

# Anatomy of a Case: Related Law

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## *Scenario Part One*

### ***Child's statements in child abuse assessment:***

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*Dept. of Human Services v. J.G.*, 258 Or App 118, 308 P3d 296 (2013) (child's statements to CARES doctor and interviewer were admissible under OEC 803(4) based on evidence in the record from multiple sources that proved by a preponderance that statements were made for purposes of medical evaluation and treatment).

### ***Recent unexplained trauma cases:***

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1. *Dept. of Human Services v. J.M.*, 262 Or App 133, 325 P3d 35 (2014). The assessment of a parent's progress toward addressing an unexplained injury ordinarily requires a determination of the cause of the injury. This allows DHS and the parent to identify what actions are needed to ameliorate the conditions that led to the child's unexplained injury. Therefore, the cause of C's tibia injury is relevant to the determination of whether the parents have made sufficient progress to make it possible for C to return home. Because there was never any admission, stipulation, or finding as to the cause of the injury, parents' attempt to introduce evidence that the injury resulted from rickets does not represent a collateral attack on any prior admission, stipulation or finding as to the cause of the injury.

2. *Dept. of Human Services v. T.R.*, 251 Or App 6, 282 P3d 969, *rev den*, 352 Or 564, 291 P3d 736 (2012). T.R. involved hearing impaired parents and 3 month old child with 27 unexplained fractures. The Court of Appeals upheld the juvenile court's change of plan from return to parent to adoption even though parents had participated and completed services offered. Expert testimony had established that a safety concern persisted given that there was no determination of the cause of 27 fractures. In *J.M.* in a footnote, the Court of Appeals contrasted *T.R.*, noting that in *T.R.*, the juvenile court found as fact that the injuries to the child either had resulted from the parents themselves or that, at a minimum, the parents knew or should have known of the injuries. The juvenile court also found that the parents' denial of awareness was not credible. In light of those

unchallenged factual findings about the nature and the cause of the child's injury, and the parents' knowledge of it, the juvenile court in *T.R.* correctly concluded the parents had not made sufficient progress to permit the child to return home where the parents continued to deny knowledge of the child's injuries.

## *Scenario Part Two*

### *Sex offense cases:*

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1. *Dept. of Human Services v M.E.*, 255 Or App 296, 297 P3d 17 (2013). After exercising *de novo* review, the court reversed a judgment of jurisdiction over two children, M.A. and M.I., twin girls who were 13 years old at the time of the jurisdictional hearing. The juvenile court had found that mother's current husband — the girls' stepfather — had, on one occasion approximately four years before the hearing, sexually abused M.I.; that mother did not believe that the incident occurred; and, therefore, that the children were at risk of harm sufficient to warrant juvenile court jurisdiction under ORS 419B.100(1)(c).

M.I. told the CARES interviewer that one day, around the time that she was in the fourth grade, she was lying on the couch watching television with stepfather, who was sitting on the couch at her feet. She thought mother and the other children were at the grocery store. M.I. related that stepfather had been rubbing her back with his hand when he moved his hand under her shirt and began rubbing her stomach. She said (and demonstrated using dolls) that his hand then slid down inside the front of her pants, under her underwear, touching the top of her vaginal area. He then pulled his hand out of her underwear and put it over her underwear between her legs, rubbing her front private area. She indicated that stepfather had never touched her inappropriately again. Before the jurisdictional hearing, Dr. Colistro, a forensic/investigative psychologist and certified clinical sex-offender therapist, performed a psychological evaluation and psychosexual risk assessment of stepfather. The results of his psychological testing supported the presence of a social anxiety disorder, which was consistent with what stepfather reported. Stepfather's "psychosexual profile as it pertains to sexual violence risk \* \* \* indicate[d] an absence of criminogenic factors." Colistro stated, "[I]t is safe to conclude that [stepfather] is in no way criminally oriented."

Colistro's report summarized the results of his evaluation, in part, as follows:

"In summary, results of this psychologic evaluation and psychosexual risk assessment, which has taken into account documentation from law enforcement, DHS, CARES NW and others, and which has subjected these data to quantitative and qualitative psychosexual risk assessment protocols, fail to support the hypothesis that [stepfather] poses any significant threat for committing a person-to-person crime in general or a sex crime in particular. A sexual person-to-person crime is particularly unlikely given [stepfather's] intensely felt moral values and the fact that his social anxiety is at its highest in the context of close interpersonal relations."

In reversing the trial court, the court stated:

"Even assuming that stepfather — who has never been charged with or convicted of a sexual offense — can be considered a 'sex offender,' we have held that, generally, 'a person's status as a sex offender does not *per se* create a risk of harm to a child.' *Dept. of Human Services v. G.J.R.*, 254 Or App 436, 445, [295] P3d [672, 676 – 77] (2013) (citing *State ex rel Dept. of Human Services v. N.S.*, 229 Or App 151, 157 – 58, 211 P3d 293 (2009)). Nor is there a 'presumption that a party's status as an 'untreated' sex offender presents a safety risk to a child.' *Id.* (citing [*Dept. of Human Services v.] B.B.*, 248 Or App [715,] 727[, 274 P3d 242 (2012)])."

The court concluded there was no current risk of harm based on Dr. Colistro's report and evidence from another expert that mother was capable of being protective even if she did not believe the abuse had occurred.

2. In *Dept. of Human Services v. B.B.*, 248 Or App 715, 274 P3d 242, *adh'd to on recons*, 250 Or App 566, 281 P3d 653 (2012), the court reversed jurisdiction as to father who had abused children 16 years prior and had not completed treatment:

"[Father summarizes that] '[t]o meet its burden the department presented evidence (1) that, when father was released from parole 11 years prior to the jurisdictional hearing, father's treatment provider (Shannon) and his parole officer (Bergey) were 'concerned' that father might re-offend; (2) that by the time of the hearing, father had lived with his children for seven

years and had unsupervised contact with them over the last two years; (3) that, upon questioning, the children did not report any sort of abuse or neglect; and (4) that the 'philosophical position' of the prevailing therapeutic community was that 'therapy would increase the likelihood for remission and reduce the likelihood for recidivism.'" We agree with father that '[t]hat evidence fails' to satisfy DHS's burden of proof. The juvenile court erred in finding jurisdiction as to father based on the grounds alleged in paragraph 2.C of the petition. [(Father has history of inappropriate sexual contact with minors and such behavior unremediated endangers the child's welfare and safety.)]

For similar reasons, we disagree with the juvenile court's finding that father endangers the children because he failed to 'complete sex offender treatment as recommended by the child welfare authorities,' as alleged in paragraph 2.D of the petition. Although it is undisputed that father terminated sex offender treatment with Shannon in 1999 and did not engage in additional treatment, there is no evidence in this record that Oregon or Ohio child welfare authorities had required father to engage in additional sex offender treatment."

3. In *Dept. of Human Services v. A.F.*, 243 Or App 379, 259 P3d 957 (2011), the court held that proof father possessed images and partially-downloaded videos of child pornography was insufficient to establish that the father endangered the welfare of his children under ORS 419B.100(1)(c) in light of testimony by the state's sex offender treatment expert that the father posed a "potential risk," but that he would need additional information such as how recently and frequently the father had used the pornography, before he could determine whether the father was an actual risk to his children.

4. Other related cases: *Dept. of Human Services v. C.F.*, 258 Or App 50, 308 P3d 344, *rev den*, 354 Or 386, 314 P3d 964 (2013) (in DV case, evidence legally sufficient to support ruling that there was current threat of injury despite lack of physical confrontation in 18 months); *Dept. of Human Services v. C.J.T.*, 258 Or App 57, 308 P3d 307 (2013) (evidence must establish a nexus between past behavior and current threat of harm); *Dept. of Human Services v. L.G.*, 251 Or App 1, 4, 281 P3d 681, 683 – 84, *adh'd to as modified on*

*recons*, 252 Or App 626, 290 P3d 19 (2012) (focus must be on child's current conditions and circumstances and not on some point in the past).

### ***Amend the petition? New petition?***

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#### PROCESS

Prior to jurisdiction, a party can amend "within a reasonable time before adjudication." ORS 419B.872(1). After jurisdiction, a party must file a motion to amend. ORS 419B.809(6). The court can amend on its own motion at any time but must grant a continuance "as the interests of justice require." ORS 419B.809(6); ORS 419B.872(2).

#### SUBSTANCE

1. *Dept. of Human Services v. N.T.*, 247 Or App 706, 715, 271 P3d 143, 148 (2012) (Both DHS's efforts and a parent's progress are evaluated by reference to the facts that formed the bases for juvenile court jurisdiction.).

2. *Dept. of Human Services v. J.R.L.*, 256 Or App 437, 300 P3d 291 (2013) (A parent's progress must be evaluated by reference to the facts that formed the bases for juvenile court jurisdiction and only parental deficits fairly implied by the jurisdictional allegations and identified in the case plan may properly be considered in the analysis.).

3. *Dept. of Human Services v. N.M.S.*, 246 Or App 284, 266 P3d 107 (2011) (If a juvenile court relies on a parental condition or characteristic that is not one that fairly can be implied from the facts found in the jurisdictional judgment, then it is outside the scope of the court's jurisdiction, and that deficit cannot be remedied by claims of 'actual notice' through case plans, or as the state suggests in this case, letters of expectation.).

4. *Dept. of Human Services v. G.E.*, 243 Or App 471, 260 P3d 516, *adh'd to as modified on recons*, 246 Or App 136, 265 P3d 53 (2011) (framing the analysis of why trial court can't base permanency judgment on facts extrinsic to the facts relied on in the jurisdictional judgment). *See also Dept. of Human Services v. A.R.S.*, 258 Or App 624, 310 P3d 1186 (2013) (*A.R.S. III*) (Under ORS 419B.310(3), DHS has the B/P to show that factual bases for jurisdiction continue to exist to the degree that they show a current threat of serious harm.)

5. *Dept. of Human Services v. N.T.*, 247 Or App 706, 717-18, 271 P3d 143, 149 (2012) (reversing judgments changing permanency plans that were based, in part, on facts related to the father's conduct not explicitly stated in, or fairly implied by, the jurisdictional judgment).

6. *Dept. of Human Services v. S.R.C.*, 263 Or App 506, \_\_\_ P3d \_\_\_ (2014) (When reviewing a challenge to jurisdiction based on additional allegations in an amended petition, the court examines whether there is sufficient evidence from which a reasonable factfinder could conclude by a preponderance of the evidence that a current risk of harm exists from the additional allegation standing alone, or that the additional allegation contributes to or enhances the risk associated with the existing bases of jurisdiction.).

## *Scenario Parts Three and Four*

### ***Pending criminal case:***

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1. ORS 419B.305(1) provides that, absent a finding of "good cause" court must hold a hearing on the petition and enter a dispositional order "no later than 60 days" after the filing of the petition.

a. The recent decision in *Dept. of Human Services v. W.A.C.*, 263 Or App 382, \_\_\_ P3d \_\_\_ (2014), compels prompt resolution of petitions notwithstanding a pending criminal case. In *W.A.C.*, the court delayed resolution of the allegations as to father for 6 months due to a pending criminal case but took jurisdiction over the child based on mother's conduct. The Court of Appeals held that the court could not take jurisdiction over the child until the petition allegations were resolved as to both parents, if both have been served, summoned and appeared. Since the court cannot take jurisdiction until the allegations of both parents are resolved, no parent can be ordered to engage in services in the meantime. ORS 419B.387 allows the court to order services "to correct the circumstances that resulted in wardship." *Dept. of Human Services v. S.P.*, 249 Or App 76, 85, 275 P3d 979, 985 (2012).

As a result of pending the case then, the parent with the pending charges probably can't be a placement resource and the other parent delays getting engaged in services (except on a voluntary basis) until all allegations are resolved. This makes delaying a case for pending criminal case untenable and not a basis for "good cause."

The harm to the children caused by such delay is not justified by any overarching right of the parent. The fact that a parent has the right to remain silent at any time in any proceeding — and then holding the hearing — is not a violation of due process. The parent may be in an uncomfortable spot but he or she is still being provided due process and the state still has to prove its case. Moreover, an acquittal in the criminal case does not mean there is no basis for jurisdiction, given the difference in the burden of proof. So in many cases, the juvenile hearing still would need to occur, even if postponed.

2. ORS 135.970(4)(a) (“Any pretrial release order must prohibit any contact with the victim, either directly or indirectly, unless specifically authorized by the court having jurisdiction over the criminal charge.”).

a. ORS 135.250(2) (“[I]f the defendant is charged with an offense that also constitutes domestic violence, the court shall include as a condition of the release agreement that the defendant not contact the victim of the violence.”). If a defendant is charged with a sex crime or a crime constituting domestic violence, the trial court or release officer or deputy must order that the defendant have no contact with the victim while the defendant is in custody.

b. ORS 135.247. A victim may petition the court for an order terminating the no-contact order, which the court may grant after a hearing if it finds “that terminating the order is in the best interests of the parties and the community.” ORS 135.247(4).

3. The court should advise father of his rights. *See State v. Hoehne*, 163 Or App 402, 989 P2d 469 (1999), *rev den*, 330 Or 252, 6 P3d 1099 (2000) (no reinforced or enhanced Miranda warning required).

### ***Ordering a psychological:***

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#### 1. AS TO MOTHER

*Dept. of Human Services v. A.E.F.*, 261 Or App 384, 323 P3d 482 (2014) (court has authority to order psychological where evaluation rationally related to basis for jurisdiction); *Dept. of Human Services v. N.B.*, 261 Or App 466, 323 P3d 479 (2014) (upholding trial court’s dispositional order that mother participate in a psychological

evaluation focusing on medical child abuse where evidence sufficient to support jurisdiction on that basis) (FYI — Dr. Dan Leonhardt testified as an expert in this case).

## 2. AS TO FATHER

*Dept. of Human Services v. F.J.S.*, 259 Or App 565, 583, 315 P3d 433, 443 (2013), *rev den*, 354 Or 840, 326 P3d 77 (2014) (discussing importance of obtaining a psychological in case involving longstanding DV, anger and aggression).

### ***Is Mother's proposed DV admission appropriate?***

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1. Violence between parents was addressed specifically in *State v. S.T.S.*, 236 Or App 646, 238 P3d 53 (2010):

“As to the court's first finding, father is correct that the inquiry does not end with whether father committed physical violence against mother; our inquiry relates to the children's conditions and circumstances and not those of the parents. Instead, our inquiry in this case is whether the violence between the parents creates a current risk of harm to the children's welfare.”

2. In *Dept. of Human Services v. C.F.*, 258 Or App 50, 308 P3d 344, *rev den*, 354 Or 386, 314 P3d 964 (2013), the court held, in a case involving domestic violence, that the evidence was legally sufficient to support ruling that there was current threat of injury despite lack of physical confrontation in 18 months.

3. Other related cases: *Dept. of Human Services v. M.Q.*, 253 Or App 776, 292 P3d 616 (2012) (threat of serious harm to the child cannot be speculative — there must be a reasonable likelihood that the threat will be realized); *Dept. of Human Services v. A.F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (child must be threatened with a current risk of serious loss or injury and not sufficient for the state to prove that the child's welfare was endangered sometime in the past); *Dept. of Human Services v. C.Z.*, 236 Or App 436, 442, 236 P3d 791, 793 (2010) (must be a nexus between the parent's behavior and the particular risk to the child at issue); *Dept. of Human Services v. W.A.C.*, 263 Or App 382, 398 – 99, \_\_\_ P3d \_\_\_, \_\_\_ (2014) (legal error for court to give conclusive effect to mother's admission that she was subjected to domestic violence by father when father denied he abused mother).

## Scenario Part Five

### ***What could the court have done, if anything, to reduce the movement of Toby from home to home?***

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ORS 419B.340, ORS 419B.449 and 25 USC § 1915 require DHS to make reasonable efforts to “make it possible for the child to safely return home.” The court might have inquired, and directed the CRB to inquire, as to the goodness of fit between Toby and foster care providers and about the support and training given to the foster parents to manage his behaviors so that moves were prevented. In the author’s view, DHS does not exercise reasonable efforts to make it possible for a traumatized child to return home when little or no support is provided to foster parents to prevent disruption of placement. A child increasingly damaged by moves will be less likely to be able to return home to minimally adequate parents.

### ***Adoptive parents:***

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#### EFFECT OF ADOPTION DECREE

*Allen v. Allen*, 214 Or 664, 671, 330 P2d 151 (1958) (court refused to annul a decree of adoption at request of adoptive parents of child with serious behavior problems who was disrupting family life).

ORS 109.381(3) provides that after the expiration of one year from the entry of judgment of adoption “the adoption shall be binding on all persons and \* \* \* the child became the lawful child of the adoptive parents and \* \* \* no one may question the validity of the adoption for any reason.”

#### DHS REFUSAL OF RELINQUISHMENT

Under ORS 418.015(2) DHS *must* accept any child placed in its custody by court order. If not by court order, ORS 418.015(1) provides that DHS “*may, in its discretion,*” accept custody of children. Similarly, ORS 418.270 provides that a “private child caring agency *may* receive children from their parents \* \* \*.” (Emphasis added). ORS 418.285 specifically grants DHS the same authority as a private child caring agency.

## REINSTATEMENT OF BIO PARENTS' RIGHTS

1. The only way a non-party can be heard is to seek a right of limited participation under ORS 419B.116(7).

2. Father:

ORS 419B.524 provides that a parent whose rights are terminated has no standing to appear in any subsequent proceeding re the child. ORS 419B.923(3) prohibits the modification or setting aside of an adoption decree made after TPR.

3. Mother:

Mother waived all the rights given to parties under ORS 419B.875 except the right to revoke consent to the adoption as provided in ORS 109.312(2)(b) and ORS 418.270(4).

ORS 109.381(2) provides that after a year, an adoption judgment is binding and conclusive and "no party \* \* \* may for any reason, either by collateral or direct proceedings, question the validity of a judgment of adoption."

ORS 419B.923(1) grants juvenile court discretion to set aside any order or judgment made by the court if made within a "reasonable time." The court's authority is broad and not limited to the circumstances enumerated in the statute. *Dept. of Human Services v. A.D.G.*, 260 Or App 525, 536 – 39, 317 P3d 950, 956 – 57 (2014); see *Dept. of Human Services v. W.A.C.*, 263 Or App 382, 389 – 94, \_\_\_ P3d \_\_\_, \_\_\_ (2014) (court abused discretion in denying father's motion to set aside a jurisdictional judgment entered before adjudicating allegations as to father).

Some states have passed legislation to specifically address the problem of legal orphans and failed permanency plans. See Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA J SOC POL'Y & LAW 318 (2010). For example, in Washington State, RCW 13.34.215 provides that a child who has not achieved permanency within three years after the termination of parental rights may petition to have his or her parents' rights reinstated.