

Juvenile Appellate Update, August 2023

Dependency

Disposition

Psychological Evaluations

- *Dept. of Human Services v. R.W.C. Sr.*, [324 Or App 598](#), (2023)

Father appeals from an order of the juvenile court requiring him to submit to a psychological evaluation, arguing that the juvenile court did not have authority under ORS 419B.387 to order the evaluation, because the permanency plan for his child had already been changed from reunification to adoption. Alternatively, father argues that DHS did not meet its burden to show that the evaluation was needed by father. Held: Whether court-ordered treatment or training is needed by a parent for one of the purposes stated in the statute is a question to be answered based on the circumstances of the individual case and is not answered solely by reference to the child's current permanency plan. Here, the juvenile court was authorized under ORS 419B.387, as supported by the record developed at the evidentiary hearing, to order father to submit to a psychological evaluation. Of note, the parties agreed that *F.J.M.*, decided by the supreme court, was the controlling case for analysis because this case arose solely under ORS 419B.387. Affirmed.

- *Dept. of Human Services v. F.J.M.*, [370 Or 434](#) (2022)

The Court of Appeals affirmed a juvenile court's order that father participate in a psychological evaluation after the juvenile court took jurisdiction of his children. The Supreme Court affirmed. The Court held that ORS 419B.387 authorizes the juvenile court to order a psychological evaluation as treatment if it is needed by the parent. Both the plain meaning of the term "treatment" and the legislative history supported the argument that evaluation and testing components (e.g. a psychological evaluation) could be ordered under ORS 419B.387. However, the ordered treatment must also be "needed" by the parent for the purpose of ameliorating the circumstances that resulted in wardship and would prepare the parent to resume care. In determining whether treatment is needed, the juvenile court must engage in a fact-specific inquiry. The statute requires that a juvenile court's findings that particular treatment (e.g. a psychological evaluation) is needed by the parent must be connected more than tenuously to the jurisdictional bases that the treatment is being ordered to correct, and that it must be based in and supported by the evidentiary record. Each case must be evaluated independently, and the evaluation may not be used to determine *if* a parent needs a certain type of treatment. Specifically in this case, the court determined that father's behavior (leaving the children repeatedly with an unsafe parent) was a reflection of the problem for which treatment is "needed" and a psychological evaluation is needed to correct that. Finally, the court also explained that even though Father had voluntarily participated in a psychological evaluation, the record did not reflect the findings, recommendations, nor Father's actions in response to any recommendations. Affirmed.

Court's Authority/Counseling

- *Dept. of Human Services v. T.B.*, [326 Or App 192](#) (2023)

Father appealed a juvenile court judgment requiring him to transfer child's dog (an emotional support animal) to child. The child had filed a motion requesting a review hearing on the issue of whether his dog should be transferred to him. The court found that under ORS 419B.385, the dog should be transferred to child's care as an emotional support animal as a form of counseling. The court also cited ORS 419B.090 in support of the ruling. The court of appeals concluded that the term counseling in ORS 419B.385 does include the use of emotional support animals. The order was also supported by ORS 419B.090, laying out the purposes and policies of the state of Oregon in relation to children in care. The court also disagreed with father's argument that the court could not make such an order because the dog was the father's personal property. Affirmed.

Evidence/Hearsay

- *Dept. of Human Services v. J.L.S.*, [321 Or App 158](#) (2022)

Mother appealed from a judgment of jurisdiction. The court first analyzed whether admitting one of the child's statements relating to mother's drug use was properly admitted as non-hearsay under OEC 801(4)(b)(A) (statement by a party opponent). The court examined the record, pursuant to the test set out in *G.D.W.* and determined the child was aligned with DHS, and not a party opponent. However, the Court also found that admission of the child's statements was harmless error because of the cumulative nature of the additional evidence related to mother's drug use. The mother also assigned error to the designation of the DHS caseworker as an expert, when testifying about her drug use. The court found that "even if the juvenile court erred in admitting Springer's testimony, it was harmless." There was sufficient evidence from other sources to support the allegation of drug use. Affirmed.

Mootness

- *Dept. of Human Services v. T.J.N.*, [323 Or App 258](#) (2022) (*review allowed 03/30/23)

The parents appealed from a review judgment (from March, 2022), changing the placement preference for the children from in home with the mother to foster care. The court did not address the merits of the appeal as they found it moot (the children joined DHS in the appeal). The court of appeals noted the argument from DHS that several subsequent orders were entered (and a new petition was filed), continuing the placement in substitute care as the placement preference. The parents did appeal one of the orders from June 2022, but the court noted five subsequent judgments in which the juvenile court concluded that placement in substitute care was in the children's best interests. One of those orders came from a jurisdictional judgment that was entered on agreement of the parties. Though the parents argued that the March order was still significant for purposes of calculating the 15 out of 22 months rule for filing a TPR, the court found numerous exceptions to the required filing of a TPR exist in ORS 419B.498, and it is not possible for the court or parties to know at this point what the circumstances will be at that time. Dismissed as moot.

- *Dept. of Human Services v. J.A.*, [324 Or App 445 \(2023\)](#)

Father challenges a judgment of the juvenile court determining that his daughter K was within the jurisdiction of the court, ORS 419B.100(1), and making her the court's ward, ORS 419B.328. After father filed this appeal, the juvenile court dismissed its dependency jurisdiction and terminated the wardship. Consequently, the Department of Human Services (DHS) moved to dismiss the appeal as moot. Father responds that the collateral consequences of the jurisdictional judgments will have continuing practical effects on him. Held: The Court of Appeals granted DHS's motion to dismiss because there was little likelihood that a reversal of the jurisdictional judgment would have any practical effects on father's rights. The Court noted that father was not challenging a jurisdictional judgment as to his other child, the mother was deceased (lessening the likelihood of a domestic relations case), father did not challenge the founded disposition in a timely manner, and the impact of the jurisdictional judgment on future child welfare investigations would be minimal, as DHS would review the whole case. Dismissed as moot.

Parties' Rights

- *Dept. of Human Services v. T.S.M.*, [322 Or App 424 \(2022\)](#)

Father appealed a permanency judgment, arguing that the court violated his right under ORS 419B.875(2) to participate in the dependency hearing, when the court muted his microphone for portions of the hearing. The court of appeals held that his rights were not violated as he was permitted to make comments about the child's placement (the topic being addressed at the hearing). A party's right to participate in a hearing is not unlimited, allowing them to participate in whatever way they wish. The juvenile court appropriately exercised its discretion in ensuring orderly conduct. Affirmed.

Permanency Plan Change

- *Dept. of Human Services v. M.G.J.*, [326 Or App 426 \(2023\)](#)

Mother appealed from judgments changing the permanency plan from reunification to tribal customary adoption. Mother argued that the juvenile court erred in finding that DHS made active efforts toward reunification and that her progress toward reunification was insufficient. Jurisdiction as to one child, S, was based on domestic violence (against mother) placing the child at risk of harm. Another petition was later filed as to the other child, P, alleging jurisdiction based on exposure to domestic violence, substance abuse, chaotic lifestyle and residential instability (the opinion is unclear as to whether jurisdiction was established on all of these bases).

The children were removed from and returned to mother more than once. Many of the placements were in either domestic violence shelters, supportive housing, or substance abuse treatment facilities. Mother was terminated from, or left, all these living situations. Mother was also referred to several domestic violence and substance abuse programs separate from housing. Of all the services, mother did complete an online domestic violence and parenting class, but DHS expressed concern that these classes only consisted of reading materials, and DHS could not get feedback from a provider or determine mother's retention of the materials. Mother did

not complete any of the other substance use or domestic violence services to which DHS referred her, that would have provided that feedback. Mother completed a psychological evaluation but did not complete a follow up meeting to learn about the results.

DHS conferred with her tribe, the Pit River Tribe, throughout the case. The children were moved to Illinois to live with a cousin who was eligible to enroll in the Pit River Tribe twenty-two months after the first petition was filed. Mother virtually visited with the children once a week, and then stopped visiting after about two months. Mother told DHS to stop contacting her, but they continued to try. At the permanency hearing, 26 months after the petition was filed, mother testified that she was clean and sober and not in the previous domestically violent relationship. However, the court found that she failed to complete any court ordered services relating to substance abuse or domestic violence, and there was ample evidence to support a finding of active efforts.

Mother also argued that the court relied on extrinsic facts, her ego and her failure to maintain visits, as the basis for its determination. The court held that though the juvenile court did comment on those two things, the record was clear that was not what the court relied on in the decision to change the plan away from reunification. Instead, the record showed that the court relied on mother's failure to complete any court ordered services.
Affirmed

Reasonable Efforts/Active Efforts

- *Dept. of Human Services v. L.B.*, [325 Or App 176](#) (2023)

This is an ICWA case in which Mother appealed a judgment changing the permanency plan from reunification to guardianship. The court held that ODHS made active efforts to reunify the mother and the children, and worked with the tribe as well, to provide services that were specific to the circumstances leading to jurisdiction. Mother argued the efforts weren't active because DHS failed to provide her with a second neuropsychological evaluation (which was requested at the permanency hearing in question) and also didn't refer her to other services recommended by her counselor. ODHS policy was to provide one evaluation every two years. Though policy alone is not a sufficient reason to provide a service, the court found that requesting an exception to a policy of offering one evaluation every two years, didn't show a lack of reasonable efforts. The court of appeals found that the juvenile court did conduct a proper cost-benefit analysis, by determining that in spite of several services provided by the agency, mother had not made progress toward minimal adequacy. The court appropriately concluded that mother was unlikely to benefit from additional services. Affirmed.

- *Dept of Human Services v. H.K.*, [321 Or App 733](#) (2022)

Mother appealed two orders arising from a permanency hearing; one relating to the order for a psychological evaluation and one relating to a finding of reasonable efforts. As to the order for a psychological evaluation, because the juvenile court did not make the factual findings required under the four-part standard laid out in *W.C.T.* (decided after the permanency hearing), as DHS conceded, the court vacated and remanded that order.

Regarding the finding of reasonable efforts, the court conducted a detailed analysis of the case history and different services provided to the child and mother. The court focused the reasonable efforts analysis on ORS 419B.476(2)(a) and whether the services (even if extensive and therapeutically appropriate) afforded mother a reasonable opportunity to demonstrate she was capable of becoming a minimally adequate parent. The child was placed in a different county than mother and had multiple placement disruptions. Almost all of the service providers determined that in person therapeutic visitation and/or in person family therapy with a neutral provider was necessary in order for reunification to be possible. Because this did not occur the court held that mother did not have sufficient time to show she could be a minimally adequate parent. Order re reasonable efforts reversed and remanded.

Termination of Parental Rights

Best Interests

- *Dept. of Human Services v. L.M.B.*, [321 Or App 50](#) (2022)

Mother appealed from a Judgment terminating her rights. The court of appeals reviewed the case *de novo*, and held that the record failed to show that it was in the child's best interests to terminate mother's rights. The court clarified that the even when the record demonstrates a parent's unfitness, the determination still must be case specific as to whether it is in a particular child's best interest to sever the legal relationship. "Ultimately,...we must be able to determine with confidence that the benefits to the child of ending the child's legal relationship with a parent outweigh the risk of harm posed to the child by severing that legal relationship." Though the court determined it was in the child's best interests to remain long-term with her current caregivers, they also found the record lacked the evidence needed to allow for the inquiry needed to make that recommendation. Reversed and remanded.

Fitness

- *Dept. of Human Services v. N.H.*, [322 Or App 507](#) (2022)

Mother appealed a judgment terminating her rights due to unfitness. The child was removed shortly after birth, and the termination trial occurred when child was four. Mother had a diagnosed intellectual disability and trauma disorder, and despite some progress over the years, the court held that her conduct is and was seriously detrimental to the child. The court recognized that termination may not be based solely on a parent's disability, but it may consider conduct if the conduct interferes with the parent's ability to provide proper care for a child for extended periods of time. The evidence showed that mother had difficulty internalizing lessons provided to improve parenting skills, she lacked insight into the child's extensive needs, she failed to respond to the child appropriately and she was unable to provide for her own basic needs, including a safe and stable home. After finding her unfit, the court also appropriately found DHS proved by clear and convincing evidence that the child could not be integrated into mother's home within a reasonable time, noting she had not yet begun to work on recommendations about how to safely care for the child. Finally, the court concluded that termination was in the child's best interests. The child had diagnosed developmental delays, was

residing with a stable family that wanted to adopt her and had and could meet her needs, and she was not strongly bonded to the mother. The court also noted that mother had injured child during a visit and struggled emotionally after contact with mother. Affirmed.

- *Dept of Human Services v. W.L.J.-E.*, [324 Or App 121](#) (2023)

Father appealed from a judgment terminating his rights. The court reviewed the evidence, noting father's substance abuse and multiple untreated mental health disorders (including antisocial personality disorder) as some of the conditions leading to his unfitness. The court further noted evidence supported that father failed to make meaningful progress on the barriers to his ability to become fit since the child's birth. The court also found that termination was in the child's best interests, as father would likely not respect the boundaries of a guardianship, based on his history and poor compliance with treatment, leading to confusion and disruption for the child. Affirmed.

- *Dept. of Human Services v. J.E.D.V.*, [320 Or App 149](#) (2023)

The children and DHS appeal the juvenile court's judgment dismissing the petitions to terminate the mother's parental rights. The arguments also address motions for mistrial and the denial of a motion to allow remote testimony.

Mistrial: The motions for mistrial alleged improper *ex parte* contact between the Judge and the mother. The court ultimately determined that they were not timely, being filed three weeks after the ruling, but still reviewed them for abuse of discretion. The court of appeals found that because the alleged conversation between the mother and the judge did not involve information relevant to a question of law or fact before the court, it did not constitute *ex parte* communication.

DHS failed to prove that mother was unfit: The allegations in the termination petitions were based on mother's mental health diagnoses and lack of stable housing, among other things. Mother was diagnosed with ADHD and bipolar disorder, and also exhibited traits of a personality disorder. However, the juvenile court found, and the court of appeals agreed, that the record did not support the contention that mother could not provide legally adequate care of her children for extended periods of time. Though her care was not optimal, and the record showed that the children had experienced trauma and had trauma related needs, the link between their trauma and mother's parenting was not sufficient for the high standard of termination – that her conditions presented a risk of seriously detrimental harm, requiring termination.

Dismissal with prejudice: The court reviewed this dismissal for abuse of discretion and found that the court did not abuse discretion. Additionally, the court noted that the question remains unclear as to how dismissing with prejudice may preclude the filing of future termination petitions. The dismissal does clearly prohibit the refile of the same petitions, however, the underlying dependency case was not disturbed and the agency still had to abide by the statutory provisions relating to permanency hearings and termination timelines.

Denial of motion for remote testimony: A PJO was issued three days before trial, requiring TPRs to be held in person, and allowing for remote testimony upon the filing of a motion. The PJO also indicated it superseded any prior orders relating to remote testimony, and the court informed the parties of this the day before trial. DHS had previously filed a motion for remote testimony for one of their witnesses. DHS only challenged the judge's denial of DHS's renewed motion for remote testimony on the first day of trial and the court found the DHS did not establish how the alleged error was prejudicial.

Affirmed.

- *Dept of Human Services v. C.H.*, [327 Or App 61 \(2023\)](#)
- *Dept. of Human Services v. M.M.*, [327 Or App 268 \(2023\)](#)

Delinquency

Confidentiality/Juvenile Court Records

- *State of Oregon v. C.P.*, [322 Or. App. 51 \(2022\)](#)

Youth appealed from a court order releasing his psychological evaluation and juvenile court counselor's report to the victim in the case. The youth was adjudicated on one count of Assault in the Second Degree, and the victim filed a motion under ORS 419A.258 requesting to inspect and copy portions of the Supplemental Confidential File (SCF). The juvenile court granted the motion in part, allowing disclosure of the psychological evaluation and a report from the Juvenile Court Counselor, with a protective order. On the issue of appealability and mootness, the court held that the order releasing the records was final due to its adverse effects on the youth, and a temporary stay did not change that. The issue was also not moot, as the victim retained access to Youth's records. Finally, the court analyzed whether releasing the youth's privileged records was an error, as a matter of law. The court weighed the competing interests of the youth and the victim, pursuant to ORS 419A.258(6), and found the balance to tip in the youth's favor. ORS 419A.255 clearly defines who may have access to records in juvenile cases, and victims are not included. Further, Article I, Section 42 of the constitution also does not provide crime victims with a right of discovery. The court held the trial court erred because the victim did not have a "legitimate need" for reports, as dictated by ORS 419A.258(7)(a), in order to fully participate in the proceedings, as required by Article I, section 42(1)(b) of the Oregon Constitution. Reversed and remanded.

Sex Offender Registration

- *State v. A.R.H.*, [371 Or 82 \(2023\)](#)

Youth appealed an order requiring him to report as a sex offender. The court of appeals affirmed, and in a unanimous opinion, the supreme court also affirmed. The court held that the inquiry was a factual one and turned on whether there was any evidence on the record to support the court's finding relating to whether it was highly probable (a clear and convincing standard) that the youth proved he was rehabilitated and not a threat to the safety of the public. The court examined the text and context of ORS 163A.030(7)(b) and rejected the youth's arguments that completion of sex offender treatment and finding that he was a low risk to re-offend should be weighed more heavily than other factors in the statute. Though the court recognized that a different fact finder may have come to a different conclusion, the standard of review based on the factual inquiry required the court to accept the trial court's findings, unless the record required the court to answer the question a different way. The court also rejected the youth's constitutional arguments that ORS 163A.030 was unconstitutionally vague under the state and federal constitutions. Of

note, the court shared some concerns in footnote 10, relating to the proof requirements. Additionally, the court seemed to suggest the youth could still challenge his registration requirement in footnote 11.

Commitment to a Youth Correctional Facility

- *State v. D.B.O.*, [325 Or App 746 \(2023\)](#)

Youth appealed a judgment placing him in the care and custody of the Oregon Youth Authority and recommending placement in a youth correctional facility. Youth argued that the court failed to make written findings pursuant to ORS 419C.478(1) as to why commitment was in his best interests. The court of appeals determined that the finding that the youth “cannot be maintained in the community” was too ambiguous and failed to explain why it would be in his best interests to be committed to OYA. Vacated and remanded.

Evidence

- *State v. J.D.B.*, [326 Or App 237 \(2023\)](#)

Youth appealed from a judgment finding him within the jurisdiction of the court for an act that, if committed by an adult, would constitute assault in the first degree. The court first rejected youth’s argument relating to sufficiency of the evidence as to his self-defense claim. However, the court held in youth’s favor relating to his claim of a *Brady* violation. Youth’s claim of self-defense was based on his contention that the named victim in the case, D, had sexually abused him for several years. Youth had attempted to obtain D’s cell phones to obtain proof of the abuse, and the State supported D’s motion to quash the subpoena, which was granted. Later, youth learned the state was seeking a warrant for D’s cell phones. Subsequently, in the middle of the factfinding hearing, the State obtained D’s cellphones. The state failed to disclose the phones to youth, and the court of appeals held that this was a violation of due process, as they likely contained content that was material to youth’s self-defense claim. The court determined that outright dismissal (as requested by youth) was not required, but that it should be remanded for a new factfinding proceeding. Reversed and remanded.

Motion to Suppress/Warrant exception

- *State v. M.T.F.*, [326 Or App 371 \(2023\)](#)

Youth appealed from a judgment adjudicating her delinquent for assaulting a public safety officer. The court of appeals examined the denial of her motion to suppress and the adjudication itself. Officers came into contact with the Youth, M, after a they received a call about a suspected overdose. They entered her tent after announcing their presence, to render aid. M then kicked one officer several times. The juvenile court found, and the court of appeals agreed, that the emergency aid exception applied to the warrant requirement when they entered her tent to aid with a suspected overdose. As to her self-defense claim, the court found that the state presented enough evidence to disprove it, noting that officers were in full uniform, announced they were leaving the tent, and asked M not to kick them. Finally, the court analyzed how *Owens*, 368 Or 288 (2022), should come into play in this case, as it was decided after M filed her opening brief.

The court in *Owens* held that the court is required to find that one acted with at least criminal negligence with respect to whether one's conduct would cause physical injury. The State conceded that the youth preserved an argument relating to the requisite intent. Even though M did not assign error to that determination, the state's concession that it was erroneous under *Owens* required review. The court of appeals found it was harmless, as the court made comments during the trial about the state of mind rising to the level of negligence. Affirmed.

Miranda/Compelling Circumstances

- *State of Oregon v. N.J.D.A.*, [322 Or. App. 26 \(2022\)](#)

Youth appealed from the denial of his motion to suppress, after he was adjudicated for murder, first-degree arson, and first-degree aggravated theft. The Youth made statements to a law enforcement officer after a fire was started that resulted in his father's death. The court analyzed whether the youth was in compelling circumstances during his encounter. The Court analyzed the location of the encounter, the physical space, the presence of youth's mother, the length of time, and the amount of pressure exerted upon the Youth. Youth was questioned by a police officer in a location that was familiar to him, and the conversation with an officer occurred outside. The Youth's mother was also present, remained within earshot, and ended the interview when she felt it was more like an interrogation. The length of the encounter was less than 10 minutes, though the Court noted that the duration necessary to contribute to compelling circumstances may be less for a child than an adult. The court found no evidence that the officer used aggressive or coercive interrogation tactics. Under the totality of the circumstances, youth was not in compelling circumstances, requiring Miranda. Youth was also unusually naïve for his age and had social deficits, but his age and psychological profile did not render the circumstances sufficiently compelling. Affirmed.

Sufficiency of the Evidence

- *State v. D.B.O.*, [326 Or App 384 \(2023\)](#)

Youth appealed a judgment finding him within the jurisdiction of the court for sexual abuse in the third degree. The court of appeals held that youth preserved his argument relating to sufficiency of the evidence, by arguing that the youth's conduct did not fit into the elements of the offense, sex abuse 3, in his closing. Additionally, the court upheld the juvenile court's findings that the youth did in fact touch another person, J's, penis, based on evidence on the record. Additionally, there was sufficient evidence of a sexual purpose because the youth was viewing pornography during and after touching J's penis. The court determined that sexual purpose may be inferred even when the contact is brief and involves clothed intimate body parts, so long as the inference is reasonable in the context of all of the evidence. Affirmed.

- *State v. J.H.*, [326 Or App 640 \(2023\)](#)