



Oregon Juvenile Law Appellate Update

THROUGH THE EYES OF THE CHILD CONFERENCE

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Delinquency

MOTION TO SUPPRESS

➤ *State of Oregon v. T. T.*, [308 Or App 408 \(2021\)](#)

Youth was a backseat passenger in a car that was pulled over for speeding. During the stop, the 25 year old driver admitted that he brought an ounce of marijuana with him from California, which the officer knew to be a crime. The trooper smelled marijuana and he eventually searched the car and discovered large bags of marijuana in the trunk. Youth moved to suppress evidence, arguing that marijuana is legal for the driver to possess, and the smell of marijuana is not enough to establish probable cause of criminal activity. The state argued that the trooper reasonably suspected the driver was furnishing marijuana to minors, and had reasonable suspicion the driver was trafficking drugs. The juvenile court denied youth's motion, and based on evidence and other admissions by youth, found youth to be within its jurisdiction for acts that, if committed by an adult, would constitute unlawful delivery of a marijuana item and unlawful possession of marijuana by a person under the age of 21. On appeal, youth assigns error to the denial of his motion to suppress, arguing that the trooper lacked reasonable suspicion to turn the traffic stop into a drug investigation and, in any event, lacked probable cause to search the vehicle. The primary issues on appeal are (1) whether the traffic stop unlawfully turned into a drug investigation when the trooper asked where they were coming from and how long they had been there; (2) if not, whether the trooper, at a later point in the traffic stop, had reasonable suspicion to ask the driver and youth to get out of the vehicle for a drug investigation; and (3) if the traffic stop was lawfully converted into a drug investigation, whether the trooper developed probable cause to search the car under the automobile exception to the warrant requirement.

Held:

Youth failed to preserve his argument that the stop was illegal at the point of the trooper's initial inquiry about their travel, and the questions raised by youth in light of the Supreme Court's decision in *State v. Arreola-Botello*, 365 Or 695, 451 P3d 939 (2019), are not obvious for purposes of plain-error review. With regard to reasonable suspicion later in the traffic stop, because it was lawful for persons 21 and over to possess some amount of marijuana in Oregon at the time of the stop, the odor of usable marijuana in the vehicle was unremarkable, and the fact that the marijuana was not on the driver's person did not make it objectively reasonable to believe that the underage passengers were the ones in possession of it--let alone that the driver had delivered it to them unlawfully. Had all of the vehicle occupants been under the age of 21, the smell of marijuana would take on different significance. With legalization of marijuana, the issue is whether marijuana is present in an amount above a particular threshold that separates legal and illegal conduct. Importation or exportation of any amount of marijuana to or from Oregon is also illegal. As to reasonable suspicion of drug trafficking, some of the facts (officer noticed there was nothing in the passenger compartment to suggest a long trip; that they traveled down and back on I-5 in a rental car with a destination of northern California) identified by the trooper were drug-courier profiling facts, which are accorded minimal weight under the Oregon Constitution, because they sweep up an impermissibly broad

segment of the population to constitute the particularized suspicion of a specific crime. However, here, those facts, bolstered by the additional facts of the vehicle's unusual quick roundtrip to Redding and the driver's effort to conceal that pattern, were enough to create reasonable suspicion of drug trafficking. With additional information from questioning the driver and passengers, the trooper had probable cause to search the car under the automobile exception to the warrant requirement. Affirmed.

RESTITUTION

➤ ***State v. L. G. S.-S.*, [307 Or App 208 \(2020\)](#)**

Youth appeals from a supplemental judgment awarding restitution to Safeco Insurance. When youth submitted his plea, he admitted to liability for restitution on all of the counts including the ones that were dismissed, but did not stipulate to any amounts as the state had not proposed any. The court accepted youth's admissions and found him within the jurisdiction of the court. With regard to restitution, the state represented that it was not anticipating restitution in the case. At the dispositional hearing two weeks later, the state indicated restitution would be sought, but did not provide any evidence as to the amount. The court entered a jurisdiction and disposition judgment and set a restitution hearing five weeks out. The same victim list that was attached to the plea agreement and adjudication order was attached to the judgment. At the restitution hearing, youth objected to the request for restitution for Safeco Insurance, which was not a victim identified in the judgment, on the basis that adding a victim and a restitution request after adjudication violated ORS 419C.450. The trial court rejected youth's argument, reasoning that a victim did not need to identify their insurance company at the time of adjudication, because an insurance company request is based on subrogation rights for a victim's loss and is not a different loss. On appeal, youth argues that the juvenile court erred in awarding restitution to Safeco Insurance, because the state violated the timing requirement in ORS 419C.450.

Held: The court erred in awarding restitution to Safeco Insurance, because the state did not meet the timing requirement in the juvenile restitution statute, ORS 419C.450, which requires the state to present restitution evidence "prior to or at the time of adjudication." The court applied the holding from *State v. M.A.S.*, [302 Or App 687 \(2020\)](#), that the state was required by ORS 419C.450 to present its restitution evidence before the court concluded the adjudicatory hearing. In this case, at the time the youth was adjudicated (when the court accepted youth's plea and found him within its jurisdiction) the state did not present evidence to the court of injury, loss or damage to Safeco Insurance, nor had the state even identified Safeco Insurance as a victim. If the court finds from that evidence that the victim suffered an injury, loss or damage, then the court is required to include in the judgment of jurisdiction that the youth pay restitution to the victim. The court did not address whether the fact that Safeco had subrogation rights to a named victim has any bearing on the timeliness of the restitution request, because the state also did not timely request restitution for Safeco. Reversed.

Dependency

DISPOSITION OF CHILD ABUSE ASSESSMENT (JUDICIAL REVIEW)

➤ ***Bruce Querbach v. Dept. of Human Services*, [308 Or App 131 \(2020\)](#)**

This proceeding arises under ORS 183.484, which provides for judicial review of final agency orders other than contested cases. The Department of Human Services (DHS) made founded dispositions that petitioner had subjected his children to abuse in the form of mental injury to both his children, physical abuse of his son, and threat of harm toward his daughter. On review, the circuit court affirmed DHS's mental injury determinations but set aside its determinations of physical abuse and threat of harm. Applying a probable cause standard, the court concluded that the founded dispositions of mental injury were supported by substantial evidence in the record, but that the founded dispositions of threat of harm and physical abuse were not. On appeal, petitioner assigns error to the circuit court's determination that substantial evidence supports DHS's founded dispositions of mental injury. On cross-appeal, DHS assigns error to the circuit court's application of the probable cause standard, contending that the rules impose a lower standard. DHS also contends that substantial evidence supports all of its founded dispositions.

Held:

The standard for founded dispositions of abuse is “reasonable cause to believe”, which has been interpreted by the court as akin to the “reasonable suspicion” standard in criminal law. DHS evaluates whether there is reasonable cause to believe the child is at risk of harm from abuse or neglect by a particular individual. The role of the circuit court in reviewing the DHS determination is to determine whether a reasonable person could reach the same determination that DHS made. The circuit court erred in applying a probable cause standard.

On appeal, the question is whether the record allows for the determination that it was reasonable for DHS to believe under the circumstances before it that petitioner caused his children to suffer mental injury, physically abused his son, and threatened harm to his daughter. The evidence in the record about what was known to DHS supports an objectively reasonable belief that petitioner committed the abuse identified by DHS, or so a reasonable person could conclude, regardless of contrary evidence presented by petitioner. The circuit court correctly sustained DHS's founded dispositions of mental injury to both children but erred when it set aside DHS's founded disposition that petitioner caused physical abuse. The founded disposition of threat of harm to petitioner's daughter is not supported by substantial evidence, and the circuit court correctly set aside that founded disposition.

INDIAN CHILD WELFARE ACT (ICWA)

➤ ***Dept. of Human Services v. H. C. W.*, [311 Or App 102 \(2021\)](#)**

In this juvenile dependency case, mother appeals the trial court's determination that her child, N, is not an "Indian child," as defined in 25 USC section 1903(4) and, thus, that the Indian Child Welfare Act (ICWA) does not govern the case. Mother is a descendant member of the Karuk tribe, which has two types of membership: descendancy and fully enrolled membership. N is eligible for descendant membership but not eligible for fully enrolled membership. The trial court concluded that N did not qualify as an "Indian child" because N was not eligible for fully enrolled membership.

Held: The plain text of 25 USC section 1903(4) only requires that a child be a "member" or eligible for "membership" and does not distinguish between types or tiers of "membership." Further, to the extent that the text leaves doubt, the well-established requirement that the court construe ambiguous provisions of the ICWA in favor of tribal interests compels the same conclusion. The trial court erred in concluding that N was not an "Indian child" and that ICWA did not apply in this case. The court's conclusion that the ICWA applies to this case obviates the need to address mother's remaining assignment of error. Reversed and remanded

INTERSTATE COMPACT FOR THE PLACEMENT OF CHILDREN (ICPC)

➤ ***Dept. of Human Services v. D. C. B.*, [310 Or App 729 \(2021\)](#)**

In this consolidated appeal of juvenile dependency cases, the juvenile court held that the Interstate Compact on the Placement of Children (ICPC), ORS 417.200 to 417.260, prohibited mother from residing in the state of Washington with her two children without that state's approval. Sometime after jurisdiction was established, the children were returned to mother's physical custody pursuant to a safety plan, although they remained in the legal custody and guardianship of DHS. With the permission of DHS, mother and the children moved to Washington to live with mother's father and stepmother, who also act as safety service providers. DHS requested that Washington Department of Children, Youth and Families (WDCYF) conduct a home study and approve the children's placement in Washington. Six months later, the request to place the children in Washington was denied under the ICPC. WDCYF informed DHS that the children need to return to Oregon because Washington was denying placement.

Mother filed a "motion to continue placement and opposition to ICPC application", arguing that the correct interpretation of ICPC is that it regulates out of state placements in non-parental custody, and was inapplicable to her children because they were living with her. DHS argued that the ICPC applies to a placement with a parent whenever a child is within the court's jurisdiction. After a hearing, the juvenile court ruled that the ICPC applies to placements with parents when DHS has legal custody and guardianship of

the children and, thus, that the ICPC applied to the children. On appeal, mother and father assign error to that ruling.

Held: Subsection (a) of Article III of the ICPC specifies when a child's placement is subject to the compact's requirements. It provides

“(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child *for placement in foster care* or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article.”

The court considered whether the phrase “placement in foster care,” means only a placement that is a substitute for parental care, or whether it includes arrangements under which a child is living with a parent. The court determined the established meaning of a “placement in foster care” – both at the time the compact was drafted and at the time Oregon entered the compact – was a placement that operated as a substitute for parental care, and was one of such duration as to be an integral part of the child rearing process. The court concluded that “placement in foster care,” as that phrase is used in ORS 417.200, Article III, refers to substitutes for parental care and does not encompass circumstances such as those in this case, where children are residing with a parent in another state. Consequently, the trial court erred. Reversed and remanded.

JURISDICTION

Admissions

- ***Dept. of Human Services v. K.W.*, [307 Or App 17 \(2020\)](#)**

Mother appeals the dependency judgment in which the juvenile court established jurisdiction over her child, H, based on mother's fact admissions. Mother argues that her admissions were insufficient to permit the juvenile court's dependency jurisdiction and that the judgment should be reversed, even though she did not raise that objection at the jurisdictional trial. In her view, preservation is excused by *Dept. of Human Services v. D. D.*, 238 Or App 134, 138, 241 P3d 1177 (2010), *rev den*, 349 Or 602 (2011), which fused the dual meanings of "jurisdiction" in ORS 419B.100(1)--dependency jurisdiction and subject matter jurisdiction--and held that dependency jurisdiction could be, like subject matter jurisdiction, challenged at any time. The Department of Human Services and H assert otherwise and argue that the two meanings of "jurisdiction" were disentangled in *Dept. of Human Services v. C. M. H.*, 301 Or App 487, 455 P3d 576 (2019), *rev allowed*, 366 Or 825 (2020).

Held: ORS 419B.100 governs the juvenile court's subject matter jurisdiction in dependency cases. The court's subject matter jurisdiction attaches with the commencement of dependency proceedings, not with the jurisdiction determination as mother contends. The court overruled its' decision in *D.D.* that under ORS 419B.100, dependency jurisdiction and subject matter jurisdiction are functionally equivalent and that dependency jurisdiction can be challenged regardless of whether it was raised by the

parties below. Because mother failed to object to the court's jurisdictional determination below, or invited the error, the court affirmed the jurisdictional judgment.

Amended Allegations

➤ ***Dept. of Human Services v. S. S.*, [307 Or App 37 \(2020\)](#)**

Mother appeals from juvenile court judgments taking dependency jurisdiction over her three children. At the jurisdictional trial, the court received a request to amend the petition for B, under ORS 419B.809(6), to include an allegation that mother “has subjected [B] to ongoing verbal, psychological, emotional, and physical abuse and this creates the conditions and circumstances such as to endanger the welfare of [B].” The court made a finding in the jurisdictional judgments that this allegation was found as an amended allegation. None of the parties objected. The court determined that several other allegations had been proved and that the children had been harmed by parents' behavior and if the court did not take jurisdiction, the children would continue to be harmed. The court later terminated jurisdiction and dismissed wardship after this appeal was filed.

Held: The court found the appeal was not moot, since the jurisdictional judgment contains findings that mother abused B, which affected her rights in a related domestic relations matter. Regarding the amended allegation, under ORS 419B.809(4), a dependency petition is required to contain the facts that bring the child within the jurisdiction of the court, including sufficient information to put the parties on notice of the issues in the proceedings. The court, on its own motion, may at any time direct that the petition be amended under ORS 419B.809(6). The court is required to grant a continuance as the interests of justice may require if the amendment results in a substantial departure from the alleged facts in the petition. ORS 419B.809(6). Mother's argument that the court must direct DHS to amend the petition and then grant a continuance is not obvious such that it qualifies for correction on plain error review. The juvenile court did not commit plain error, because it is not obvious and beyond reasonable dispute that the court could not amend the petition using the procedure it did. Nor does ORS 419B.809(6) require a continuance after the amendment where the amended allegation was based on the same evidence presented to prove the other allegations. The court found the record supported the juvenile court's findings and disposition and affirmed the juvenile court's decision.

Claim and Issue Preclusion

➤ ***Dept. of Human Services v. T. G. H.*, [305 Or App 783 \(2020\)](#)**

In this juvenile dependency case subject to ICWA, father appeals from a judgment of the Lincoln County juvenile court assuming jurisdiction over his three children. Father contends that the court erred in rejecting his argument that DHS's jurisdictional petition is barred by issue preclusion as a result of an earlier jurisdictional proceeding in the Douglas County juvenile court in which the court had not assumed jurisdiction. Father also asserts that the court erred in denying his motion *in limine* to exclude from the court's consideration evidence that had previously been considered by the Douglas

County juvenile court in evaluating the earlier jurisdictional petition. Father contends, in the alternative, that the evidence does not establish sufficient grounds for dependency jurisdiction.

Held: New evidence regarding the psychological and emotional impact of father's abuse of the children became available at the second jurisdictional trial. The general rule is that when a petition alleges jurisdictional facts that are substantially similar to allegations that have been previously litigated, and the evidence in proof of those allegations is no different from evidence the court has previously considered, then issue and claim preclusion should preclude re-litigation. However, the court has recognized in termination of parental rights cases, policy considerations such as the best interests of the child serve as a rationale from deviating from the general rule. The same considerations apply to jurisdictional proceedings that include the welfare of the child as the main focus of the court's determination.

When there are new jurisdictional allegations or similar allegations that are based on "new substantial material facts" (i.e., facts that were either not available or not presented and that likely would have been material to the juvenile court's determination), then the welfare of the child must prevail over the policy underpinnings of claim and issue preclusion that would otherwise bar re-litigation. In this case, the Lincoln County juvenile court based its jurisdictional determination on evidence regarding the effects of father's discipline on the child's psychological and emotional welfare that had not been presented to or considered by the Douglas County juvenile court. The Douglas County juvenile court determination has no preclusive effect on the consideration of any evidence relevant to the allegations considered by the Lincoln County juvenile court that are based on those new substantial material facts.

The trial court also did not err in denying father's motion *in limine* to exclude evidence that had been considered previously by the Douglas County court, because, in determining whether DHS had met its burden to establish the new allegations by clear and convincing evidence, the Lincoln County juvenile court was required to evaluate the totality of the circumstances, including the present effects of past events on the children's condition. Finally, the juvenile court's judgment assuming jurisdiction is supported by legally sufficient evidence in the record. Affirmed

Conditions and Circumstances; ORS 419B.100(1)(c)

- ***Dept. of Human Services v. T. H.*, [313 Or App 560 \(2021\)](#)**

Father appeals two juvenile court judgments asserting dependency jurisdiction over his two daughters. After a contested trial, the juvenile court asserted jurisdiction over the children, based on father having sexually abused one of the children four years earlier and mother being unable to protect the children. The court received conflicting testimony between AM and father, with father denying the abuse occurred. The court made credibility findings about the testimony of both parents and AM and ultimately suggested that AM's lack of motive versus what would be a motive for father to lie tipped the scales in favor of believing AM over father. Father assigns error to the assertion of dependency jurisdiction. He seeks de novo review, particularly as to the sexual abuse finding. Father

acknowledges that, given the normal standard of review, his success on appeal is dependent on de novo review.

Held: The Court of Appeals declined to conduct de novo review where the issue of whether the children were sexually abused was highly contested, the juvenile court made express factual findings, its rulings comported with its findings, and the juvenile court was acutely aware that its resolution of that factual dispute would be critical to its disposition. Under the circumstances, the Court of Appeals declined to substitute its judgment for that of the juvenile court. Affirmed.

➤ ***Dept. of Human Services v. L. T.*, [313 Or App 641 \(2021\)](#)**

Mother appeals a juvenile court order taking dependency jurisdiction over her infant daughter L based on mother's substance abuse, mental health problems and inability to protect L from father's violent and aggressive behavior. Evidence at trial indicated that father repeatedly raised his voice and threatened others during his brief visits with L, despite the impact it was having on the infant. He also demanded that mother remove L, who was born prematurely, from the hospital against medical advice. On these occasions, mother became withdrawn and submissive and took no steps to defuse father's behavior to protect L. Evidence was also presented that mother, who is underage, admitted to using marijuana every day, throughout the day. Her drug and alcohol counselor testified that he recommended that mother participate in level one rehabilitation services for marijuana addiction. He also expressed concern about the fact that she is underage, her need for the substance, and that the high volume of consumption could increase her risk of inattentiveness and decrease her ability to identify dangers around her infant.

Held: There was sufficient evidence to support the court's findings regarding failure to protect and substance abuse. The evidence of the volume and frequency of mother's use of marijuana, combined with the testimony about the effects of high amounts of marijuana consumption on infant care, was sufficient to establish a nexus between that behavior and risk of harm to L. Regarding mental health, while there was evidence that mother had been diagnosed with bipolar, ADHD and depression years ago, the record contains no evidence of whether those conditions persist or have any impact on mother's ability to parent. Jurisdictional judgment reversed and remanded for entry of a judgment establishing dependency jurisdiction based on allegations other than mental health; otherwise affirmed.

➤ ***Dept. of Human Services v. V.G.-C.*, [307 Or App 571 \(2020\)](#)**

Mother and father were the subject of an investigation of organized criminal activity, were later arrested and charged with several drug offenses. Father fled after posting bail, and mother was sentenced to five years of supervised probation. During the investigation, while executing a search warrant, officers discovered \$115,000 in cash in grandmother's dishwasher and \$10,000 to \$20,000 elsewhere in the house. She was not arrested or charged with any crimes, although police suspected that she was involved. E and A were removed from the parents' care after the parents' arrest, and were returned to mother's care about a year and four months later. Mother and children lived with grandmother under the terms of mother's probation. Over a year later, without informing mother's

probation officer, mother and children began living with mother's new boyfriend, who was subsequently arrested for carrying more than two pounds of methamphetamine and a half-pound of heroin. Grandmother paid the boyfriend's \$50,000 bail, with over half in cash. Mother's probation was revoked and she was sentenced to five years in prison and three years of post-prison supervision. The children were placed in foster care again. The juvenile court denied grandmother's guardianship petition and ruled that the children were within its dependency jurisdiction. Mother's appeal primarily focuses on grandmother's availability to care for the children. The question on appeal is whether even with DHS having proved parental deficits – the evidence in the record, as a whole, established that the totality of the children's circumstances or conditions in the care of grandmother exposed them to a current risk of serious loss or injury that was reasonably likely to be realized.

Held: Affirmed. The trial court did not err because, given the facts, there was a "reasonable likelihood" of harm to the welfare of the children. The court found the following facts supported the court's determination. In conducting an investigation of mother for drug trafficking, police located over \$100,000.00 in grandmother's dishwasher. Second, grandmother paid bail for mother's boyfriend with over \$25,000 in cash and denied knowing the boyfriend to law enforcement. The juvenile court was within its discretion to find grandmother's denials not credible. There was evidence that, as a result of a family-run drug enterprise, the children had been directly exposed to drugs and drug manufacturing, including smelling the odor of drugs being made in their home, and that grandmother had been, and would continue to be, involved in that enterprise to some degree. The court distinguished this case from *Dept. of Human Services v. A. L.*, 268 Or App 391, 342 P3d 174 (2015), where DHS could not identify any harm to the children caused by living with the grandparents.

➤ ***Dept. of Human Services v. L.E.F.*, [307 Or App 254 \(2020\)](#)**

Father appeals from an order continuing the jurisdictional hearing date beyond the 60-day deadline of ORS 419B.305(1) and from the jurisdictional judgment. The juvenile court asserted jurisdiction over father's children after considering, among other things, evidence that father abused alcohol, had anger control issues, and engaged in inappropriate discipline. Father assigns error to the court's assumption of jurisdiction. He argues that there was insufficient evidence to support jurisdiction and that the court denied him due process when it (1) failed to hold a jurisdictional hearing within the 60-day period; (2) failed to provide him with parenting time; and (3) required a separate modification proceeding to proceed before the juvenile dependency cases concluded.

Held: A juvenile court may assert jurisdiction over a child under ORS 419B.100(1)(c) when it finds that the child's conditions or circumstances endanger the child. A child is endangered when he or she is exposed to conditions or circumstances that present a current threat of serious loss or injury. DHS must establish by a preponderance of the evidence a connection between the parents' allegedly risk causing conduct and the harm to the child, and it must also establish that the threat of harm is current and non-speculative. At the jurisdictional trial, father's testimony of his alcohol use was inconsistent with D's, which the juvenile court found more credible. D described in detail the effects of father's drinking, including that he had red and puffy eyes and would

stumble and fall over. D's testimony was consistent with what she told DHS. The court also noted that father had not been honest during this drug and alcohol assessment. The evaluator testified that father's abstention from alcohol for the two months prior to the trial was not significant, and that anyone can hold it together for two months. The court found the juvenile court's inference concerning the likelihood and imminence of father's further alcohol abuse during his parenting time was supported by the record. The court also found there is evidence in the record from which the juvenile court could reasonably find that each child experienced substantial pain when dragged and slapped by father, and that such force used in the course of "discipline" was not reasonable. Finally, the court found the trial court's finding regarding father's anger issues was supported by evidence in the record when there was testimony from a psychologist that father may do something inappropriate or ineffective when things are pushed too far, and testimony from the children that they were afraid of their father because he drank and was mean most days they spent with him. The court also found the trial court did not err by finding good cause to reschedule the jurisdictional trial beyond the 60-day deadline, given that the court was in the middle of a different trial and that rescheduling the witnesses to testify would require time and notice. Also the trial was rescheduled to a date only several judicial days later.

The record was legally sufficient to support the court's jurisdiction over father's children, and good cause justified holding the jurisdictional hearing outside of the 60-day period. Father failed to preserve the remainder of his due process arguments because they arose from his separate domestic relations proceeding. Affirmed.

Conditions and Circumstances; ORS 419B.100(1)(c) and Failure to Appear

➤ ***Dept. of Human Services v. C. C.*, [310 Or App 389 \(2021\)](#)**

In this consolidated dependency case, mother and father separately appeal from jurisdictional judgments in which the juvenile court made their children, A and H, wards of the court. Mother is the biological mother of only H and, thus, challenges the juvenile court's jurisdiction only as to H, asserting that the Department of Human Services presented legally insufficient evidence to support jurisdiction. Father is the biological father of both A and H and contends, in a combined argument, that he did not receive statutorily required notice for the jurisdictional hearing, and, as a result, the juvenile court erred in conducting the hearing and taking jurisdiction of the children in his absence. He was served with a copy of the petitions along with a statutorily compliant summons. He appeared as summoned for the shelter hearing, and then again as ordered for a settlement conference. At the settlement conference, the court ordered him to appear for a jurisdiction hearing on June 3. Father did not appear at the June 3 hearing. Since DHS believed father was going to make admissions that day, the juvenile court suggested setting a prima facie hearing, giving father another chance to appear. Counsel for father and DHS agreed to that plan and agreed on a hearing date nine days later. Father failed to appear again and DHS presented a prima facie case. After that presentation, Father's attorney stated, "I don't think there is any evidence put on that said father was, in fact, served."

After a jurisdictional hearing with mother, the juvenile court found three jurisdictional bases related to 5-year old H: (1) that mother experiences a ‘chaotic lifestyle’ and ‘residential instability’ to such an extent that it poses a danger to H; (2) that mother needs assistance from DHS to learn the skills she requires in order to safely parent H; and (3) that mother is unable to be a safe parenting resource for H. On appeal, mother argues the evidence presented at the hearing was insufficient to support those findings, particularly that mother’s circumstances pose a current risk of harm to H. Father also argues the juvenile court did not make an oral or written order that notified father of the time, place and purpose of the jurisdictional hearing, as required by ORS 419B.816.

Held: Father's challenge was unpreserved and did not qualify as plain error. In determining that father's error was not plain, the court found that father's contention that he needed to be served with notice of the June 12 jurisdictional hearing for the court to have authority to proceed with that hearing in his absence is in reasonable dispute. The court distinguished this case from previous holdings in termination of parental rights cases, under statutes analogous to ORS 419B.815 and ORS 419B.816, in which the appellate court reversed the trial court's termination in the parent's absence as plain error. The distinguishing factor was the applicability of ORS 419B.815(7) to the dependency case, which allows the court to establish jurisdiction when a person fails to appear for any hearing related to the petition either on the date specified in the summons or court order, or on a future date.

Regarding mother’s appeal, the juvenile court has jurisdiction over a child whose condition or circumstances are such as to endanger the welfare of the child or of others. The exercise of jurisdiction is supported when, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child. A child’s welfare is endangered if the child is exposed to conditions or circumstances that present a current threat of serious loss or injury and there is a reasonable likelihood that the threat will be realized. DHS has the burden to establish a nexus between the allegedly risk-causing conduct or circumstances and the risk of harm to the child, and that the risk is present at the time of the hearing and not merely speculative.

In this case, there was insufficient evidence that mother’s residential instability poses a risk of harm where mother had an active lease for at least six additional months in an evidently suitable home. The related finding that mother’s “chaotic lifestyle” posed a risk of harm was also unsupported. Although mother’s move to Washington may have been impulsive, she did so out of concern of possible drug use in the home and relocated to a place of safety with a friend, reaching out for supportive services. The juvenile court found that the remaining two allegations – that mother needed assistance to safely parent and that she was not a safe parenting resource – were proved largely based on mother’s lack of a relationship with H, in addition to the concerns about mother’s alleged chaotic lifestyle and residential instability. However, the lack of a relationship does not pose a nonspeculative risk of harm to a child standing alone. The evidence in support of the allegations against mother was insufficient to support jurisdiction as to H.

Subject Matter (to determine parentage pre-jurisdiction)

➤ *Dept. of Human Services v. C. M. H.*, [368 Or 96 \(2021\)](#)

On review from the Court of Appeals in an appeal from Benton County Circuit Court, Locke A. Williams, Judge. 301 Or App 487, 455 P3d 576 (2019). The decision of the Court of Appeals and the judgment of the circuit court are affirmed. Opinion of the Court by Justice Meagan A. Flynn. Justice Thomas A. Balmer did not participate in the consideration or decision of this case. Today, the Oregon Supreme Court concluded that ORS 419B.100(1) refers to the juvenile court's subject matter jurisdiction and that the juvenile court's subject matter jurisdiction under ORS 419B.100(1) is not limited to cases in which the court has determined the merits of a petition alleging that a child falls within one of the categories listed in that statute. Petitioner challenged a judgment of the juvenile court that determined that she is not a legal parent of a child born while she was married to the child's biological mother. The parentage dispute came before the juvenile court after the department filed a petition alleging that the child's condition and circumstances endangered her welfare -- placing the child within one of the categories specified in ORS 419B.100(1) -- based on allegations as to biological mother, the claimed biological father, and petitioner. After the juvenile court entered the judgment of nonparentage as to petitioner, the department moved to dismiss the pending petition to address the child's alleged condition and circumstances, and the juvenile court dismissed the case. Petitioner appealed from the judgment of nonparentage, arguing that the judgment was void for lack of subject matter jurisdiction because the juvenile court did not determine that the child actually fell within one of the categories specified in ORS 419B.100(1). The Court of Appeals affirmed the judgment.

Held: In a unanimous opinion authored by Justice Meagan A. Flynn, the Oregon Supreme Court affirmed. The Court reasoned that ORS 419B.100(1), which provides that "the juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and" who falls in a category specified in ORS 419B.100(1), refers to the juvenile court's subject matter jurisdiction. Thus, the statute specifies a scope of proceedings that the juvenile court may hear and over which the court may exercise judicial power. The Court further reasoned that that subject matter jurisdiction does not depend on a determination that a child actually falls within one of the ORS 419B.100(1) categories. Instead, the juvenile court's subject matter jurisdiction generally extends to cases in which the allegations and relief sought in a pending petition invoke the court's authority to make such a determination. The Court concluded that the department's pending petition was sufficient to give the juvenile court subject matter jurisdiction over this case at the time the court entered the judgment of nonparentage. The Court emphasized that the merits of the juvenile court's determination were not in dispute and declined to reach petitioner's unpreserved argument that the juvenile court's statutory authority to resolve parentage disputes required it to first determine the merits of the pending petition.

MOTION TO DISMISS

➤ ***Dept. of Human Services v. D. L.*, [308 Or App 295 \(2020\)](#)**

Mother assaulted A, her teenaged deaf daughter, by throwing a heavy wooden stool at her, causing significant pain and a black eye. The child was removed, and the juvenile court asserted jurisdiction over A on the grounds that mother (1) physically assaulted the child and (2) had anger and impulse control problems. Mother appeals from a judgment denying her motion to terminate wardship and dismiss dependency jurisdiction over A. Mother argued that since jurisdiction, she had engaged in services, had a successful three-month in-home trial reunification with A, and had not assaulted A again. Mother argues that the Department of Human Services (DHS) did not meet its burden to establish that (1) the adjudicated bases for jurisdiction still existed at the time of the motion hearing and (2) that they continued to pose a serious risk of harm to A. DHS relies on mother's continued impulsivity including her disruptive behavior in court, her minimization of the impact that the original assault had on A, and her breach of the in-home safety plan (where she attempted to physically force A into a room at church causing pain and bruising to A's arm) to argue that the court did not err in denying her motion.

Held:

When the permanency plan remains reunification, DHS continues to bear the burden of demonstrating that the original bases for jurisdiction have not been ameliorated and that they continue to post a threat of serious loss or injury to the child. The court evaluates motions to dismiss by: (1) determining whether the adjudicated bases for jurisdiction continue to post a threat of serious loss or injury to the child, and, if they do, (2) the court assesses the likelihood that the risk of loss or injury will be realized in the absence of juvenile court jurisdiction and wardship. The focus is on whether the adjudicated bases continue to support jurisdiction. DHS must establish that the threat of harm from the jurisdictional bases remain current and non-speculative. That requires something more than past danger. There must be a reasonable likelihood that the threat will be realized.

The juvenile court did not err. The record supported the court's determination that the adjudicated bases for jurisdiction continued to pose a serious risk of harm to A, and that the harm was likely to be realized. The incident at the church, considered in the context of mother's demonstrated anger and impulse control issues, logically leads to the conclusion that the risks associated with the initial assault have not been ameliorated. Mother's lack of insight is related to the ongoing risk of harm. The court was entitled to rely on mother's courtroom conduct in its assessment of her credibility and on her continued minimization of the original assault and the new incident in determining the current likelihood that A will suffer serious loss or harm if wardship is terminated. Affirmed.

➤ ***Dept. of Human Services v. N. L. B.*, [306 Or App 93 \(2020\)](#)**

In 2018, the juvenile court took jurisdiction over two children, E and J, based on mother's and father's stipulations that E "was diagnosed with child physical abuse, traumatic subdural hemorrhage, and retinal hemorrhage in the right eye" while in the care of her

parents. During the following months, neither parent provided information about how E was injured and suggested that E's injuries may have been due to a genetic condition, though genetic testing later ruled that out. In 2019, father was charged with assault and criminal mistreatment for causing E's injuries. Due to a related no-contact order, father moved out of the family home and was only allowed supervised visits. Several months later, DHS filed new petitions asserting as an additional basis for jurisdiction that father had been criminally charged and mother failed to appreciate the risk he poses as a result. Mother and father each filed motions to dismiss, arguing that the record no longer supports maintaining jurisdiction on the bases asserted in 2018 and that the new 2019 petitions fail to allege facts sufficient to support taking jurisdiction. The trial court denied their motions and they both appeal renewing the same arguments.

Held: DHS bears the burden of demonstrating that the original bases for jurisdiction continue to pose a threat of serious loss or injury, as long as the permanency plan remains reunification. Under *Dept. of Human Services v. T.L.*, 279 Or App 673 (2016), the court applies a two part inquiry: (1) whether the original bases for jurisdiction continue to pose a threat of serious loss or injury and, if so, (2) the court assesses the likelihood that the risk of loss or injury will be realized.

The record supports the trial court's continuance of jurisdiction on the bases asserted in 2018. Although there was testimony that the caseworker believed that mother is able to meet the children's basic needs, little more than a year ago E suffered life-threatening injuries which doctors concluded were "consistent with abusive head trauma" and having been "shaken aggressively." When asked about the injuries, mother and father could not, and still cannot, provide an explanation consistent with the physical evidence. Without parents' understanding as to how the injury occurred to an infant in their sole custody and care, and the lack of any participation in services specifically tailored toward preventing the injury from happening again, the bases for jurisdiction have not been addressed or ameliorated. During the entirety of the time since the injuries to E were discovered, the family has been under a DHS safety plan which alone could explain the fact that the child has not suffered additional injuries.

Regarding the post jurisdiction petition allegations filed in 2019, the court examines whether sufficient evidence exists from which a reasonable factfinder could conclude by a preponderance of the evidence, either that a current risk of harm exists from the additional allegation standing alone, or that the addition allegation contributes to or enhances the risk associate with the already established bases of jurisdiction. The allegations regarding father's criminal charges are insufficient to establish jurisdiction. The fact that father was indicted is only an accusation--it provides no new facts about any risk the children are exposed to. DHS has failed to meet its burden of providing any nexus between the indictment and any harm to the children whether the indictment is viewed alone or in connection with the established bases for jurisdiction. The 2019 jurisdictional judgments are reversed and remanded and the judgments denying the motions to dismiss are affirmed.

➤ *T.W. v. C.L.K.*, [310 Or App 80 \(2021\)](#)

In 2016, DHS filed dependency petitions regarding the children who were living with mother. Father was living in Vermont because he was on parole or probation for a driving while intoxicated conviction and his supervising authority would not permit him to relocate to Oregon. The juvenile court found that it had jurisdiction over the children based on mother's substance abuse interfering with her ability to parent, and based on an amended allegation: "[t]he father is out of state and ~~unable to be a resource~~ is currently unable to be a resource due to his criminal convictions and attendant consequences." Important to the appellate court's analysis, DHS dismissed an allegation that father's "criminal behaviors and attendant consequences interfere with his ability to safely parent." The terms of father's supervision included requirements that he complete alcohol treatment and submit to urine and breath testing. Father understood that the conditions of his supervision allowed him to "socially drink" as long as it did not get him "in any trouble" after completing treatment. In 2018, the juvenile court entered orders establishing guardianships with maternal grandparents. Father participated in video chats with the children while in Vermont and had three in person visits with them in Oregon. After completing supervision in Vermont, father returned to Oregon and in March of 2020, filed a motion to dismiss jurisdiction and terminate the wardships. At the hearing on the motion to dismiss, father initially testified that he had not consumed alcohol since 2014, but later clarified that he meant he had not "abused" alcohol since 2014, but had engaged in some social drinking since that time. However, the grandparents testified that father's speech was sometimes slurred during video visits, and grandfather testified that in August 2019, father said he was still drinking a half case a day. The juvenile court denied father's motion, reasoning that the jurisdictional obligation incorporates the entire picture of threat of harm to the children, which included father's noncredible testimony about his drinking habits.

Father appealed, arguing that the jurisdictional bases have been ameliorated because he now lives in Oregon and his last criminal conviction was in 2014. He argues the juvenile court erred in its reliance on evidence extrinsic to the jurisdictional bases. Mother also asserts that the juvenile court looked beyond the specific jurisdictional bases in making its determination, and that if there are presently conditions or circumstances that endanger the children that were not previously proved, the dependency petition must be amended to reflect those additional bases. Children respond that the burden was on the parents to prove that the children were no longer exposed to a current threat of serious loss or injury due to conditions or circumstances expressly stated or *fairly implied* by the jurisdictional judgment.

Held: Reversed and remanded.

A juvenile court has dependency jurisdiction over a child whose conditions or circumstances are such as to endanger the child's welfare. A child's welfare is endangered under ORS 419B.100(1)(c) if the child is exposed to a current threat of serious loss or injury and that threat is reasonably likely to be realized. In a petition alleging jurisdiction, the proponent must set forth facts in ordinary and concise language that bring the child within the jurisdiction of the court, including sufficient information to put the parties on notice of the issues in the proceeding. It is the pleaded and proved jurisdictional basis

that delineates the authority of the court and sets the expectation of services provided by DHS. If circumstances change and a ward would be endangered by a return to parent even though original bases for the court's jurisdiction no longer exist, the court may be able to assert jurisdiction based on new circumstances within the procedural confines of ORS 419B.809(6). *Dept. of Human Services v. J.C.*, 365 Or 223 (2018). While the jurisdictional bases govern the case, those bases may evolve over time, but only by following the procedural channels of ORS 419B.809(6), which requires a motion to amend, to ensure the parents are on notice and provided with due process.

When a parent moves to dismiss jurisdiction after the court has changed the child's permanency plan from reunification, the parent bears the burden of proving the jurisdictional bases no longer exist. The juvenile court must determine whether the original bases for jurisdiction continue to pose a current threat of serious loss or injury and if so, the likelihood that risk will be realized.

Under *Dept. of Human Services v. J.L.R.*, juvenile courts are authorized to disregard errors or defects in petitions or other documents only when the error or defect does not affect the substantial rights of the adverse party. The relevant inquiry to determine whether the allegations extrinsic to those expressly alleged in the petition can be fairly implied is whether parents received adequate notice. The court examines the bases for a juvenile court's decision and the jurisdictional judgment to determine whether the judgment would put a reasonable parent on notice that those bases would be used to continue jurisdiction over a child and to change the permanency plan for a child.

Here, the juvenile court explicitly struck the reference to father's "criminal behaviors" and rewrote the stated basis to focus solely on father's presence out of state as a consequence of his "criminal convictions" and "attendant consequences." The effect of that change was to place the basis for jurisdiction not on father's behavior, but upon his presence in Vermont as a result of his convictions. On this record, the court cannot conclude that father was provided adequate notice that facts relating to his current alcohol consumption were part of the jurisdictional basis, especially in light of the way the allegation was amended to delete reference to father's "behavior" in this case.

The dissent disagreed that father's alcoholism was a fact extrinsic to the jurisdictional basis and noted facts in the record that demonstrated father had actual notice of the importance of addressing his alcoholism in ameliorating the basis for jurisdiction.

ORDER FOR PSYCHOLOGICAL EVALUATION

➤ *Dept. of Human Services v. F. J. M.*, [312 Or App 301 \(2021\)](#)

Father appeals jurisdictional and dispositional judgments of the juvenile court taking jurisdiction of father's five children under ORS 419B.100(1)(c) and directing father to participate in services, including a psychological evaluation. Father contends that the court erred in its jurisdictional and dispositional determinations and lacked authority to require him to submit to a psychological evaluation.

Held: Affirmed. The juvenile court focused on father's long-term failure to protect the children from mother, and found that the evaluation would be helpful in determining what else needs to be done to assure that Father can keep the children safe and away from their mother. The Court of Appeals has held that a psychological evaluation is authorized under ORS 419B.387 if needed as a component of treatment or training. The court concluded that the record and the juvenile court's findings and explanation aligned with the Court of Appeals' case law for what must be shown under ORS 419B.387 to authorize a compelled psychological evaluation.

➤ ***Dept. of Human Services v. M. O. B.*, [312 Or App 472 \(2021\)](#)**

Father appeals a judgment of jurisdiction and disposition regarding his infant son, R. At the time the court established jurisdiction, it also ordered father to participate in a psychological evaluation without specifying whether it was relying on its authority under ORS 419B.387 or ORS 419B.337(2). On appeal, father argues that the juvenile court exceeded its authority under ORS 419B.387 when it ordered father to participate in a psychological evaluation.

Held: The juvenile court did not err. For purposes of this opinion, the court considered whether the juvenile court was authorized to order father to participate in a psychological evaluation under ORS 419B.387. The court's authority under that statute requires that a juvenile court make certain predicate determinations at an evidentiary hearing before ordering a psychological evaluation. Evidence must establish that such treatment or training is needed and that a psychological evaluation as a component of treatment or training is authorized.

In this case, legally sufficient evidence supported the juvenile court's determination that a psychological evaluation was a component of the treatment or training needed by father to prepare father to resume care of R. There was evidence of a need for treatment and training to address father's pattern of assaultive and impulsive behavior and a psychological evaluation was a component of that treatment or training. Although it is not clear what the psychological evaluation will reveal, that does not transform the evaluation into a discovery mechanism to determine if there is a need for treatment or training. The court emphasized that ORS 419B.387 does not authorize a psychological evaluation every time a parent has problem and an evaluation could reveal merely useful treatment and training. In this case, R had been out of his parents' care for over six months (since birth) and the efforts previously undertaken by DHS to enable R's safe return home had not worked. Thus, the juvenile court did not exceed its authority under ORS 419B.387. Affirmed

➤ ***Dept. of Human Services v. F.T.R.*, [306 Or App 697 \(2020\)](#)**

In this juvenile dependency case, the parties appeared at a review hearing where the concerns were raised about mother's lack of progress and behavioral problems with the children following visits with mother. Mother's attorney stated that mother's criminal attorney advised her not to participate in services, as it would result in self-incrimination issues. Mother stated that she had not made progress because she had not received referrals from DHS and can't pay for the services without DHS referrals. Her attorney

argued for a mental health evaluation and stated mother would participate in a drug and alcohol assessment and parenting classes. DHS stated it would fund the services once mother completed initial assessments, but mother had failed to complete those as instructed. The juvenile court ordered the psychological evaluation and made no express findings regarding mother's assertion of the privilege against self-incrimination, nor did the court's order depend on the grant of any form of immunity. Relying on *Dept. of Human Services v. K. L. R.*, 235 Or App 1, 230 P3d 49 (2010), mother argues that submitting to that exam may require her to incriminate herself in a related criminal case in violation of the Fifth Amendment to the United States Constitution. She contends that that right prevents a court from ordering her to participate in a psychological evaluation in the absence of a grant of "use immunity." She did not directly ask the juvenile court to condition her participation on a grant of use immunity.

Held: The Fifth Amendment's protections against self-incrimination can be asserted in any proceeding, be it civil, criminal, administrative, judicial, investigative, or adjudicatory. However, it does not provide a right to refuse to honor a subpoena or take the witness stand. Rather, barring exceptional circumstances, the only way a person can assert the privilege is on a question-by-question basis. There is nothing in the record to indicate the types of questions that would be presented, nor is there evidence that mother would be required to incriminate herself as part of the evaluation.

The court did not foreclose the possibility that a record could be developed in a particular case that an ordered psychological evaluation could violate the right against self-incrimination in the absence of use immunity. The court noted there is a line between adjudicating parental rights based upon a refusal to waive rights against self-incrimination and adjudicating parental rights based upon a parent's failure to comply with treatment or rehabilitation (the former being constitutionally impermissible), which requires a case-by-case assessment of the record. On this record, however, mother did not establish that the ordered evaluation was so clearly incriminating in violation of her Fifth Amendment rights that it was impermissible in the absence of a blanket grant of immunity. The court stated in a footnote that their opinion does not foreclose mother from invoking her rights against self-incrimination on a question-by-question basis while being interviewed by the evaluator. Affirmed.

PERMANENCY HEARING

Reasonable Efforts

- *Dept. of Human Services v. J. D. R.*, [312 Or App 510 \(2021\)](#)

In this juvenile dependency case, father appeals from a permanency judgment continuing J's permanency plan of reunification. Jurisdiction as to mother included that she was "aware that the father cannot presently safely parent the child, but needs assistance to learn how to best develop the skills to protect the child from father's unsafe caregiving," and that she had "intellectual capacity limitations that impact her ability to safely parent." Father admitted he "was recently diagnosed with Autism Spectrum Disorder with accompanying intellectual impairment, which has impacted his ability to safely parent the

child and maintain a safe and appropriate living environment.” Father contends DHS failed to investigate or provide services that were targeted toward his autism spectrum disorder.

DHS efforts included visits, medical and dental care, assistance in securing necessities and other services for J, and assistance relating to cleaning and organizing the parents’ apartment. DHS also provide referrals for SAFE (mother), Iron Tribe, Options, parent mentors and for psychological evaluations. At the hearing, the juvenile court found DHS made reasonable efforts but added, “I do expect there to be additional efforts to find a parent coach, trainer, counselor who is trained in working with autistic adults.”

Father argued DHS efforts were largely focused on mother and left him out of the case planning. Father acknowledged that mother was easier to work with, but asserted that his diagnosis is what made him harder to work with. He argued DHS needed to provide service providers experienced at working with individuals with autism, because that condition was at the root of both father’s and mother’s relationship problems and father’s parenting problems. DHS argued its reunification efforts were complicated by confusion over whether the parents were a couple and the fact that mother was far more committed to taking steps necessary to be reunited with J.

Held: By the plain language of the judgment of jurisdiction, father’s autism spectrum disorder with accompanying intellectual impairment is the root cause that has impacted father’s ability to safely parent the child and maintain a safe and appropriate living environment. Despite this, the evidentiary record contains no evidence that DHS made any efforts toward alleviating that root cause, or that DHS conducted any investigation into the availability of services for autistic adults. DHS efforts are not reasonable when they are not aimed at alleviating the court’s specific jurisdictional basis in its entirety. Even if it could have been reasonable for DHS to first address father’s parenting issues with standard agency services, it was not reasonable to continue that course of action and never investigate services for autistic adults for nearly a year, particularly after father failed to make progress with those standard services. The fact that one parent has proved more successful than the other does not alleviate DHS from the duty to pursue efforts aimed at each individual parent. Reversed and remanded for correction of reasonable efforts determination; otherwise affirmed.

➤ ***Dept. of Human Services v. W. M.*, [310 Or App 594 \(2021\)](#)**

Mother and father each appeal a permanency judgment that changed the permanency plan for their three-year-old daughter, A, from reunification to guardianship. They contend that the juvenile court erred when it determined that the Department of Human Services’ efforts afforded them the opportunity to become minimally adequate parents even though, as a result of the COVID-19 pandemic, they could not obtain the in-person training they need to develop the skills to manage A’s serious feeding disorder. A had been in foster care since 2017 on the ground that both parents “lack the stability and parenting skills to meet the child’s needs and safely parent the child.” At the time of the permanency hearing, A had a very serious feeding issue. She had been receiving therapy for it while in foster care, but initial efforts to treat it had not been successful. In early 2020, A began to make progress with the help of an occupational therapist, Linden, and

“food play” opportunities A’s foster mother was providing her. Except for one session, the therapy was provided via telehealth due to the pandemic. By the time the permanency hearing was held, 12 therapy sessions had been provided, with mother and father attending nine remotely. In Linden’s view, mother needed in-person “hands-on” coaching to address A’s feeding issues. Linden did not recommend the parents be responsible for feeding A until they could demonstrate their understanding of how to feed A.

Parent’s ability to address the feeding issue was the primary issue at the permanency hearing. DHS argued it had provided reasonable efforts throughout the case, that parents had not been consistent in showing up for appointments prior to COVID, and that they had not demonstrated they could meet A’s needs. Parents argued that due to the combination of COVID restrictions, A’s intensive needs, and the recent change in the therapeutic approach to A’s feeding disorder, they had not had a fair opportunity to demonstrate that they could appropriately manage A’s feeding disorder. The juvenile court changed the plan from reunification to guardianship.

Held: Reversed.

Before changing a child’s permanency plan away from reunification, the juvenile court must find: (1) that DHS has made reasonable efforts to reunify the family; and (2) that, notwithstanding those efforts, parents have not made sufficient progress for the child to safely return home. ORS 419B.476. “Reasonable efforts” are efforts that focus on ameliorating the adjudicated bases for jurisdiction, and that give parents a reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents. To qualify as reasonable, the efforts must go on long enough to allow for a meaningful assessment of whether parents are making sufficient progress to permit reunification.

In this case, the DHS’s efforts leading up to the permanency hearing did not give parents a reasonable opportunity to address the jurisdictional bases. Although parents had not made progress in addressing A’s feeding disorder prior to 2020, neither had the professionals trying to address it. According to Linden, mother would need in-person, hands-on work with Linden and A, something that pandemic prevented from happening. DHS’s efforts must extend long enough to allow for parents to obtain the type of training the pandemic has prevented them from having, and long enough to allow for meaningful assessment of whether that training will permit them to become minimally adequate parents.

The trial court erred in changing the permanency plan from reunification to guardianship.

➤ ***Dept. of Human Services v. K. G. T.*, [306 Or App 368 \(2020\)](#)**

Father appeals a judgment changing the permanency plan for his five-year-old son, B, from reunification to adoption. Father, who is incarcerated, challenges the juvenile court’s determination that the Department of Human Services (DHS) made reasonable efforts to reunify B with father, which is a necessary predicate to changing his plan away from reunification. The crux of the parties’ disagreement is as to whether DHS had any

obligation to consider offering services beyond those available through the Department of Corrections (DOC).

Father's jurisdictional bases include substance abuse, mental health, exposing B to unsafe circumstances, residential instability, and inability to provide for and parent B. DHS sent father a letter of expectation outlining expectations for father: (1) complete a DHS approved parenting training program, (2) complete a DHS approved drug and alcohol rehabilitation program, (3) complete mental health services approved by DHS and (4) maintain safe and stable housing. DHS maintained frequent but not regular contact with father while he was incarcerated and arranged for video visits with B. Beyond visitation, DHS relied on DOC to provide father with the services he needed even though DHS knew that virtually no services were available to father through DOC. At the permanency hearing, the juvenile court noted that DHS's efforts were complicated by father's multiple moves between facilities, making it difficult to set up services. The court also found DHS had offered substance abuse treatment "to the extent possible" but that attending the Narcotics Anonymous meetings available through DOC is generally not considered sufficient, and that it would not be reasonable to require DHS to send someone out to conduct drug and alcohol counseling just for father. Likewise, the juvenile court found it would not be reasonable to expect DHS to send a counselor out to the facility. In the permanency judgment, the only service the court marked as having been provided to father was visitation with B.

Held: DHS is not excused from making reasonable efforts towards reunification just because a parent is incarcerated. When a parent argues that DHS's efforts have not been reasonable because of failure to provide a particular service, the court's reasonable efforts determination should include something resembling a cost-benefit analysis particularly when DHS has deemed the service to be a key to reunification. If it is truly not possible to provide a particular service to a parent, the "cost" necessarily outweighs the benefit. Otherwise, if providing a needed service is possible, the court must engage in a cost-benefit analysis that is tied to the goal of providing the parent with a reasonable opportunity to demonstrate improvement, if not ameliorate the jurisdictional bases. DHS must establish the cost. For the benefit portion of the analysis, the juvenile court must consider the importance of the service that was not provided and the extent to which that service was capable of ameliorating the jurisdictional bases. The question of whether reunification is unlikely even if the parent successfully engages in the services is separate from the reasonable efforts determination and should instead be considered in relation to whether the parent has made sufficient progress to make reunification possible. In this case, the juvenile court erred in determining that DHS made reasonable efforts toward reunification as a predicate to changing B's permanency plan to adoption. The juvenile court focused on the inconvenience to DHS of setting up services for father to receive in prison, without meaningfully considering the actual cost or benefit of doing so. Given the lack of necessary services available through DOC, DHS had to at least consider other options to provide services to father. Having failed to do so, and having failed to provide the necessary information for the court to consider the relative costs and benefits of such services, DHS failed to satisfy its burden of proof to establish that it made reasonable efforts toward reunification. Reversed.

➤ ***Dept. of Human Services v. R. A. C. -R.*, [306 Or App 360 \(2020\)](#)**

Father appeals a judgment changing the permanency plans for his two children from reunification to guardianship. After living in Mexico with father for years, mother and children fled to Oregon, with assistance from the Mexican government, to escape father's domestic violence. Several months later, the juvenile court asserted jurisdiction over the children, with domestic violence as the only jurisdictional basis for father. Father continues to live in Mexico and is legally barred from reentering the United States. DHS has stayed in contact with father, and it has arranged twice-weekly video visits with the children. However, DHS has never referred father for services because it has been unable to locate any appropriate services where father lives in Mexico. Two DHS caseworkers have contacted DIF on numerous occasions, and one caseworker also searched online to try and find services. The caseworkers came to understand that the only domestic-violence programs available in Mexico were for victims, not perpetrators. DIF conducted a home study on father and recommended against placing the child with father due to his violent behavior. Father may have participated in some services on his own, including parenting classes and counseling. The DHS caseworker testified she did not receive any documentation about this. Father testified he had participated in therapy and anger management and sent documents to DHS a couple of times. The only documentation in the record indicates that father attended some therapy sessions during which no determination was made as to whether he is violent.

Father contends that the juvenile court erred in changing children's permanency plans, because the Department of Human Services (DHS) did not make reasonable efforts to reunify children with him. In particular, father points to DHS's failure to offer him any domestic violence treatment services in Mexico.

Held: The juvenile court did not err. The record establishes that DHS made substantial efforts to locate services for father and to provide services to father, but that certain services are unavailable in the area where father lives, including domestic violence programs for perpetrators. This case is different from *Dept. of Human Services v. K.G.T.*, 306 Or App 368 (2020) in two respects. First, DHS made much more extensive efforts to try and find services for father in this case than it made in *K.G.T.* Second, DHS has no control over the services available to father in Mexico. When a parent is incarcerated in a state prison in Oregon, like the father in *K.G.T.*, DHS itself may have no control over DOC, but both DHS and DOC are ultimately agencies of the State of Oregon, making it more difficult for “the state” to claim that it has no control over the services available to a person in an Oregon prison. In addition, there was no geographical barrier to providing services in *K.G.T.* The court noted that DHS’s obligation to provide reasonable efforts is not less for parents who live out of the country. When there is no feasible way to provide a service to a parent, DHS cannot be required to provide that service as a condition of proving that it made reasonable efforts, as that would have the effect of leaving the child stuck in limbo, unable to have his or her plan changed from reunification. Under the specific circumstances of this case, the trial court did not err in determining that DHS made reasonable efforts towards reunification. Affirmed.

➤ ***Dept. of Human Services v. L. A. K.*, [306 OR App 706 \(2020\)](#)**

Father appeals from a juvenile court judgment changing his son's permanency plan from reunification to guardianship. Father argues that the Department of Human Services (DHS) did not demonstrate that it had made "reasonable efforts," pursuant to ORS 419B.476(2)(a), to achieve reunification prior to moving for a change in the child's permanency plan. Specifically, father argues that the sole basis for jurisdiction alleged and found proven by the juvenile court was "amorphous and ill-defined." That sole basis was that, "[D]espite prior services offered to the father [by DHS and] other agencies, the father has been unable and/or unwilling to overcome the impediments to his ability to provide safe, adequate care to the child." DHS responds that "impediments," as that term is used in this case is a euphemism for father's addiction and criminal activity. They argue there was no dispute below that prior services offered to father addressed his substance abuse and criminal activity.

Held: The alleged and proven jurisdictional basis delineates the authority of the court. Once a juvenile court has taken jurisdiction over a child under ORS 419B.100(1)(c), the court retains that jurisdiction only so long as the jurisdictional bases continue to pose a current threat of serious loss or injury, and there is a reasonable likelihood that threat will be realized. The jurisdictional basis also sets the expectation of services provided by DHS. For those reasons, the jurisdictional basis set forth in the judgment matters. The term "impediments" is not an interchangeable term for addiction or criminal activity. Accordingly, DHS did not meet its burden to establish that it provided father services sufficiently related to the jurisdictional basis so as to constitute "reasonable efforts." Reversed and remanded.

Sufficient Progress

➤ ***Dept. of Human Services v. C. W.*, [312 Or App 572 \(2021\)](#)**

In this juvenile dependency case, mother appeals a judgment changing the permanency plan for her seven-year-old son, B, from reunification to adoption. The juvenile court's jurisdiction was originally based on mother's substance abuse and problems with anger control. Mother engaged in treatment aimed at those problems, and the court later dismissed jurisdiction as to anger control, but determined that mother's substance abuse continued to pose a risk to B. At the permanency hearing, the Department of Human Services (DHS) argued that mother's progress toward reunification was insufficient for purposes of ORS 419B.476(2)(a) because she had stopped engaging in treatment. Mother argued that she had graduated from treatment four times and had taken to heart what she had learned. The juvenile court determined that mother's progress toward reunification had been insufficient and granted DHS's motion, stating that mother needed to prove that she did not have an alcohol problem.

Held: DHS did not meet its burden to prove that mother's progress toward ameliorating the effects of her substance abuse qualified as insufficient for purposes of ORS 419B.476(2)(a). In the context of dependency jurisdiction, the court has determined that a parent's failure to complete treatment, in and of itself, does not establish that the parental deficit continues. Similarly, alcohol use on its own, does not prove that mother posed a

risk of harm to B. Though mother's participation in the services recommended by DHS bears on the progress she has made toward reunification, the paramount concern in ORS 419B.476 is the health and safety of the child. The caseworker confirmed that when mother relapsed, she was still meeting B's needs. The evidence from the foster provider and therapist was that mother was able to provide B with support and care and recognize his needs and that there were no indicators of any current safety concern. Also, B has a strong bond with mother and has expressed a desire to return to her care. Finally, B's therapist expressed concern that B would experience distress the longer the separation from mother continued. Reversed.

➤ ***Dept. of Human Services v. K. S. S.*, [310 Or App 498 \(2021\)](#)**

O was born when father was 22 and mother was 16. Subsequently, father pleaded guilty to third-degree rape and was sentenced to five years of probation. After a subsequent domestic violence incident involving mother, he was arrested for violating the no-contact order, disorderly conduct, harassment and menacing constituting domestic violence. DHS took protective custody of O and filed a dependency petition. The sole basis for jurisdiction was father's "mental health issues interfere with his ability to safely parent the child." Attached to the jurisdictional judgment was father's case plan, which referenced father's psychological evaluation, as well as father's suicidal ideations. The case plan also referenced father's pending criminal charges.

Over the next year, father participated in counseling sessions, completed parenting classes, and consistently attended weekly supervised visits. He came to visits prepared with snacks and toys for O and was fairly attentive and engaged during visitation. A DHS caseworker noted in a court report that father appeared to be able to meet most of O's basic needs but occasionally required some prompts and support about when and how to consistently attend to O's basic needs and what is age appropriate for O. As part of his criminal case, father was required to complete sex offender treatment. He violated the terms of his probation for not being honest about entering into a new romantic relationship, and his probation was revoked.

At a permanency hearing, DHS sought to change the permanency plan from reunification to adoption. The caseworker testified that father's counselor reported that he had difficulty being honest about what's going on in his life. When the caseworker was asked whether she had observed any progress in father's mental health issues, she testified that she had seen some maturity, but that her continued concern was his ability to be honest. She also testified that father's sex offender treatment was part of his mental health issues and that completing treatment would help address father's mental health issues. During closing arguments, DHS argued that father's cognitive issues continued to be a barrier and that his behaviors demonstrated ongoing mental health deficits. In response, father argued that the only jurisdictional basis – mental health – had been ameliorated and that the sex offender treatment was not part of the jurisdictional basis. Further, father argued he was no longer suffering from the anxiety and depression that was present at the time of jurisdiction.

The juvenile court concluded DHS had made reasonable efforts and father had made insufficient progress to make it possible for O to safely return home and changed O's

permanency plan to adoption. In doing so, the court concluded that father's sex offender treatment was related to his mental health, and that father's failure to be honest impeded his mental health treatment.

On appeal, father argues that the juvenile court erred in concluding that father had not made sufficient progress towards reunification and that, in making that determination, the court relied on an extrinsic fact--father's failure to complete sex offender treatment--that was not fairly implied by the adjudicated basis for dependency jurisdiction.

Held: To change a permanency plan from reunification to adoption, the proponent of the change must prove that, despite DHS's reasonable efforts to reunify the child with the parent, the parent has not made sufficient progress for the child to safely return home. In making those determinations, the court may not change the plan based on conditions or circumstances that are not explicitly stated or fairly implied by the jurisdictional judgment. The jurisdictional judgment serves to provide a parent with constitutionally adequate notice. Facts are not fairly implied by the jurisdictional judgment, and thus are extrinsic to the judgment if a reasonable parent would not have known from the jurisdictional judgment that he or she needed to address the condition or circumstance exemplified by those facts. When evaluating whether a parent was on notice that his, her, or their progress would be assessed based upon particular facts, we look to the petition, the jurisdictional judgment, and documentation attached to the jurisdictional judgment providing the parent notice as to the conditions for reunification.

In this case, the Court of Appeals concluded that neither the petition nor the jurisdictional judgment and its attachments provided father with adequate notice that he had to complete sex offender treatment for purposes of his dependency case. Although the case plan attached to the jurisdictional judgment did note that father had pending criminal charges for Rape III, that fact standing alone does not inform father of any conditions that he was required to meet for purposes of the dependency proceeding. Completing sex offender treatment was not specifically prescribed in the case plan, nor can it be fairly implied given the circumstances of this case. Reversed and remanded.

Sufficient Progress, Compelling Reasons

➤ ***Dept. of Human Services v. D. M.*, [310 Or App 171 \(2021\)](#)**

When E was one month old, she was removed by DHS for the first time and placed in foster care. Nine months later, she was returned to father and stepmother. Four months later, she was removed again after a domestic violence incident and placed with the same foster parent as her first episode of care. In a related criminal matter, mother pleaded guilty, by Alford plea, to one count of first-degree criminal mistreatment for unlawfully and knowingly causing physical injury to E. The court took jurisdiction based on the following allegations, as amended:

- A. The father's volatile relationship with [stepmother] presents a serious risk of psychological and physical harm to the child.
- B. The father failed to protect the child from the physical abuse and maltreatment by father's significant other by continuing to leave the child in her care.

C. The father failed to maintain a safe environment for the child because the father has allowed the child to live in [a] home that is unsafe and unsanitary, including prescription medication and spoiled food being left within access of the child.

D. The mother is not currently a custodial resource, due to living out of state and residential instability.

E. The father's substance abuse, if continued and left untreated, interferes with his ability to safely parent the child.

Approximately two years after her removal, DHS sought to change E's permanency plan from reunification to adoption. After a permanency hearing, the juvenile court changed E's plan to adoption, finding that father and stepmother were credible in some respects, but were not consistently credible. The court noted that stepmother asserted, with observable anger, that she will never admit to abusing the children. The court found, however, she did abuse and neglect E by physically causing bruises, locking E in her room, ignoring E, and withholding fluids. The court further found that father did not protect E and that the parents were not acknowledging what domestic violence is and were minimizing the conflict and abuse of the children. The court also noted that father still had 14 batterer's intervention visits left and that the parties refused to meet with a licensed counselor, opting instead for a pastor who was not licensed and did not hold a degree. In addition, the court found father and stepmother were not fully engaged in using what they had learned, had not engaged with E's counselor, lacked insight, their home was not calm and safe, there was still trash piled up around the home, and expressed concerns that father was still drinking on occasion, given his work schedule and parenting responsibilities.

Held: Affirmed. In order to change E's permanency plan from reunification to adoption, the court must find: (1) that DHS made reasonable efforts to reunify E with father; and that (2) notwithstanding those efforts, father's progress was insufficient to permit reunification. If the court determines the plan should be changed, it must also determine whether the party resisting the plan change has proved that there is a compelling reason that DHS should not file a petition to terminate parental rights.

The court rejected father's arguments that DHS failed to provide reasonable efforts. Regarding whether father made sufficient progress, the juvenile court gives the highest priority to the child's health and welfare. Even if a parent has completed all required services, evidence that a parent continues to engage in behavior that is harmful to a child supports a determination that the parent has not made sufficient progress for the child to return home. In this case, the record supports the juvenile court's findings that E suffered harm from father's and stepmother's past conduct and that acknowledging that E suffered trauma as a result of that conduct is necessary for E to return safely home. E's counselor testified that such an acknowledgment was necessary, and that father and stepmother would have to engage in E's treatment to learn her needs and the tools necessary to parent her. The court could reasonably infer that father had not made sufficient progress based on his minimization of his and stepmother's past conduct and its effect on E, including his tacit denial that any of stepmother's past conduct with E constituted abuse, his minimal engagement with E's counselor, and his inability to articulate what he would do if he again had concerns about stepmother's conduct with E. The court could also reasonably infer that father's and stepmother's relationship

continued to be volatile, given their minimization of past conduct, downplaying of current disagreements and father's admission to "talking with another chick" around the time his son was born. The record also supports the juvenile court's findings that father and stepmother both continue to demonstrate a lack of insight and ability to apply lessons from services to their life and parenting. Finally, the juvenile court's findings that E could not safely return home without father acknowledging the previous harm to E, that father and stepmother were not engaging with E's counselor and that father had inconsistent engagement in the Batterer's Intervention Program were sufficient to support the juvenile court's legal conclusion that there was no compelling reason that the filing of a petition to terminate parental rights would not be in the best interests of E. That legal conclusion is further supported by father's failure to propose an alternative plan that would better serve E's needs or to demonstrate that keeping E in the same placement with her siblings was a compelling reason not to pursue an adoption under these circumstances.

PRESERVATION

➤ ***Dept. of Human Services v. T. M.G.*, [307 Or App 117 \(2020\)](#)**

Mother appeals a permanency judgment, asserting that the juvenile court lacked authority to order her to make two of her children, who were not wards of the juvenile court or otherwise subject to its control, available for visitation with mother's daughter, M, who was a ward of the court.

Held: Mother did not preserve the arguments that she advances on appeal. The focus of mother's arguments was on the challenges that the order would place on her. Although she mentioned the children were not wards of the court, she did not elaborate further that: (1) she was a "fit" parent with regard to them and therefore entitled to the presumption, (2) under the Due Process Clause, the juvenile court had no authority to override her parenting decisions until the presumption had been rebutted, and (3) the evidence was insufficient to overcome the presumption. The parties were not on notice of the potential need to make additional arguments or further develop the evidentiary record, nor did the juvenile court have the opportunity to correct its course of action, if warranted. The Court of Appeals did not consider the merits of mother's arguments, finding they were not preserved. Affirmed.

PROBATE GUARDIANSHIP

➤ ***Keffer v. A.R.M.*, [313 Or App 503 \(2021\)](#)**

Mother and father appeal from a limited judgment appointing mother's father (grandfather) as guardian for their child, A. This case is one of four related cases involving mother, father, A, and mother's child, O. The juvenile court had taken wardship of A and O, and the Department of Human Services placed them in foster care. Grandfather sought to be appointed the guardian for A and O by filing petitions for probate guardianship. Ultimately, the juvenile court changed A's and O's permanency plans from reunification to guardianship, appointed grandfather as their guardian through the probate code, and terminated wardship and dismissed dependency jurisdiction based on the guardianship

appointment. In this appeal, mother and father argue that the court could not appoint grandfather as a guardian through the probate code.

Held: The juvenile court did not have authority to appoint grandfather as A's guardian under the probate code, because the juvenile dependency guardianship statutes establish the exclusive means by which a juvenile court may establish a guardianship for a ward that is under the exclusive jurisdiction of the juvenile court. Reversed and remanded.

Note: The legislative history recited in the opinion suggests the only circumstance in which a probate code guardianship would apply when DHS is involved is in the limited circumstance where both parents are deceased and DHS seeks to be appointed guardian for purpose of consenting to the adoption.

Termination of Parental Rights

BEST INTERESTS

➤ *Dept. of Human Services v. M. H.*, [306 Or App 150 \(2020\)](#)

The Department of Human Services (DHS) appeals from a judgment of the juvenile court denying its petition to terminate mother's parental rights to her child. The juvenile court determined that mother was unfit; however, it also determined that DHS had not established that freeing child for adoption was in child's best interest. On appeal, DHS argues that the court impermissibly considered child's likely adoptive placement in its best-interest analysis and requests that the Court of Appeals determine, on de novo review, that mother's parental rights should be terminated.

In this case, the five-year old child had experienced a total of 12 different placements involving eight or nine caregivers. He has high needs and exhibits challenging behaviors. His behaviors improved over the course of the last two placements, with his current foster mother providing therapeutic (non-relative) foster care and serving as a potential adoptive placement. A clinical psychologist testified that it was in child's best interest to be adopted by foster mother.

Expert testimony established child's close bonds are primarily with foster mother and grandmother, while child has an insecure attachment to mother who is more like a friend to the child. The child has one overnight visit with grandmother every week, and a psychologist testified any disruption in the relationship with grandmother could cause a deterioration in behavior. Also, witnesses testified that a permanent, stable placement is required to address child's particular needs. DHS also identified maternal relatives (a couple) in Alaska as an adoptive resource for the child, however, the child had only met one of them a few times. According to DHS administrative rule, the maternal relatives would be given preference over the current foster parent, since they were relatives and the foster mother had not yet achieved "current caretaker" (419A.004(1)) status. The trial court found that based on testimony regarding how well the child had done in the current

placement, the testimony about how it would be difficult for the child to transition, and the fact that DHS would likely move the child to Alaska if the child was freed for adoption, termination was not in the child's best interest.

Held: The juvenile court did not legally err in its analysis. The Court of Appeals focused on the best interest requirement of ORS 419B.500. It is a child-focused inquiry separate from the parent-focused unfitness requirements in ORS 419B.504. There is no presumption or preference for termination of a parent's rights when a parent is found to be unfit under ORS 419B.504. DHS bears the burden of demonstrating that terminating the parent's rights will serve the child's best interest and must present evidence of what is in the best interest of the particular child under that child's circumstances; generalized notions of what is best do not suffice. The Court rejected DHS's argument that the legislature intended to prohibit a court from considering a child's potential adoptive placement in determining whether freeing that child for adoption is in the child's best interests. The court considered the language in ORS 419B.498(1)(a) requiring DHS to identify, recruit, process and approve a qualified family for adoption *simultaneously* with the petition to terminate, as suggestive that the identified adoptive placement is relevant to the best-interest inquiry in a termination proceeding. Further, the court explained, *if a child's likely adoptive placement informs whether freeing that child for adoption is in the child's best interest due to the child's particular needs and circumstances, then evidence of where, and with whom, that placement may be is a permissible consideration for the court.*

The Court found it was in the child's best interest to stay in his current placement with foster mother as a permanent placement, with continued contact with grandmother and possibly with mother. Given that the record established that freeing the child for adoption would likely result in DHS placing him with his Alaskan relatives, the court was not persuaded that freeing the child for adoption was in child's best interest.

NOTICE (ORS 419B.820)

➤ ***Dept. of Human Services v. J. C. G., [312 Or App 461 \(2021\)](#)***

Mother appeals from a judgment terminating her parental rights, and child appeals from judgments terminating rights to both his parents. Although other substantive issues were raised, the court wrote to address the adequacy of the juvenile court's notice under ORS 419B.820 concerning dates on which parents would be required to appear. ORS 419B.820 provides that if parents appear in response to a summons and contest a petition for termination of parental rights, the court must inform them, either by written order provided to the parents in person or mailed to the parents, or by oral order made on the record, of the time, place and purpose of future hearings, of their obligations to appear, and that failure to appear may result in termination of their parental rights without further notice. In this case, the court held a telephonic preliminary hearing in which mother may have appeared and father appeared. When trial dates were discussed, DHS's attorney represented that she would prepare orders to appear for the court to sign. The following month, DHS filed a motion seeking to serve the orders by publication to appear at a trial readiness hearing and a trial. The court allowed for publication (although the

publication did not, ultimately contain the date of the trial readiness hearing). Neither parent appeared at the trial readiness hearing or at trial, and child's counsel raised issues concerning the adequacy of notice to the parents. The trial court rejected counsel's argument, stating that service by publication was adequate, and that the court had orally provided parents with the necessary information at the initial hearing.

Held: The Court of Appeals found the juvenile court was incorrect in its recollection that it provided parents with the necessary information under ORS 419B.820. The court also found that ORS 419B.820 makes specific provisions concerning how information must be provided to parents and does not contain any provision for service by publication. Reversed and remanded.