requirement for facts subject to judicial notice); OEC 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

were required to, once per year “absent a reasonable emergency or an act of god,” send parents a photograph of T “and a short summary of important events and changes from the prior year.” ER 60.

On December 19, 2024, the tribe filed in the trial court, in the Oregon dependency case, a “Declaration in Support of Customary Adoption TG.” ER 76.

On January 2, 2025, father filed in the Oregon trial court, in the Oregon dependency case, a written objection to “the acceptance of the Tribal Customary Adoption (hereafter TCA) of T[] and to the [Oregon] court entering a judgment of adoption.” ER 1-3, 76-77. Father requested “a hearing on the matter that complies with the minimum requirements of ORS 419B.365, the federal Indian Child Welfare Act (25 USC 1901 *et seq.*) and the Due Process Clause of the United States Constitution’s 14th Amendment.” ER 1. Father argued that “[i]t is illegal and fundamentally unfair to deny [him] the legal protections and due process afforded Indian children’s parents under ORS 419B.365(5), ORS 419B.500(1), [and] the federal Indian Child Welfare Act,” and that “[t]he court should schedule a contested evidentiary hearing that provides the protections and process afforded families of Indian children when a government wants to implement a permanent guardianship or traditional adoption under Oregon’s and the federal ICWA and other applicable laws.” ER 2-3.

At a hearing the following day, father reiterated his written arguments against the Oregon court accepting the tribe's TCA document and against the Oregon court entering a judgment of tribal customary adoption of T. ER 7-10, 17-23 (Tr 5-8, 15-21).⁴ The Oregon court rejected father's arguments, entered an order accepting the tribe's TCA document, and entered a judgment of tribal customary adoption of T in the case register of the Oregon dependency case. ER 49-53, 54-62.

II. Father's appeals

Father appealed the trial court's order accepting the tribe's document and the court's judgment of tribal customary adoption, arguing that the TCA in this case effectively functioned as a termination of his parental rights, or at least as the establishment of a permanent guardianship. As such, father argued, the Oregon court could not enter a judgment of adoption unless and until the proponents of the Oregon court's doing so proved beyond a reasonable doubt at an evidentiary hearing that father's rights should be terminated according to Oregon statute, and presented testimony by a qualified expert witness

⁴ The only evidence the court heard or received at that hearing was an exhibit setting forth the tribe's internal procedure for tribal customary adoption. ER 41-48. That document is marked "Father's Exhibit 202," but the court received it as "exhibit 201." Tr 25-27 (ER 27-29). Pursuant to that document, parents are allowed to provide the tribe's Indian Child Welfare Committee with written documents not exceeding 15 pages in length, and neither parents nor their counsel are permitted to attend the Committee's meetings. Ex 201 at 4-5.

establishing that his continued custody of T was likely to result in serious emotional or physical damage to T, as required by Oregon statute, case law, and ICWA. App Br 17-18; Reply Br 5-6. (A186627). Father further argued that construing ORS 419B.656 to *not* require such protections for the parents of Indian children rendered that statute both in violation of due process and in conflict with ICWA, which therefore preempted ORS 419B.656. App Br 32-39; Reply Br 7-11.

III. The Court of Appeals decision

The Court of Appeals affirmed the trial court's judgments. The court held that, as a matter of statutory construction, ORS 419B.656 makes the tribe the "active decisionmaker" in a TCA and leaves the Oregon court presiding over an Oregon dependency case with no role beyond "accepting" a tribe's TCA order, affording that order full faith and credit, and entering an adoption judgment. Att 11-14. The court also held that ICWA does not apply to proceedings to establish a TCA because such a proceeding is not a proceeding "in State court" for ICWA purposes. Att 15-17 (citing 25 USC § 1912(a)). For that reason, the court declined to address whether ICWA preempted ORS 419B.656. Att 5 n 2. The court also declined to address any due process arguments because, in its view, father did not ground any arguments "on due process jurisprudence." Att 17.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

ICWA’s protections for Indian families and the parents of Indian children apply when a party seeks “the foster care placement of, or termination of parental rights to, an Indian child” in an “involuntary proceeding in State court * * *.” 25 USC § 1912(a). When an Oregon trial court presiding over an open Oregon juvenile dependency case, pursuant to an Oregon statute, convenes a hearing in that Oregon dependency case, determines at that hearing that it will “accept” a tribe’s order setting forth the terms of a TCA, signs an Oregon adoption judgment, and enters that adoption judgment into the Oregon dependency case register, does that proceeding qualify as a “proceeding in State court,” such that ICWA’s heightened protections for Indian families and the parents of Indian children apply?

First Proposed Rule of Law

Yes. A proceeding that is convened by an Oregon judge, in an open Oregon dependency case, that results in an Oregon adoption judgment signed by that Oregon judge and entered in the Oregon dependency case register, all pursuant to an Oregon statute, qualifies as a “proceeding in State court” for purposes of ICWA. Accordingly, ICWA’s heightened protections for Indian families and the parents of Indian children apply.

Second Question Presented

ICWA's purposes include preventing the breakup of Indian families, a purpose it sought to achieve by providing heightened protections to those families. Under ICWA, a state court may not implement the "termination of the parent-child relationship," 25 USC § 1903(1)(ii), between an Indian child and their parent over the parent's objection without proof beyond a reasonable doubt of a basis to do so under state law and testimony from a qualified expert witness ("QEW") establishing that continued custody by the Indian child's parent is likely to result in serious emotional or physical damage to the child. 25 USC § 1912(f). As clarified by this court in *M.G.J.*, ORS 419B.656 authorizes an Oregon court to divest the parent of an Indian child of all or most of their parental rights without such proof, by the Oregon court's actions of accepting a TCA document and entering an Oregon judgment of adoption in the Oregon court's register of the dependency case. Is ORS 419B.656 therefore in conflict with ICWA, and does ICWA therefore preempt ORS 419B.656?

Second Proposed Rule of Law

Yes. ICWA conditions an Oregon court's authority to "terminate the parent-child relationship" between an Indian child and their parent on the Oregon court first having provided the parent with protections that are higher than those afforded to the parents of non-Indian children under Oregon law, specifically, proof beyond a reasonable doubt of a statutory basis to terminate parental rights

and testimony by a qualified expert witness establishing that continued custody by the parent is likely to result in serious emotional or physical damage to the child. But ORS 419B.656 authorizes an Oregon court to “terminate the parent-child relationship” between an Indian child and their parent *without* the proof and testimony required by ICWA. ORS 419B.656 thus conflicts with ICWA and impedes ICWA’s purpose, and ICWA therefore preempts ORS 419B.656.

Third Question Presented

Are the parents of Indian children entitled to fewer substantive and procedural safeguards than the parents of non-Indian children when faced with a court’s severance of their parental rights without their consent?

Third Proposed Rule of Law

No. As a matter of due process and equal protection, the parents of Indian children are entitled to the same substantive and procedural protections as the parents of non-Indian children before a court may sever their parental rights without their consent.

REASONS FOR ALLOWING REVIEW

1. This appeal presents significant issues of law involving a state statute and the legality of an important government action. ORAP 9.07(1)(b), (d); ORAP 9.07(4).
2. This case clearly presents the issues and is free from factual disputes or procedural obstacles that would prevent this court from reaching

them, and the issues are clearly presented in the briefs in the Court of Appeals.

ORAP 9.07(7), (8), (15).

3. The Court of Appeals decision appears to be wrong and results in a serious injustice, *viz.*, the severance of father's parental rights to and relationship with his child and entry of an adoption judgment, in the absence of any of the protections afforded to non-Indian parents facing similar deprivations. ORAP 9.07(14)(a).

4. The Court of Appeals issued a written, precedential opinion. ORAP 9.07(11).

CONCLUSION

For the foregoing reasons and those set forth in father's opening and reply briefs in the Court of Appeals, father respectfully requests that this court allow review and reverse the decision of the Court of Appeals.

Respectfully submitted,

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ATTACHMENT INDEX

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ATTACHMENT OMITTED

APPENDIX D - 18

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)
UNDER ORAP 9.05(3)(a)

Petition length

I certify that (1) this petition for review complies with the word-count limitation in ORAP 5.05 under ORAP 9.05(3)(a), and (2) the word-count of this petition for review (as described in ORAP 5.05(2)(a)) under ORAP 9.05(3)(a) is 2,146 words.

Type size

I certify that the size of the type in this petition for review is not smaller than 14 point for both the text and footnotes as required by ORAP 5.05(1)(d)(ii) under ORAP 9.05(3)(a).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Petition for Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 7, 2025.

I further certify that I served this petition on October 7, 2025, upon Benjamin Gutman #160599, Solicitor General, and Inge D. Wells #881137, Senior Assistant Attorney General, 1162 Court Street NE, Salem, OR 97301, attorneys for Petitioner-Respondent by emailing a true copy to AppellateService@doj.oregon.gov and inge.d.wells@doj.oregon.gov, and by emailing a true copy to Erica Hayne Friedman, attorney for respondent Mother, erica.hf@youthrightsjustice.org, and by mailing a true copy to:

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Signed

By Tiffany Keast at 12:34 pm, Oct 07, 2025

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APPENDIX E - 1

 IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of T. A. G., II, a Child.

DEPARTMENT OF HUMAN SERVICES,
 Petitioner-Respondent,
 and

K. C.,
 Respondent,
 v.

T. G., aka T. J. G.,
 Appellant.

Multnomah County Circuit Court
 Case No. 19JU05952

Petition No. 113766

A186627

CONFIDENTIAL BRIEF UNDER
 ORS 419A.255

**EXPEDITED JUVENILE DEPENDENCY CASE (NOT TPR)
 APPELLANT'S OPENING BRIEF**

Appeal from the Judgment of the Circuit Court
 for Multnomah County
 Honorable Linda Hughes Pro Tem,

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04/25

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III. Oregon’s legislature did not intend for ORS 419B.656 to deprive parents of Indian children of the procedural and substantive protections to which they are entitled under both ICWA and state law.17

A. Text: By directing the trial court to “determine” and “find” certain things as necessary conditions to “accept” the tribe’s TCA, the Oregon legislature unequivocally expressed its intent that the Oregon court reach its own conclusions and did not intend for the court to rotely adopt tribal or state government decrees.18

B. Context: The statute is silent as to the substantive and procedural protections due a parent when a TCA permanently severs all enforceable parental rights; but the context of ORS 419B.090(4) and ICWA, *inter alia*, illuminates that the proponent of the TCA must prove grounds for termination of parental rights beyond a reasonable doubt before the Oregon court may “accept” this type of TCA.23

C. Legislative history: The legislative and enactment history of ORS 419B.656 demonstrates that the legislature intended to afford Indian families protections beyond those afforded by the due process clause and ICWA and did not intend to allow pro forma termination of Indian parental rights.28

IV. As the TCA in this case terminated all of father’s parental rights, the trial court had the authority to accept it and enter an adoption judgment only upon proof of grounds for terminating father’s parental rights and the requirements of ICWA; as no party proved anything of the sort, this court must reverse.31

V. In the unlikely event that this court interprets ORS 419B.656 to allow what happened in this case, this court should nonetheless invalidate the adoption judgments because the trial court’s acceptance of the TCAs in this case qualifies as a termination of parental rights under ICWA, ICWA preempts state law, and the procedural and substantive law applied by the trial court violated ICWA.32

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding

In this juvenile dependency case, to which the Indian Child Welfare Act (“ICWA”) and Oregon Indian Child Welfare Act (“ORICWA”) apply, father appeals the trial court’s order accepting the tribe’s order of tribal customary adoption. ER 49-53.

Nature of the Judgment

The Multnomah County Circuit Court entered the order at issue on January 24, 2025. ER 77.

Jurisdiction

This court has jurisdiction pursuant to ORS 419A.200(1) and ORS 419A.205(1)(c) and (d).

Notice of Appeal

The trial court entered the order on January 24, 2025. Father timely filed a notice of appeal from that order on January 31, 2025.

Questions Presented¹

ORS 419B.656 authorizes the trial court to implement a tribal customary adoption (TCA) without the parent's consent and over the parent's objection. Once a tribe has "completed" a TCA, it must file its TCA order or equivalent document with the trial court for the court to determine, pursuant to ORS 419B.656, whether to "accept" the tribe's TCA order and, if so, enter a judgment of adoption.

1. When the proponents of a TCA file a declaration supporting their request that the court implement a TCA, and the parent then files a written objection to the court's doing so in advance of the required hearing on the TCA and reiterates his arguments at that hearing, is the parent's objection to the TCA "untimely?" In other words, does any provision of ORICWA authorize the Oregon trial court to refuse to entertain a parent's objection to a TCA made both in writing in advance of the hearing and on the record at the hearing? Assuming not, does the trial court commit reversible error when it does so?

2. When, as in this case, the TCA retains no enforceable rights for the parent, does ORS 419B.656 require the party moving for the TCA to first prove that the parent's conduct warrants terminating parental rights before the court

¹ The arguments raised in father's second and third questions presented are currently under advisement in the Oregon Supreme Court in *Dept. of Human Services v. M.G.J.*, S067679 (argued and submitted on June 20, 2024).

may enter a judgment of adoption, and must the procedure and proof of such parental conduct comport with ICWA?

3. If the proponent of the TCA proves that the parent's conduct authorizes terminating parental rights, ORS 419B.656 allows the trial court to enter a judgment of tribal customary adoption if the court first makes four determinations, *viz.*, (1) that the home study of the potential adoptive placement conforms to the requirements enumerated in the statute; (2) that no adults living in the proposed adoptive home have disqualifying criminal convictions; (3) that TCA is an appropriate permanent placement option for the Indian child; and (4) that the TCA is in the Indian child's best interests under ORS 419B.612. Must those conclusions be based upon sufficient evidence in the record? In other words, in the absence of evidence in support of each required determination, may the trial court merely adopt the tribe's or the department's representations as to those determinations?

Summary of Arguments

A TCA is "the adoption of an Indian child, by and through the tribal custom, traditions or law of the child's tribe, and which may be effected without the termination of parental rights." Once a tribe has "completed" a TCA, it must file its TCA order or equivalent document with the trial court for the court to determine, pursuant to ORS 419B.656, whether to "accept" the tribe's TCA order and, if so, enter a judgment of adoption.

On the merits, ORS 419B.656, by its plain text, conditions the court's authority to implement a TCA on the court first making specified determinations, including, most importantly, that the TCA is in the best interests of the Indian child as set forth in ORS 419B.612. But the text is silent as to what—if any—procedural or substantive protections the court must afford the parent when the TCA permanently deprives the parent of their parental rights.

As Oregon's courts will not interpret ORS 419B.656 (or any statute) in isolation, that statute's silence does not conclusively establish that the legislature intended for the trial court to accept a TCA and enter a judgment of adoption in the absence of sufficient procedural and substantive protections. Contextual statutes such as ORS 419B.090(4), other provisions of ORS chapter 419B, and the federal Indian Child Welfare Act (ICWA) illuminate that the requirements of ORS 419B.656 must necessarily vary depending on the severity of the parental deprivation. And when the trial court's acceptance of the TCA would operate to permanently deprive the parent of all their parental rights, the court may not accept the TCA and enter a judgment of adoption unless and until the proponents of the TCA prove statutory grounds for termination of parental rights (TPR) and do so in accord with ICWA, which requires proof beyond a reasonable doubt and testimony of a qualified expert that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

Thus, properly construed, ORS 419B.656 contains two proof stages. At the first stage, the court must assess the nature and extent of the deprivation of parental rights and then hold the proponent of the TCA to the legal and substantive standards that due process, ORS chapter 419B, and ICWA require. When the TCA will result in the loss of all enforceable parental rights, the proponent of the TCA must prove a statutory basis for TPR under ORS 419B.502 to ORS 419B.510 and that TPR serves the child's best interest under ORS 419B.500, and it must do so in accord with the requirements of ICWA, which requires proof beyond a reasonable doubt and also requires testimony by a qualified expert that continued custody by the parent is likely to result in serious physical or emotional damage to the child.

The second proof stage arises only upon satisfaction of the first. At the second stage, the proponent of the TCA must then also present evidence that is sufficient to allow the trial court to make the determinations required by ORS 419B.656.

Both stages must occur at a properly noticed evidentiary hearing at which the trial court may consult with the tribe but must independently make the family- and child-specific determinations that due process, ICWA, and ORS 419B.656 require.

This construction of ORS 419B.656 does not offend due process or ICWA and is consistent with the appellate courts' approach in construing other statutes authorizing adoption over a parent's objection.

The enactment and other legislative history of ORICWA supports father's reading of ORS 419B.656. That is so because that history reveals that Oregon's legislature intended all provisions of ORICWA to enhance, not diminish, the protections for Indian families, including the parents of Indian children.

In this case, the department and the tribe proposed a TCA that would deprive father of all of his parental rights. Father filed a written objection in advance of the hearing. And he objected to the TCA on the record at the hearing. Inexplicably, the trial court refused to entertain the objection, concluding that it was untimely. The court was wrong to rule as it did, because no source of law requires anything more of a parent to register an objection to an Oregon court ruling to permanently deprive the parent of their parental rights.

Father's objection was well-founded because the TCA effectively terminated all of father's parental rights. The trial court accepted the tribe's TCA order and entered a judgment of adoption for father's child as a "ministerial" task, without holding the proponents of its doing so to their burden to prove a statutory basis for TPR, the requirements of ICWA, and the ORS 419B.656 determinations. For those reasons, this court should reverse.

To the extent this court disagrees and determines that ORS 419B.656 requires the trial court to accept a tribe's TCA order and enter an adoption judgment that effectively terminates parental rights regardless of whether any party sufficiently proved a statutory basis for TPR or satisfied the requirements of ICWA, this court must nonetheless invalidate the court's order under ICWA. That is so because that construction of ORS 419B.656 obstructs the purposes of ICWA, and ICWA therefore preempts ORS 419B.656.

Finally, the trial court's order accepting the tribe's TCA order paved the way for the adoption judgment that terminated father's parental rights as that phrase is employed in ICWA ("any action resulting in the termination of the parent-child relationship"), but the department obtained that order and judgment in violation of ICWA (*inter alia*, without proof beyond a reasonable doubt and without qualified expert testimony). Therefore, under ICWA, father is entitled to petition any "court of competent jurisdiction to invalidate" the adoption judgment. Father so petitions this court.

Summary of Facts

This case involves father's child, T [REDACTED] (sometimes referred to in the record as "T [REDACTED]" or "T [REDACTED]"), who qualifies as an Indian child for purposes of ICWA and ORICWA.

In August 2019, the department filed a dependency petition regarding T [REDACTED]. ER 64. The following month, the department filed an amended petition. ER 65. One year later, in September 2020, the trial court entered a judgment of jurisdiction and disposition. ER 70.

In July 2022, the court changed T [REDACTED]'s permanency plan from reunification to guardianship; then, in January 2024, the court changed the permanency plan from guardianship to tribal customary adoption.² ER 73, 75.

Eleven months later, on December 6, 2024, the Cowlitz Indian Tribe's Indian Child Welfare Committee ("ICW Committee") issued a document entitled "Short Title: Customary Adoption TG" ("tribe's TCA order"). ER 59-62. In that order, the ICW Committee "resolved" that parents "[are] no longer physically, legally, or financially responsible for T [REDACTED]" and that "[a]ll such responsibilities are hereby transferred to * * * the Tribal Customary Adoptive Parents ('TCA Parents')." ER 60. The tribe's TCA order stated that "the TCA Parents [] are now the legal parents of" T [REDACTED], "have all the rights and responsibilities of a biological parent," and are entitled to change T [REDACTED]'s last name. ER 61. The order further stated that the "TCA Parents may allow

² This court may take judicial notice of the facts that the trial court so ruled, as those facts are not subject to reasonable dispute, in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned[.]" *viz.*, the electronic trial court file (eTCF). OEC 201(b) (setting forth that requirement for facts subject to judicial notice); OEC 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

visitation with the Birth Parents consistent with the best interests of [T █████]. The TCA Parents have the sole discretion to determine the best interests of [T █████] regarding visitation with the Birth Parents.” ER 60. The “TCA Parents” were required, once per year “absent a reasonable emergency or an act of god,” to send parents a photograph of T █████ “and a short summary of important events and changes from the prior year.” ER 60.

On December 19, 2024, the tribe filed in the trial court a “Declaration in Support of Customary Adoption TG.” ER 76.

On January 2, 2025, father filed a written objection to “the acceptance of the Tribal Customary Adoption (hereafter TCA) of T █████ and to the court entering a judgment of adoption.” ER 1-3, 76-77.

On January 3, 2025, the court held the required hearing on the matter. ER 5, 76-77. Father reiterated his written arguments against the court’s accepting the tribe’s TCA order and entering a judgment of adoption. ER 7-10, 17-23 (Tr 5-8, 15-21). The court overruled father’s objections as untimely, and thereafter entered an order accepting the tribe’s TCA order and a judgment of tribal customary adoption.³ ER 49-53, 54-62.

³ Father appealed the trial court’s adoption judgment. *Dept. of Human Services v. T.G.*, A186628. Respondent-mother’s March 13, 2025 motion to consolidate the two appeals remains pending as of this brief’s filing. Father files his opening briefs in each appeal contemporaneously. The two opening briefs are substantively the same.

FIRST ASSIGNMENT OF ERROR

The trial court erred in overruling father's objection to the tribal customary adoption as untimely.

SECOND ASSIGNMENT OF ERROR

The trial court erred in accepting the tribe's TCA order without proof of grounds for termination of father's parental rights and in violation of the requirements of ORICA and ICWA.

THIRD ASSIGNMENT OF ERROR

The trial court erred in accepting the tribe's TCA order.

Combined Preservation of Error⁴

Father filed a written objection to the court's accepting the tribe's TCA order and entering a judgment of adoption, arguing, in relevant part, as follows:

“[Father] objects to the acceptance of the Tribal Customary Adoption (hereafter TCA) of T [REDACTED] and to the court entering a judgment of adoption. He specifically requests a hearing on the matter that complies with the minimum requirements of ORS 419B.365, the federal Indian Child Welfare Act (25 U.S.C. 1901 et seq.), and the Due Process Clause of the United States Constitution's 14th Amendment.”

“* * * * *

⁴ Father sets out combined preservation of error, standard of review, and argument sections for his assignments of error because the procedural posture of the assignments of error and the legal theories advanced in support of those assignments are essentially the same. ORAP 5.45(6).

“[Father] makes this objection on the grounds that the TC[A] of T [REDACTED] as described in [the tribe’s TCA order], essentially amounts to, at best, an ORS 419B.365 permanent guardianship. In some respects, it is a greater restriction on parental rights. Therefore, to implement the TCA without a contested evidentiary hearing allows a lower standard of protection for [father] than the federal Indian Child Welfare Act. Oregon law mandates that higher standard than a simple change of plan based on a preponderance of evidence without the protection of even the rules of evidence that occurred at the jurisdictional case permanency hearing. ORS 419B.660.

“* * * * *

“To allow this Tribal Customary Adoption without first having an evidentiary hearing to establish beyond a reasonable doubt the required grounds for a permanent guardianship under ORS 419B.365(2) and (5)(a) violates Oregon law and the federal Indian Child Welfare Act because it falls below the standard of protection to the rights of [father]. The court would be authorizing this TCA, after a very informal hearing where proof was on that of a preponderance of the evidence.

“Oregon law regarding putting in place a permanent guardianship for an Indian child requires that before the court grants the motion for the permanent guardianship, evidence at the hearing must establish beyond a reasonable doubt that continued custody of the Indian child by the child’s parent is likely to result in serious emotional or physical damage to the Indian child. ORS 419B.365(5)(a)(C)(i). This has not occurred in this case. At a permanency hearing, the court authorized DHS to move forward with the process of attempting to achieve a TCA, the functional equivalent of, at a minimum, a permanent guardianship. It is illegal and fundamentally unfair to deny [father] the legal protections and due process afforded Indian children’s parents under ORS 419B.365(5), ORS 419B.500(1), [and] the federal Indian Child Welfare Act.”

At the subsequent hearing, father reiterated those arguments. ER 7-10, 17-23 (Tr 5-8, 15-21).⁵ ER 27-29 (Tr 25-27). The department's counsel argued that the court's role was limited to a "ministerial" function of giving full faith and credit to the tribe's TCA order. ER 11-13 (Tr 9-11). The tribe's counsel argued that "Oregon law is as [the department's counsel] stated, and that once these things are filed, the court is supposed to proceed and process the customary adoption." ER 13-15 (Tr 11-13). T [REDACTED]'s counsel stated that her "position has been fully expressed" by the department's and the tribe's counsel. ER 15 (Tr 13). Mother's counsel argued that her review of the legislative history of ORS 419B.656 suggested that the legislature "did not intend for a hearing under that statute to be an opportunity for parties to re-litigate matters" and intended "that Oregon courts give full faith and credit to tribal child custody determinations regarding Indian children." ER 15-17 (Tr 13-15).

⁵ The only evidence the court heard or received at the hearing was an exhibit setting forth the tribe's internal procedures for TCAs. ER 41-48. That document is marked as "Father's Exhibit 202," but the court received it as "exhibit 201." ER 27-29 (Tr 25-27). Father offered the exhibit presumably to defeat any argument that he received, as part of the tribe's internal process, the procedural and substantive protections he was due. Pursuant to the document, parents are entitled to provide written documents not exceeding 15 pages in length to the ICW Committee, and neither parents nor their counsel are permitted to attend the ICW Committee's meetings. Ex 201 at 4, 5.

The court overruled father's objections:

“THE COURT: I found what [mother's counsel] had to say about the legislative history quite informative and I appreciate that she went to the effort to look that up. And I found the arguments of both [the department's counsel] and [the tribe's counsel] to be quite on point.

“I really still don't understand why this got filed late yesterday. And some of us are just getting it this morning. *It's really untimely. * * * So it's not a surprise to anyone that we're all here today to finalize the tribal customary adoption.*

“And the law does say the court shall, and even if it said the court will as opposed to shall, I would proceed because this has been our plan.

“* * * * *

“And [father], I don't say that to you in a way to disrespect what [father's counsel] has indicated she believes to be your rights. I absolutely believe that anything we do of this nature has to be given a lot of consideration. *And parents need a full opportunity to litigate any issues that they might have. But that time really has come and gone.*

“And in terms of notice, you have been on notice for a year now that the plan is tribal customary adoption. * * * So I am prepared to proceed. * * *.”

ER 24- (Tr 22-25) (emphasis added). Thereafter, the court entered an order accepting the tribe's TCA order and a judgment of a tribal customary adoption.

ER 49-62.

Combined Standard of Review

This court reviews questions of statutory construction for legal error.

Dept. of Human Services v. S.E.K.H., 283 Or App 703, 706, 389 P3d 1181

(2017) (citing *State v. Thompson*, 328 Or 248, 256, 971 P2d 879, *cert den*, 527

US 1042, 119 S Ct 2407, 144 L Ed 2d 805 (1999)). Oregon’s appellate courts are “oblig[ed] to interpret the statutes correctly, which includes an obligation to consider relevant context, regardless of whether it was cited by any party.”

Dept. of Human Services v. J.R.F., 351 Or 570, 273 P3d 87 (2012) (citing *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997)). In juvenile dependency cases, “that relevant context includes ORS 419B.090(4), which makes clear that the due process rights of parents are always implicated in the construction and application of the provisions of ORS chapter 419B.” *J.R.F.*, 351 Or at 791.

Combined Argument

I. Introduction

In 1978, Congress passed the Indian Child Welfare Act (ICWA), 25 USC §§ 1901 - 1963, in an attempt to stop public and private agencies from continuing to break apart and destroy Indian families and cultures.⁶

⁶ See 25 USC § 1901(4) (“an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions”); 25 USC § 1902 (stating that ICWA’s purpose was, in part, “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs”).

Nonetheless, Oregon continued to remove Indian children from their homes at higher rates than non-Indian children.⁷

Accordingly, in 2020, the Oregon legislature enacted the Oregon Indian Child Welfare Act (ORICWA).⁸ See Or Laws 2020, ch 14. The following year, the Oregon legislature amended ORICWA and authorized a new type of permanency plan for an Indian child: tribal customary adoption (TCA). ORS 419B.476(5)(g); ORS 419B.656. A TCA does not require the consent of the Indian child’s parents, and a TCA “may be effected without the termination of parental rights.” ORS 419B.656(4)(e); ORS 419B.656(1). In a TCA, “[a]ny parental rights or obligations not specifically retained by the Indian child’s parents in the juvenile court’s adoption judgment are conclusively presumed to transfer to the tribal customary adoptive parents.” ORS 419B.656(5).

⁷ In 2020, the percentage of Indian and Alaska Native children in foster care in Oregon rose to 4.9 percent, while such children continued to comprise only about 1.6 percent of Oregon’s population. Oregon Department of Human Services, *2020 Child Welfare Data Book 2*, 7 (Sep 2021), <https://www.oregon.gov/odhs/data/cwdata/cw-data-book-2020.pdf> (accessed Apr 6, 2024).

⁸ After the legislature adopted ORICWA, the department promulgated rules regarding it, in which the department recognized that “ORICWA does not cover the full range of procedures involved in a juvenile court proceeding; where it is silent, the usual state court procedure applies. Under constitutional law, [ICWA] takes precedence where it conflicts with state law. When federal and state law provide different standards of protection, the higher standard applies.” OAR 413-115-0010(2)(e).

II. As father’s objections were to the court’s entering an order accepting the tribe’s TCA order and an adoption judgment, he had no basis or obligation to object until the proponents of the TCA sought those actions from the court and the court convened a hearing to act upon that request.

As noted, on December 6, 2024, the tribe’s ICW Committee met and issued its TCA order. ER 62. On December 19, 2024, the tribe filed in the trial court a declaration in support of the TCA ER 76. And on January 2, 2025, father filed a written objection to the court’s accepting the tribe’s TCA order and entering a TCA judgment. ER 76-77. At the subsequent hearing on the TCA, the court faulted father for the timing of his objection because “you have been on notice for a year now that the plan is tribal customary adoption.” ER 26 (Tr 24). But father’s challenge was not to the court’s changing the permanency plan to TCA. Rather, his challenge was to the court’s authority to *implement* the TCA by adopting the tribe’s TCA order and entering an adoption judgment. Father had no basis or obligation to object to those things until after the proponents asked the court to do them—at which time, father objected. Accordingly, to the extent the court overruled father’s objections based on untimeliness, the court erred.

Although this court could reverse and remand on that procedural basis alone, the same substantive issues—father’s right to procedural and substantive protections—will arise on remand, so this court should proceed to address them in the present appeal.

III. Oregon’s legislature did not intend for ORS 419B.656 to deprive parents of Indian children of the procedural and substantive protections to which they are entitled under both ICWA and state law.

When an Indian child is subject to the Oregon circuit court’s dependency jurisdiction, ORS 419B.476(5)(g) allows the trial court to change the child’s permanency plan to tribal customary adoption (TCA). If the tribe consents to the plan of TCA, it must file a proposed order or judgment “evidencing that the tribal customary adoption has been completed.” ORS 419B.476(7)(d)(A). If the tribe does so, ORS 419B.656 requires the trial court to make certain determinations and to ultimately determine whether to accept the TCA and enter a judgment of adoption under Oregon law.

As set forth in the sections below, the text, context, and legislative history of ORS 419B.656 support father’s reading that the trial court must receive evidence and independently assess that evidence to itself determine whether the TCA satisfies the ORS 419B.656 criteria and ultimately whether to accept the TCA and enter an adoption judgment. And while the text is silent as to the procedural and substantive protections to which an objecting parent is entitled before the court may grant the TCA over the parent’s objection, pertinent context and legislative history support father’s reading that, when the TCA operates to permanently deprive the parent of all enforceable parental rights, the court may accept it only upon proof beyond a reasonable doubt that

the parental rights of the Indian child's parent should be terminated according to Oregon statute and, as required by ICWA, testimony by a qualified expert that continued custody of the child by the parent is likely to result in serious emotional or physical damage.

- A. Text: By directing the trial court to “determine” and “find” certain things as necessary conditions to “accept” the tribe’s TCA, the Oregon legislature unequivocally expressed its intent that the Oregon court reach its own conclusions and did not intend for the court to rotely adopt tribal or state government decrees.**

When construing a statute, Oregon courts first examine the plain text of the statute at issue, as it is well settled that the text of the statute, in context, is the best indication of the enacting legislature's intent. ORS 174.020(1)(a); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-11, 859 P2d 1143 (1993). In doing so, “the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010. In engaging in the textual analysis, the court may rely on any legislative history the court deems relevant and useful. *Gaines*, 346 Or at 171-72. If the intended meaning of the statute remains ambiguous, the court applies maxims of statutory construction to aid the court in ascertaining legislative intent. *Id.* at 172.

ORS 419B.656 sets forth the requirements of the Oregon trial court in determining whether to “accept” any particular TCA. That statute provides, in pertinent part:

“(1) As used in this section, ‘tribal customary adoption’ means the adoption of an Indian child, by and through tribal custom, traditions or law of the child’s tribe, and which may be effected without the termination of parental rights.

“(2) If the juvenile court determines that tribal customary adoption is in the best interests, as described in ORS 419B.612, of a ward who is an Indian child and the child’s tribe consents to the tribal customary adoption:

“(a) The Department of Human Services shall provide the Indian child’s tribe and proposed customary adoptive parents with a written report on the Indian child, including, to the extent not otherwise prohibited by state or federal law, the medical background, if known, of the child’s parents, and the child’s educational information, developmental history and medical background, including all known diagnostic information, current medical reports and any psychological evaluations.

“(b) The court shall accept a tribal customary adoptive home study conducted by the Indian child’s tribe if the home study:

“(A) Includes federal criminal background checks, including reports of child abuse, that meet the standards applicable under the laws of this state for all other proposed adoptive placements;

“(B) Uses the prevailing social and cultural standards of the Indian child’s tribe as the standards for evaluation of the proposed adoptive placement;

“(C) Includes an evaluation of the background, safety and health information of the proposed adoptive placement, including the biological, psychological and social factors of the proposed adoptive placement and assessment of the commitment, capability and suitability of the proposed adoptive placement to meet the Indian child’s needs; and

“(D) Except where the proposed adoptive placement is the Indian child’s current foster care placement, is completed prior to the placement of the Indian child in the proposed adoptive placement.

“(c)(A) Notwithstanding subsection (3) of this section, the court may not accept the tribe’s order or judgment of customary adoption if any adult living in the proposed adoptive placement has a felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or a crime involving violence.

“* * * * *

“(3)(a) The juvenile court shall accept an order or judgment for tribal customary adoption that is filed by the child’s tribe if:

“(A) The court determines that tribal customary adoption is an appropriate permanent placement option for the Indian child; [and]

“(B) The court finds that the tribal customary adoption is in the Indian child’s best interests, as described in ORS 419B.612[.]

“* * * * *

“(b) The court shall afford full faith and credit to a tribal customary adoption order or judgment that is accepted under this subsection.

“(4)(a) Notwithstanding ORS 109.276, a tribal customary adoptive parent is not required to file a petition for adoption when the court accepts a tribal customary adoption order or judgment under subsection (3) of this section.

“* * * * *

“(d) After accepting a tribal customary adoption order or judgment under subsection (3) of this section, the juvenile court that accepted that order or judgment shall proceed as provided in ORS 109.350 and enter a judgment of adoption. In addition to the requirements under ORS 109.350, the judgment of adoption must

include a statement that any parental rights or obligations not specified in the judgments are transferred to the tribal customary adoptive parents and a description of any parental rights or duties retained by the Indian child's parents, the rights of inheritance of the child and the child's parents and the child's legal relationship with the child's tribe.

“(e) A tribal customary adoption does not require the consent of the Indian child or the child's parents.

“* * * * *

“(5) Any parental rights or obligations not specifically retained by the Indian child's parents in the juvenile court's adoption judgment are conclusively presumed to transfer to the tribal customary adoptive parents.”

Thus, from the plain text of the statute we know that the court may enter a judgment of TCA without the consent of the parent or child, ORS 419B.656(4)(e), and that some TCAs “may be effected without termination of parental rights,” ORS 419B.656(1).

The plain text tells us that if the trial court determines that a TCA is in the child's best interests and the child's tribe consents to the TCA, the court must review the tribe's “home study” to determine if it, *inter alia*, “[i]ncludes federal criminal background checks * * * that meet the standards applicable under [Oregon law] for all other proposed adoptive placements,” “uses prevailing social and cultural standards of the tribe,” and “[i]ncludes an evaluation of the background, safety and health information of the proposed adoptive placement” as well as an “assessment of the commitment, capability and suitability of the proposed adoptive placement to meet the Indian child's

needs.” ORS 419B.656(2)(b)(A) - (C). And if the court determines that the home study complies with those requirements, the court “shall accept” it. ORS 419B.656(2)(b).

Similarly, the text tells us that the tribe’s “fil[ing]” of an “order or judgment for tribal customary adoption” triggers the trial court’s responsibility to determine whether the “tribal customary adoption is an appropriate permanent placement option for the Indian child” and whether “the tribal customary adoption is in the Indian child’s best interests, as described in ORS 419B.612.” ORS 419B.656(3)(a)(A) - (B). And if the court determines that the TCA is appropriate and is in the child’s best interests, then the court has no discretion; it “shall” accept the tribe’s order. ORS 419B.656(3)(a).

Lastly, the text informs that—*if* accepted by the trial court—the court shall afford the tribe’s order “full faith and credit.” ORS 419B.656(3)(b).

Thus, a simple reading of the unambiguous text confirms that the legislature intended for the trial court to play a critical and gatekeeping role in the establishment of any TCA. It intended for the court to inspect the home study and make independent and child-centric determinations—which necessarily must be derived from evidence before it—about both the suitability of the placement and the child’s best interests. And although ORS 419B.656 does not expressly allocate the burden of proof to any specific party in the text, “[t]he general rule is that the burden of proof is upon the proponent of a fact or

position, the party who would be unsuccessful if no evidence were introduced on either side.” *Harris v. SAIF*, 292 Or 683, 690, 642 P2d 1147 (1982).

It is only after the court satisfies itself as to those elements that the court’s role become a ministerial task to “accept” the TCA.

Although the text acknowledges that a TCA “may be effected without the termination of parental rights,” it is silent as to the procedural protections due a parent when the TCA *does* terminate parental rights.

B. Context: The statute is silent as to the substantive and procedural protections due a parent when a TCA permanently severs all enforceable parental rights; but the context of ORS 419B.090(4) and ICWA, *inter alia*, illuminates that the proponent of the TCA must prove grounds for termination of parental rights beyond a reasonable doubt before the Oregon court may “accept” this type of TCA.

Parents have a constitutionally protected interest, as a matter of due process, in their relationship with their child. *Stanley v. Illinois*, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 (1972) (recognizing that the right to the companionship, care, custody, and control of one’s children is an interest protected by due process).

And ORS 419B.090(4) requires Oregon courts to construe and apply all provisions of ORS chapter 419B—as a matter of state statutory law—to not violate a parent’s due process rights. As the Oregon Supreme Court explained in *J.R.F.*, ORS 419B.090(4) “guard[s] the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution” and directs

that the provisions of the dependency code (which includes ORS 419B.656, the provision at issue in this case) “shall be construed and applied in compliance with federal constitutional limitations on state action established by the United States Supreme Court with respect to interference with the rights of parents to direct the upbringing of their children” and other parental rights. 351 Or at 578-79.

Even in the absence of such explicit statutory context, Oregon’s Supreme Court has readily construed adoption statutes to avoid violating a parent’s due process rights, as adoption “terminates all such rights of the natural parent.” *Simons et ux v. Smith*, 229 Or 277, 284, 366 P2d 875 (1961).⁹

In *Simons*, the issue was whether the court should construe ORS 109.314 to divest the father of all parental rights without proof that his rights should be terminated. *See id.* at 279 (“The only question on this appeal is whether ORS 109.314 can be enforced literally to cut off the rights of a father who is free from disabilities or faults which, under the [termination of parental rights]

⁹ As noted, ORS 419B.656 defines “tribal customary adoption” to mean “the *adoption* of an Indian child, by and through the tribal custom, traditions or law of the child’s tribe, which may be effected without the termination of parental rights.” ORS 419B.656(1) (emphasis added). Accordingly, a TCA is, by its express terms, an adoption. And while a TCA “*may* be effected” without terminating parental rights, ORS 419B.656(1), that does not preclude the tribe or the court from actually or effectively doing so. Indeed, a TCA terminates any and all parental rights that are not explicitly retained to the parent in the court’s adoption judgment. *See* ORS 419B.656(4)(d), (5).

statutes permit termination of a parent’s parental rights.”). On its face, ORS 109.314 allowed a child’s custodial parent after a marital dissolution to agree to an adoption of the parents’ child by the custodial parent’s spouse without the consent of the noncustodial parent, who could “appear and object” to the adoption. *Id.* at 279-85. The statute was silent as to the protections—if any—the trial court must afford the noncustodial parent when that parent did “appear and object.” In providing no more protection than the words of the statute required, the trial court in *Simons* decided that the custodial parent’s consent was sufficient, without more, to overcome the noncustodial father’s objection and to authorize the child’s adoption by the father’s spouse. *Id.*

On appeal, the father challenged the constitutionality of ORS 109.314. But instead of striking the statute as unconstitutional because it violated the father’s due process rights, the Oregon Supreme Court construed it (apparently applying the canon of constitutional avoidance) to require proof in the first instance of a basis upon which the trial court could terminate the father’s parental rights. *Id.* at 279-80 (where the father asked the court to “[s]trike down the statute as repugnant to due process of law,” the court explained that that “alternative should be avoided if possible” and instead construed the statute to include a requirement for proof of a basis to terminate parental rights to avoid a due-process problem). Without such proof, the court held, the objection of the noncustodial parent precluded the adoption of the parent’s child. *Id.*

Similarly, and correctly so, in *Moran v. Weldon*, 184 Or App 269, 273-76, 57 P3d 898 (2002), *rev den*, 335 Or 195 (2003), this court applied the reasoning in *Simons* to construe another adoption statute, ORS 109.322, which permitted adoption without parental consent if the nonconsenting parent had been sentenced to a prison term of no less than three years and had actually served at least three years, to require proof of a basis for terminating the nonconsenting parent's parental rights to avoid due process problems. In *Moran*, the trial court construed the statute to allow the adoption of a parent's child over the parent's objection based on the sole fact that the parent had been imprisoned for more than three years. *Id.* at 272. Recognizing, as the Oregon Supreme Court did in *Simons*, that "an adoption without the consent of the biological parent has the effect of terminating that parent's rights, an action that ought to be related to the parent's conduct as a parent," and that "[t]ermination is the greatest possible deprivation of the fundamental right to be a parent," this court concluded that allowing an adoption over a parent's objection based on the length of incarceration alone without proof of an additional "statutory ground for terminating parental rights" raises "serious constitutional issues." *Moran*, 184 Or App at 275 (internal quotation marks omitted). Interpreting the statute to require proof of a statutory basis for termination of parental rights, this court held, "give[s] effect to the procedures that the statute prescribes without permitting the termination of a parent's rights in the absence of evidence that would otherwise support that action,

thereby protecting a parent's fundamental constitutional right while preserving the statutory scheme that the legislature created." *Id.* at 275-76.

In accord with the ORS 419B.090(4) requirement as clarified in *J.R.F.*, 351 Or at 791, and the reasoning in *Simons* and *Moran*, this court should apply the same methodology in interpreting ORS 419B.656.

Accordingly, when a TCA purports to divest a parent of all enforceable parental rights, this court should construe ORS 419B.656 as requiring the proponent of the TCA to prove some conduct or circumstance on the part of the nonconsenting parent that would warrant terminating that parent's parental rights.¹⁰ This court should clarify that—in the absence of such proof—the court must sustain the nonconsenting parent's objection.

And when the TCA leaves a parent no enforceable parental rights, the standard of proof is beyond a reasonable doubt because that is what ORS chapter 419B and ICWA require. *See* 25 USC § 1912(f) (requiring proof beyond a reasonable doubt, including testimony of a qualified expert witness, in a termination of parental rights proceeding concerning an Indian child); ORS

¹⁰ Presumably, some tribes will form TCAs that do not effectively terminate parental rights. In those cases where parental rights remain intact, the procedures a parent is due may be less demanding than in the instant case where the TCA permanently transferred all of father's parental rights to the adoptive parents. For example, for a TCA that results in an arrangement more akin to a general guardianship under ORS 419B.366, the procedures due a parent of an Indian child would be commensurate with those that ICWA and Oregon law require in the hearing for a general guardianship.

419B.660(1)(a) (requiring the “higher standard of protection” in ICWA to control over any provision of ORICWA that provides a lower standard of protection).

C. Legislative history: The legislative and enactment history of ORS 419B.656 demonstrates that the legislature intended to afford Indian families protections beyond those afforded by the due process clause and ICWA and did not intend to allow pro forma termination of Indian parental rights.

Little legislative history exists concerning the scope of the issue presented in this appeal, *viz.*, what procedural safeguards the legislature intended to govern an ORS 419B.656 TCA that extinguishes a parent’s parental rights. But what exists does not contradict father’s interpretation.

ORS 419B.656 originally started as part of House Bill (HB) 3182 (2021).¹¹ Part of the bill included TCA as a permanency plan option and the provisions that were later codified as ORS 419B.656. TCAs were added to recognize and allow adoptions that “align with traditional tribal child-rearing practices and the importance of tribal families.” *See* Testimony, House Committee on Judiciary, HB 3182, Mar 30, 2021 (written statement of Amanda Hess on behalf of the Confederated Tribes of Umatilla Indian Reservation) (explaining that “[c]ustomary adoption means that a child’s grandparents, aunts and uncles would

¹¹ HB 3182 was not enacted. Rather, it was replaced by Senate Bill (SB) 562 (2021), which was enacted and codified in ORS 419B.656 and other parts of ORS chapter 419B. Or Laws 2021, ch 398. The legislative history does not illuminate why that replacement occurred.

have the ability to take over or share legal parenting responsibilities so that a child can be safe, cared for and connected”); Testimony, House Committee on Judiciary, HB 3182, Mar 30, 2021 (written statement of Chris Coughlin on behalf of The Childrens Agenda/Our Children Oregon) (explaining that TCAs “align with traditional tribal child-rearing practices and the importance of tribal families” and “will allow extended family to assume or share legal parenting responsibilities so that a child can be safe, cared for, and connected”).¹²

¹² One of the early versions of HB 3182 directed the department to “prescribe by rule a procedure for the Indian child or the child’s parents to contest a tribal customary adoption under this section.” HB 3182, -2 amendments (Mar 15, 2021). The proposed amendments further stated that that “procedure must afford the Indian child and the child’s parent the same rights and opportunity to be heard that is afforded to an Indian child and parent in a proceeding for the termination of parental rights.” *Id.* Without explanation, by April 8, 2021, those proposed amendments were no longer included in the bill. HB 3182, -4 amendments approved by the House Committee on Judiciary (Apr 8, 2021). Nothing can be discerned from the absence of an explanation as to why those proposed amendments were removed from HB 3182. *See Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 227, 377 P3d 570 (2016) (stating that “drawing conclusions from silence in legislative history misapprehends the nature of the legislative history itself, which often is designed not to explain to future courts the intended meaning of a statute, but rather to persuade legislative colleagues to vote in a particular way”). The provision was most likely removed because such procedural protections were already afforded by the juvenile code. *See* ORS 419B.800(1) (“ORS 419B.800 to 419B.929 govern procedure and practice in *all* juvenile court proceedings under this chapter.” (Emphasis added.)). And the department promulgating rules about procedure does nothing to ensure those procedural protections apply in court proceedings. In any event, HB 3182 never passed but instead was replaced with SB 562, which was enacted and codified, in part, in ORS 419B.656.

Thus, the legislative history reveals that the legislature intended Oregon law to recognize TCAs as a permanency plan for an Indian child under the dependency jurisdiction of Oregon circuit courts. But it does not follow from that intention that, in doing so, the legislature also intended to *strip* Indian families of the rights and procedural protections that they would receive in proceedings concerning other permanency plans or that are enjoyed by non-Indian parents. Such a reading of the statute would run contrary to the purposes of ICWA and ORICWA, which are to protect Indian families through more robust procedural protections.

It simply cannot be that the legislature intended a parent of an Indian child (or an Indian child who does not agree with the proposed TCA) to receive less protection when facing the loss of parental rights under this form of tribal customary adoption—a permanent option that may effect a far more significant deprivation to a parent than a permanent or even a general guardianship under ORS 419B.365 and ORS 419B.366—than the parent would receive in either type of guardianship proceeding. And most fundamentally, the legislature would not have intended for ORS 419B.656 to operate to give Indian families *less* protection than non-Indian families, in direct contravention of the goals of ICWA and ORICWA, which was to give them *more* protection through, *inter alia*, heightened notice requirements, an elevated standard of proof, additional

substantive elements, and expert witness testimony. *See* ORS 419B.600 (stating the policy of ORICWA).

The text, context, and legislative history illuminate only one unambiguous interpretation of what procedural protections the juvenile court must provide at a hearing to establish an ORS 419B.656 TCA that leaves the parent with no enforceable rights: the proponent of adoption must prove statutory grounds for termination of an Indian child's parent's parental rights (under ORS 419B.500 and ORS 419B.502 to ORS 419B.510). Should the proponent fail to do so, the trial court may not accept the TCA or enter a judgment of adoption.

IV. As the TCA in this case terminated all of father's parental rights, the trial court had the authority to accept it and enter an adoption judgment only upon proof of grounds for terminating father's parental rights and the requirements of ICWA; as no party proved anything of the sort, this court must reverse.

At the hearing at issue, the trial court—unconcerned with father's current parenting capacity or the lack of evidence upon which to base any of its determinations—rotely accepted the tribe's TCA order and entered a judgment of adoption of father's child. The court's order paved the way for the adoption judgment that made the adoptive placement "the legal parents of" T [REDACTED] and granted them the rights and obligations listed in the tribe's TCA order and transferred father's parental rights to the adoptive placement, leaving the

adoptive placement the discretion as to whether to allow father and T [REDACTED] any contact at all. That is by no means a “parental right” retained by father.

The trial court erred in doing so because, properly construed, ORS 419B.656 required it to condition its rulings on evidence¹³ and to condition its acceptance of the TCA on proof that would authorize terminating father’s parental rights to his Indian child. In summarily accepting the TCA order and entering an adoption judgment, the trial court effectively terminated father’s parental rights in the absence of any of the substantive or procedural protections that father was due. On that basis, this court should reverse the adoption judgment.

V. In the unlikely event that this court interprets ORS 419B.656 to allow what happened in this case, this court should nonetheless invalidate the adoption judgments because the trial court’s acceptance of the TCAs in this case qualifies as a termination of parental rights under ICWA, ICWA preempts state law, and the procedural and substantive law applied by the trial court violated ICWA.

Although ORS 419B.656(1) permits a TCA to “be effected without the termination of parental rights,” in this case, the terms of the TCA *do* terminate father’s parental rights. As noted, father retains not even any right

¹³ The tribe’s TCA order filed in this case showed that the ICW Committee had made the determinations the tribe tasked it with making. But the ICW Committee’s determinations are not themselves evidence, and the trial court could not rely on the *Committee’s* determinations to make the determinations that ORS 419B.656 required the *court* to independently make.

of “visitation” with T [REDACTED]; rather, under the order, the adoptive placement *may* allow father and T [REDACTED] contact if the placement so chooses. The TCA transfers father’s physical, legal, and financial responsibility for T [REDACTED] to the adoptive placement. In other words, father retains no “parental rights” at all. The TCA agreement thus qualifies as a termination of parental rights under ICWA. *See* 25 USC § 1903(1)(ii) (defining “termination of parental rights” as “any action resulting in the termination of the parent-child relationship”).

But the trial court accepted the tribe’s TCA order and entered a judgment of adoption without affording father any of ICWA’s protections; most notably, without proof beyond a reasonable doubt of grounds for TPR and without qualified expert testimony “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 USC § 1912(f). To the extent this court interprets ORS 419B.656 as authorizing that result, it must nonetheless reverse the adoption judgments because that statute, interpreted in that way, obstructs the purposes of ICWA and is therefore preempted by it.

The power of Congress to preempt state law arises from the Supremacy Clause of Article VI of the United States Constitution, which provides that the laws of the United States are “the supreme law of the land” and that the state courts “shall be bound thereby, anything in the constitution

or laws of any state to the contrary notwithstanding.” The United States Supreme Court has recognized three categories of preemption: (1) when the federal law expressly provides for preemption; (2) when a congressional statutory scheme so completely occupies the field with respect to some subject matter that an intent to exclude the states from legislating in that subject area is implied; and (3) when an intent to preempt is implied from an actual conflict between state and federal law. *Willis v. Winters*, 350 Or 299, 308, 253 P3d 1058 (2011), *cert den*, 565 US 1110 (2012) (citing *Crosby v. National Foreign Trade Council*, 530 US 363, 372, 120 S Ct 2288, 147 L Ed 2d 352 (2000)).

The third type of preemption—conflict preemption—“exists not only when it is physically impossible to comply with both the state and federal law, but when ‘under the circumstances of the particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Willis*, 350 Or at 308 (quoting *Hines v. Davidowitz*, 312 US 52, 67-68, 61 S Ct 399, 85 L Ed 581 (1941); brackets in *Willis*). In the latter circumstance, to resolve a question of “obstacle preemption,” the court “examin[es] the federal law to ascertain its purposes and intended effects, examin[es] the state statute to determine its effects, and compar[es] the results to determine whether the latter statute in some way

obstructs the accomplishment of the objectives that have been identified with respect to the former statute.”¹⁴ *Willis*, 350 Or at 309 (citations omitted).

The purpose and intended effect of ICWA was to stem a pervasive history of unlawful and discriminatory state interference in the lives of Indian families and tribes and the deleterious effects thereof. 25 USC § 1902; see *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30, 32, 109 S Ct 1597, 104 L Ed 2d 29 (1989) (explaining that ICWA resulted from “rising concern in the mid-1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes”). To that end, ICWA precludes, among other things,

¹⁴ The Oregon Supreme Court described that “[w]hen traditional regulatory powers of the states are implicated * * * that analysis incorporates a presumption that Congress did not intend to preempt.” *Willis*, 350 Or at 309 (citing *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 67 S Ct 1146, 91 L Ed 1447 (1947)). However, there is “little doubt” that Congress’s authority to regulate Indian affairs “is muscular, superseding both tribal and state authority.” *Haaland v. Brackeen*, 599 US 255, 273, 143 S Ct 1609, 216 L Ed 2d 254 (2023). And, as the Supreme Court has recognized, “the Constitution does not erect a firewall around family law. On the contrary, when Congress validly legislates pursuant to its Article I powers, we have not hesitated to find conflicting state family law preempted, notwithstanding the limited application of federal law in the field of domestic relations generally. * * * In fact, we have specifically recognized Congress’s power to displace the jurisdiction of state courts in adoption proceedings involving Indian children.” *Id.* at 276-77 (brackets, quotation marks, and citations omitted).

termination of parental rights absent “a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 USC § 1912(f). And this court has long held, correctly, that the Oregon statutory elements necessary for termination of parental rights—*viz.*, a basis for TPR under ORS 419B.502 to 419B.510 and that TPR serves the child’s best interest under ORS 419B.500—must be proved beyond a reasonable doubt in an ICWA case. *Dept. of Human Services v. J.L.H.*, 258 Or App 92, 101, 308 P3d 323 (2013); *Dept. of Human Services v. K.C.J.*, 228 Or App 70, 82, 207 P3d 423 (2009); *State ex rel Dept. of Human Services v. Cain*, 210 Or App 237, 240, 150 P3d 439 (2006), *rev den*, 342 Or 503 (2007); *State ex rel Juvenile Dept v. Woodruff*, 108 Or App 352, 359, 816 P2d 623 (1991).

But the court’s acceptance of the tribe’s TCA order and its adoption judgment in this case effectively terminated father’s parental rights without *any* proof of *any* of the elements required to terminate parental rights under Oregon law and ICWA, let alone proof of *all* of those elements *beyond a reasonable doubt*. If this court interprets ORS 419B.656 as authorizing that result, then ORS 419B.656 obstructs ICWA’s purpose of protecting Indian families by providing increased procedural protections for Indian families and imposing

heightened requirements for a state to take that action. As a result, so interpreted, ORS 419B.656 conflicts with ICWA, and ICWA therefore preempts that statute. The legislature itself indicated its intent that that would be so: ORS 419B.660(1)(a) states that ICWA preempts any provision of ORICWA that provides less protection than ICWA.

Even were that not so, ICWA expressly allows a parent to petition “any court of competent jurisdiction to invalidate” a “termination of parental rights under State law, * * * upon a showing that such action violated any provision of [ICWA’s] sections 1911, 1912, and 1913.” 25 USC § 1914.¹⁵ Father so petitions this court.

As father has shown, the trial court’s action in this case taken under Oregon law amounts to the termination of father’s parental rights in violation of what ICWA section 1912(f) requires:

“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

¹⁵ See, e.g., *Dept. of Human Services v. J.G.*, 260 Or App 500, 513, 317 P3d 936 (2014) (noting that 25 USC § 1914 “provides a method of enforcing” “minimum federal standards, [such that] a state rule that precludes a party from using section 1914 on appeal to assert a right under section 1912(d) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

Such a violation subjects the adoption judgments in this case to “post-judgment invalidation under 25 USC section 1914” as the Supreme Court of North Dakota recognized in *In re K.S.D.*, 904 NW2d 479, 485 (ND 2017) (noting that a ruling to terminate parental rights without receiving the requisite qualified expert witness testimony subjects the ruling to such invalidation and reversing the judgment even though “neither party raised that issue on appeal,” because “affirmance would provide the children no certainty or stability” given that “either parent or the tribe could collaterally attack the judgment at any time”).¹⁶

¹⁶ Other courts have held similarly. *See In re H.T.*, 378 Mont 206, 213-14, 343 P3d 159 (2015) (hearing the mother’s unpreserved arguments for the first time on appeal because, as a court of competent jurisdiction, the appellate court could decide issues raised for the first time on appeal about ICWA violations under 25 USC § 1914); *People in Interest of S.R.M.*, 153 P3d 438, 443 (Colo App 2006) (relying on ICWA’s invalidation provision to reverse a judgment terminating parental rights entered without providing notice to the required parties under ICWA because such a failure “violates the plain meaning” of 25 USC § 1912(a)); *In re S.M.H.*, 33 Kan App 2d 424, 430-31, 103 P3d 976 (2005) (relying on ICWA’s invalidation provision to reverse an action for a foster care placement that occurred without qualified expert witness testimony even though the error was both unpreserved and invited by the party below); *In re Antoinette S.*, 104 Cal App 4th 1401, 1408, 104 Cal Rptr 2d 15 (2002) (holding that a parent’s failure to challenge the lack of the required notice under ICWA does not waive the issue on appeal, as 25 USC § 14 permits “any parent” to “petition any court of competent jurisdiction to invalidate” foster care placement or termination of parental rights “upon a showing that such action violated any provision of sections 1911, 1912, and 1913,” and lack of notice violates one such provision); *Matter of L.A.M.*, 727 P2d 1057, 1060 (Alaska 1986) (hearing, over the state’s objection, an unpreserved claim for lack of ICWA-required notice that was not raised in the “statement of points on appeal” because “[t]he due process right to proper notice in a parental rights termination proceeding is so fundamental that justice requires” the court to consider it and because doing so gives effect to ICWA’s invalidation provision).

CONCLUSION

Father did not receive the procedural and substantive protections he was due before his parental rights were effectively terminated.

For the foregoing reasons, father respectfully requests that this court reverse the order accepting the tribe's TCA order and remand to the trial court for further proceedings that comport with the requirements of ORS 419B.656, the standard of fundamental fairness, and ICWA.

Respectfully submitted,

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By Tiffany Keast at 11:01 am, Apr 16, 2025

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APPENDIX F - 1

 IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of T. A. G., II, a Child.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Respondent,
and

K. C. and Cowlitz Indian Tribe,

Respondent,
v.

T. G., aka T. J. G.,

Appellant.

Multnomah County Circuit Court
Case No. 19JU05952

Petition No. 113766

A186627 (Control)

CONFIDENTIAL REPLY BRIEF
UNDER ORS 419A.255

**EXPEDITED JUVENILE DEPENDENCY CASE (NOT TPR)
APPELLANT'S REPLY BRIEF**

Appeal from the Judgment of the Circuit Court for Multnomah County
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APPELLANT'S REPLY BRIEF

I. Introduction and summary of argument

Under the terms of the tribal customary adoption (“TCA”) in this case, father retains no parental rights, and the TCA therefore is akin to a termination of parental rights or, at the least, a permanent guardianship. Father was entitled to receive procedural protections concomitant with the severity of that loss and as provided by Oregon law, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the federal Indian Child Welfare Act (“ICWA”) before the Oregon court could order, over father’s objection, the involuntary adoption of father’s child.

Father proposes a construction of the TCA statute, ORS 419B.656, that is consistent with the words of that statute and its context, including ORS 419B.090(3), (4), and (6), ORS 419B.600, and ORS 419B.660, and avoids any conflict with the Due Process Clause or ICWA. In contrast, respondents’ construction of ORS 419B.656 proposes an inverted standard whereby parents of an Indian child are deprived of both due process and the heightened protections that Congress intended to provide Indian families when it enacted ICWA. Respondents’ construction of ORS 419B.656 also raises significant equal protection questions that this court should avoid. *Cf. Haaland v. Brackeen*, 599 US 255, 291-95, 143 S Ct 1609, 216 L Ed 2d 254 (2023)

(leaving open an equal protection challenge to ICWA’s placement preferences for lack of standing under Article III of the United States Constitution).¹

II. Father’s claims of error are preserved.

The preservation rule “serves several purposes, including giving a trial court the chance to consider and rule on an issue, ensuring fairness to the opposing party by giving them an opportunity to respond, and fostering full development of the record.” *State v. Fox*, 370 Or 456, 461, 521 P3d 151 (2022) (citing *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008)). When those purposes are met, preservation presents no impediment to the reviewing court reaching the merits. *Fox*, 370 Or at 461.

The tribe argues that this court should not reach the merits of whether the trial court erred because father did not “object” when the tribe notified him of its upcoming meeting and of the procedure it intended to use at that meeting. Resp Tribe Br 5. But as father’s claims of error are directed at *the Oregon court’s* acceptance of the tribe’s TCA document and entry of an adoption judgment, he had no basis or obligation to “object” until someone asked *the*

¹ Father’s construction of ORS 419B.656 minimizes if not eliminates any equal protection concern and is protective of both the Oregon Child Welfare Act (“ORICWA”) and ICWA.

court to take those actions.² And when the tribe did so, by filing its TCA document and a declaration in support, father filed a written objection to the court taking those actions. ER 1-3, 76. Then, at the next hearing before the Oregon court, father reiterated his written arguments and orally objected to the court's accepting the TCA document and entering an adoption judgment. ER 7-10, 17-23, 27-29. Thus, father did all he that he was required to do to preserve his claims that the court erred in accepting the tribe's TCA document and in entering an adoption judgment.

The tribe also contends that the preservation rule precludes this court from reaching the merits because father did not utter the words "termination of parental rights" before the trial court. Resp Tribe Br 7-8. The tribe acknowledges that father argued that the TCA amounted to "*at a minimum*, a permanent guardianship." Resp Tribe Br 7 (emphasis added); ER 2. Father further argued that "[i]n some respects, [the TCA] is a greater restriction on

² The tribe also contends that in the trial court, father "recognized" that the appropriate time to object to entry of an adoption judgment was at the permanency hearing. Resp Tribe Br 7. That is not a plausible reading of father's arguments at the hearing, but in any event, again, father's claim is that *the court* erred in accepting the tribe's TCA document and entering an adoption judgment. He had no basis or obligation to object to the court doing so at the preceding permanency hearing where the court changed the permanency plan to TCA. At that time, there was no tribal order or document for the court to accept. And had father objected to the court's entering an adoption judgment at that permanency hearing, that objection surely would have been rejected as premature, because that issue was not yet before the court.

parental rights” than a permanent guardianship. ER 1. The only arrangement more restrictive of parental rights than a permanent guardianship is termination of parental rights (“TPR”) and adoption. And in any event, the statutory grounds for a permanent guardianship are the same as the statutory grounds for TPR. ORS 419B.365(2) (“The grounds for granting a permanent guardianship are the same as those for termination of parental rights.”).

The department summarily contends that father did not preserve his “argument” that ORS 419B.656 is preempted by ICWA.³ Resp Dept. Br 6. But the Oregon Supreme Court has recognized that a party need not preserve particular “arguments.” *State v. Weaver*, 367 Or 1, 17, 472 P3d 717 (2020) (“We have previously drawn attention to the distinctions between raising an *issue* at trial, identifying a *source* for a claimed position, and making a particular *argument*. The first ordinarily is essential, the second less so, the third least.” (Quoting *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (emphasis in *Hitz*))). The Oregon Supreme Court also has recognized that “[e]volution of argument from the pressures of trial to reflection on review is not uncommon.” *State v. Bray*, 363 Or 226, 246, 422 P3d 250 (2018). And because “[t]he preservation rule also may inhibit needed development or clarification of the

³ Apparently conceding the issue, the department provides no response on the merits to father’s argument that ICWA preempts ORS 419B.656 if they are in conflict.

law,” that court has cautioned against slicing the ““preservation onion * * * too thinly.”” *State v. Parkins*, 346 Or 333, 340-41, 211 P3d 262 (2009) (quoting *State v. Amaya*, 336 Or 616, 629, 89 P3d 1163 (2004)).

Father argued in the trial court that the court could not accept the tribe’s TCA document and enter an adoption judgment without first holding “a contested evidentiary hearing” at which the proponents were required to establish the elements of a permanent guardianship under ORS 419B.365 and that the court’s proceeding without such a hearing and proof would violate “Oregon law,” ORS 419B.365, ICWA, and the Due Process Clause. ER 1-3, 7-10, 17-23, 27-29. Respondents were sufficiently on notice of father’s objections, and the court had an opportunity to avoid the assigned errors. Father’s claims of error are preserved for this court’s review.

III. As father retains no “parental rights” under the TCA, the TCA is akin to a permanent guardianship, if not a TPR.

Mother and the department implicitly concede that the TCA at issue is akin to a permanent guardianship. The tribe disagrees but does not explain why that is not so. Resp Tribe Br 9-10. As for whether the TCA is akin to a TPR, the tribe argues that it is not because it places some obligations on T [REDACTED]’s adopters and because T [REDACTED] retains a right to inherit from father. Resp Tribe Br 9-10. But those aspects of the TCA do not retain any *parental rights for father*. “Parental rights” involve “the companionship, care, custody, and

management of [one's] children.” *Stanley v. Illinois*, 405 US 645, 651, 92 S Ct 1208, 31 L Ed 2d 551 (1972); accord *Troxel v. Granville*, 530 US 57, 65, 120 S Ct 2054, 147 L Ed 49 (2000) (parents have the right to control contact between their children and third parties); *Pierce v. Society of Sisters*, 268 US 510, 534-35, 45 S Ct 571, 69 L Ed 1070 (1925) (parents have the right to guide their children's education); ORS 419B.090(4)(b) - (c) (parents have the right to make health care decisions for their children and to discipline them). Father retains none of those rights under the TCA in this case.

Similarly, T ██████'s statutory right to intestate succession is not a right held by *father*, let alone a *constitutional* right that father holds by virtue of being T ██████'s parent. And even if that provision were omitted from the TCA document, father could simply draft a will leaving his property to T ██████ if he chose to do so.

VI. The Oregon court's role in a establishing a TCA, which includes signing and entering an Oregon adoption judgment at a hearing required by Oregon law in an Oregon dependency case, is a "proceeding in a state court," and ICWA therefore applies.

Respondent mother argues that “[t]he establishment of a tribal customary adoption by a tribal government does not take place in an Oregon court [and] thus, it is not an ‘involuntary proceeding *in a State court*’ that requires the application of ICWA’s substantive and procedural requirements.” Resp Mother Br 8-9 (citing 25 CFR § 23.103). Similarly, the department argues that a TCA

“is solely within the province of the tribe.” Resp Dept. Br 11. Mother and the department are wrong. An Oregon adoption judgment like the one entered in this case can be entered only by an Oregon *court*. It was the Oregon court that “accept[ed]” the tribe’s TCA document, the Oregon court that signed the Oregon adoption judgment, the Oregon court that entered that adoption judgment into the Oregon case register in the Oregon dependency case, and an Oregon statute (ORS 419B.656) that authorized the Oregon court to do so.⁴ The Oregon court’s doing those things at an Oregon court hearing under Oregon law in an Oregon dependency case clearly constitutes a “proceeding in a state court.” Father therefore was entitled to the protections of ICWA.⁵

⁴ Even assuming *arguendo* that father was not entitled to the heightened protections of ICWA, father is nonetheless entitled to reversal because this court must construe and apply the TCA statute, ORS 419B.656, in accord with due process. *Dept. of Human Services v. J.R.F.*, 351 Or 570, 579, 273 P3d 87 (2012) (courts are obliged to interpret the provisions of ORS chapter 419B correctly and in light of their statutory context, and that context includes ORS 419B.090(4), which “makes clear that the due process rights of parents are always implicated in the construction and application of the provisions of” that chapter).

⁵ Mother also argues that “ICWA at times prioritizes the interests of the tribe over the desires of an Indian child’s biological parents.” Resp Mother Br 6 (citing *Haaland v. Brackeen*, 599 US 255, 267, 143 S Ct 1609, 216 L Ed 254 (2023)). But *Haaland* explains only that, when a parent *voluntarily surrenders custody* of their Indian child for placement or adoption, the tribe may intervene in the action and seek enforcement of ICWA’s placement preferences even if the parent desires a placement that does not comport with those preferences. *Haaland*, 599 US at 267. But as father did not voluntarily surrender his parental rights and instead fought to retain them, that statement in *Haaland* is inapposite here.

- V. **In asserting that the Oregon court was required to blindly give “full faith and credit” to the tribe’s TCA document, respondents ignore the plain text of ORS 419B.656(3) and the well-settled principle that judgments issued in violation of a party’s right to due process are not entitled to full faith and credit.**

ORS 419B.656(3) states that “[t]he court shall afford full faith and credit to a tribal customary adoption order or judgment *that is accepted under this subsection.*” (Emphasis added.) And ORS 419B.656(3)(a) authorizes the Oregon court to “accept” a tribe’s TCA document only if *the court* first makes the determinations listed in that statute and ensures that the tribe’s TCA document complies with the requirements of the statute. Thus, under the “full faith and credit” provision of ORS 419B.656(3), the Oregon court need not afford a tribe’s TCA document full faith and credit unless the court has first “accepted” it.⁶

⁶ ORICWA also contains a more generally applicable “full faith and credit” provision, in ORS 419B.663. To the extent that that general provision is in conflict with the “full faith and credit” provision of ORS 419B.656(3)(b), which pertains specifically to TCAs, the more specific statute controls over the general. *See, e.g., Powers v. Quigley*, 345 Or 432, 438, 198 P3d 909 (2008) (stating that “if two statutes are inconsistent, the more specific statute will control over the more general one and citing ORS 174.020(2)). ICWA also contains a “full faith and credit” provision, in 25 USC § 1911(d). Mother asserts that “[i]f this court concludes that the legislature intended to permit reconsideration of matters decided by a tribal government in its TCA, such a procedure violate ICWA’s full faith and credit requirement.” Resp Mother Br 16. If mother is correct, then ORS 419B.656 would be inconsistent with ICWA and must fall in its entirety, because ICWA preempts state law, as explained in father’s opening brief, App Br 32-38, and as mother acknowledges, Resp Mother Br 16-17.

In any event, full faith and credit requirements are not absolute. A judgment is not entitled to full faith and credit if, for example, it was issued in violation of a party's right to due process. *Kremer v. Chemical Construction Corp.*, 456 US 461, 482, 102 S Ct 1883, 72 L Ed 2d 262 (1982) (explaining that, under the Full Faith and Credit Act, 28 USC § 1738, the initial judgment is not entitled to full faith and credit if it was rendered without due process); *Durfee v. Duke*, 275 US 106, 110-11, 84 S Ct 242, 11 L Ed 2d 186 (1963) (noting that that the federal constitution's full faith and credit provision is not without limits, and the second court can inquire to ensure that the issue at hand "was fully and fairly litigated and finally decided in the court which rendered the original judgment"); *Starr v. George*, 175 P3d 50, 55-56 (Alaska 2008) (recognizing that ICWA's full faith and credit provision does not preclude the second court from determining whether the first court provided the parties due process).

Thus, even after an Oregon court decides to "accept" a tribe's TCA order under ORS 419B.656, it is not required to afford the order full faith and credit unless the tribe afforded the parent due process. *See* 25 USC § 1302, (8) ("No Indian tribe in exercising powers of self-government shall * * * deny to any person with its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]").

The department argues, incorrectly, that the tribe's procedures satisfied father's right to due process. Resp Dept. Br 12-13 (the due process requirement "extends no further than an obligation to provide an opportunity be heard at a meaningful time, in a meaningful manner." (Citing *Matthews v. Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed 2d 18 (1976))). As the department acknowledges, due process "is flexible and calls for such procedural protections as the particular situation demands." Resp Dept. Br 13 (quoting *Dept. of Human Services v. E.L.P.*, 336 Or App 751, 758, 562 P3d 303 (2024)). In other words, a parent must be afforded procedural protections that are concomitant with the deprivation or loss they are facing.

In this case, while not disputing that the TCA subjects father to deprivations of parental rights that are at least as severe as a permanent guardianship, the department argues that father received sufficient protections to comport with due process because the tribe notified him of its upcoming meeting and gave him the opportunity to submit up to 15 pages of documents for the tribe to consider at its meeting, for which father was not allowed to be present or be represented by counsel. Resp Dept. Br 13. When a parent is faced with the involuntary and permanent loss of their parental rights via what is effectively a permanent guardianship or TPR, the opportunity to submit 15 pages of documents for consideration at a hearing the parent cannot attend either personally or through counsel is far from robust protection. Father was

entitled to more than notice and an opportunity to act pro se to submit a document. Father was minimally entitled to a fair hearing at which he could contest the proposed involuntarily deprivation of his liberty interest in his child (*viz.*, care custody, companionship, and control) with the assistance of counsel and subject to a proof beyond a reasonable doubt standard. ORS 419B.521(4)(a) (“the termination of parental rights to an Indian child must be supported by evidence beyond a reasonable doubt”); *Dept. of Human Services v. J.M.N.*, 303 Or App 600, 602, 464 P3d 506 (2020) (“the standard of proof beyond reasonable doubt applies to all facts necessary to terminate parental rights in this ICWA case”); *Santosky v. Kramer*, 455 US 745, 753-54, 102 S Ct 1388, 71 L Ed 2d 599 (1982) (when the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures); *Lassiter v. Department of Social Services*, 452 US 18, 32, 101 S Ct 2153, 68 L Ed 2d 640 (1981) (Fourteenth Amendment imposes on the states the standards necessary to insure that judicial proceedings are fundamentally fair)).

VI. Conclusion

For the foregoing reasons and those set forth in his opening brief, father respectfully requests that this court reverse the trial court's order accepting the TCA document and reverse the adoption judgment.

Respectfully submitted,

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Signed

By Tiffany Keast at 2:43 pm, Jun 11, 2025

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this reply brief complies with the 3,300 word limitation in ORAP 5.05(1)(b)(ii)(E); and (2) the word-count of this reply brief (as described in ORAP 5.05(1)(a)) is 2,928 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(1)(d)(ii).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on June 11, 2025.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Reply Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, and Inge D. Wells #881137, Senior Assistant Attorney General, attorneys for Plaintiff-Respondent, and shall also be eServed on the following:

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APPENDIX F - 20

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