



# Oregon Juvenile Law Appellate Update

THROUGH THE EYES OF THE CHILD CONFERENCE

August 2021 – July 13, 2022

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# Delinquency

## COMMITMENT TO OREGON YOUTH AUTHORITY

➤ *State v. S. D. M.*, [318 Or App 418 \(2022\)](#)

Youth appealed from a delinquency probation disposition judgment that found youth violated his probation, extended his probation, committed him to the Oregon Youth Authority (OYA), and directed youth to enter and successfully participate in a residential program through OYA.

Held: Vacated in part and remanded for written findings under ORS 419C.478(1); otherwise affirmed.

In his first assignment of error, youth argued that there was insufficient evidence to support the juvenile court's finding that youth willfully failed to comply with his probation requirements. In his second assignment of error, youth argued that the juvenile court erred in failing to include written findings pursuant to ORS 419C.478(1), that describe why it was in youth's best interests to be committed to OYA.

The court rejected youth's first assignment of error without written discussion. The court agreed with youth's second assignment of error.

Youth was originally found in the jurisdiction of the juvenile court for an act that, if committed by an adult, would constitute the crime of first-degree sodomy. The juvenile court placed youth on probation for 24 months and ordered him to enter and successfully complete sex offender treatment and follow all rules of the program. The state later moved for an order to show cause why youth's probation should not be revoked for failing to successfully complete the treatment program and failing to follow its rules. After hearing the evidence, the juvenile court extended youth's probation and committed him to the custody of OYA in a non-correctional facility. The commitment order signed by the juvenile court included a pre-printed form with space for the court to describe why it was in youth's best interest to be committed to the legal custody of OYA. In that space the juvenile court wrote that "youth violated the requirements of probation; he did not follow the rules of sex offender treatment." Youth argued that what the court wrote did not provide sufficient written findings under ORS 419C.478(1), describing why it was in youth's best interests to be committed to OYA.

Although youth did not raise the issue with the juvenile court during the hearing, the written order was not issued until after the hearing so youth could not have done so. Because of these circumstances the court held that youth was excused from its preservation requirements.

Under ORS 419C.478(1), if a juvenile court enters a dispositional order that places a youth in the legal custody of OYA, the order must include written findings describing why it is in the best interests of the youth to be placed with OYA. In this case, youth argued that the juvenile court's recitation that he violated his probation and failed to follow the rules of

the program failed to describe *why* it was in his best interests to be placed in OYA custody, as required by ORS 419C.478(1). The court agreed and noted that the legislature has required juvenile courts to consider and then separately provide a written explanation of why it is in a youth's best interests to be in OYA custody and not with his family or in the community.

The court affirmed the juvenile court's extension of youth's probationary term, vacated the juvenile court's order of commitment to OYA, and remanded for written findings under ORS 419C.478(1).

## DETENTION

### ➤ *State v. J. R.*, [318 Or App 21](#) (2022)

Youth appealed the juvenile court's orders (1) continuing youth in detention after he was found in violation of his delinquency probation under ORS 419C.145, pending disposition, and (2) finding that imposing 8 days of detention as a sanction for a probation violation did not count toward the statutory maximum periods of institutionalization or commitment provided in ORS 419C.501.

Held: Determination that youth may be held in detention under ORS 419C.145 after adjudication reversed; otherwise affirmed (second assignment of error is moot and does not satisfy requirements for review)

Youth was on probation for a prior delinquency adjudication and committed to the custody of the OYA. The juvenile court placed him in detention based on probable cause that he had violated his probation. The juvenile court later made a finding that he had violated the conditions of his probation and continued him in detention pending disposition. The juvenile court later terminated his commitment to OYA but ordered an additional 8 days of detention as a sanction.

Youth and the state both acknowledged that youth's first assignment of error was moot but that it qualified for review under ORS 14.175 because he had standing, the act challenged was capable of repetition, and that act was likely to evade review. The court agreed. For youth's second assignment of error the state argued, and the court agreed, that a juvenile court's decision to *not* count periods of detention imposed as a probation violation sanction toward the maximum periods of institutionalization or commitment authorized by statute is *not* likely to evade review. The court further noted that the question is not whether a person in youth's same circumstances would also fail to obtain appellate review, but whether the general type or category of challenge at issue is likely to evade being fully litigated. The court therefore declined to review youth's second assignment of error.

For his first assignment of error, youth argued that ORS 419C.145 authorizes detention of a youth only before adjudication. The court agreed and held that ORS 419C.145 does not provide for detention of a youth between adjudication and disposition.

Youth was found in jurisdiction of the juvenile court in 2016 for conduct that, if committed by an adult, would constitute three Class A misdemeanors. He was placed on probation and committed to the OYA. On August 2, 2019, the state filed a petition alleging youth had violated his probation. He was placed in detention under ORS 419C.145 (pre-adjudication detention). On August 9, 2019, the juvenile court held an evidentiary hearing, found that youth had violated his probation, continued his detention until further court order (allowing for early release to OYA for placement), and set disposition for August 29, 2019. Although youth was released to a placement before the August 29 hearing, the state filed a new petition on August 28, 2019, alleging that he had violated the conditions of his placement. Youth was again placed in detention under ORS 419C.145. At the August 29 hearing the juvenile court again found that youth violated his probation, continued his detention, and set disposition for October 18, 2019. On October 2, 2019, youth filed a motion to terminate his commitment to OYA, arguing that his commitment had exceeded the three-year period of commitment allowed for his 2016 misconduct and that the juvenile court lacked authority to impose any additional sanctions for his probation violation. The juvenile court terminated youth's commitment to OYA, finding the maximum period of commitment allowed under ORS 419C.501 had been exceeded, and imposed 8 days of detention as a sanction for the August 28, 2019, probation violation.

As to the merits of the issue of youth's detention between adjudication and disposition, the state argued that the term "adjudication on the merits" under ORS 419C.145 encompasses both the court's decision whether the youth committed the violation and the decision on how the juvenile court should respond to the violation (disposition). Youth argued that "adjudication on the merits" refers only to the former—the juvenile court's decision whether the youth committed the violation.

In deciding the case, the court turned to statutory construction, reviewing for legal error. The court noted that its job is to ascertain the legislature's intent, by examining the statutory text, context, and any pertinent legislative history. Because "adjudication on the merits" is not defined in the relevant statute, the court looked to the plain text, holding that "before adjudication on the merits" refers to detention imposed before the juvenile court's determination that allegations of a youth's misconduct are true (or not true). Finding that plain text definitions were not helpful in determining whether "adjudication on the merits" included disposition, the court turned to context.

For context the court turned to prior caselaw interpreting "adjudication," to related statutes in the delinquency code, to prior enactments of the detention statute, to legislative history and legislative testimony submitted in conjunction with the current detention statute, all revealing a distinction between the adjudication phase and the disposition phase.

The court concluded that the text, context, and legislative history of ORS 419C.145 show that the legislature intended detention before "adjudication on the merits" to mean holding a youth in detention only before the trial-like adjudication stage of a juvenile proceeding, which does not encompass detention after adjudication, including the period between adjudication and disposition.



## DISPOSITION

➤ ***State v. B. Y.*, 319 Or App 208 (2022)**

Youth appealed from a dispositional judgment committing him to the Oregon Youth Authority (OYA) for placement in a youth correction facility (YCF) for one year, to be served consecutively to his commitment from prior cases. Youth makes two assignments of error: first to the juvenile court's order to run his commitment consecutively to his commitment from prior cases and second to the trial court imposing a one-year commitment, when the statutory maximum is 364 days.

Held: The juvenile court does not have authority to impose consecutive dispositions and the one-year commitment was plain error. Reversed and remanded to reconsider disposition.

Youth was committed to the OYA in 2017 for three-and-a-half years in a combined disposition and spent most of his time committed to a YCF. At one point, youth ran while on parole. Based on youth's actions while being apprehended by police he was charged with conduct that, if committed by an adult, would constitute the crime of interfering with a peace officer, a Class A misdemeanor. Youth admitted to that charge and the juvenile court ordered him to serve a one-year commitment to OYA, to be served consecutively with the 2017 commitment.

Regarding his first assignment of error, consecutive commitments to OYA, youth argued that, because the juvenile code is *sui generis* (unique), the court's dispositional authority must be explicit. Youth further argued that, because the current version of the statute governing maximum dispositions, ORS 419C.501, does not contain express authority for juvenile courts to impose consecutive commitments, juvenile courts have no such authority. The state argues that, because it is long-settled that trial courts have inherent authority to impose consecutive sentences in the adult context, the reasoning applies with equal force to juvenile courts.

The court applied principles of statutory construction, looking to the text of the statute in its context, relevant legislative history, and, because those factors were ambiguous, canons of construction. The court found that the text of 419C.501 was silent about how to deal with youth adjudicated with multiple offenses. Similarly, examining previous versions of the statute did not provide a clear answer: the court found that previous versions of the statute implicitly authorized consecutive dispositions for separate offenses, since the juvenile disposition statute stated that juvenile maximums shall not exceed the maximum period of institutionalization or commitment if the act had been committed by an adult. At that time, the court had inherent authority to impose consecutive sentences in adult cases.

The language linking juvenile disposition to the maximum allowed in the adult criminal context was removed from the juvenile code in 1999 and replaced with the current statutory language. However, the explicit goal of the change was unrelated to consecutive sentencing, rather it was to restate time limits for institutionalizing juveniles in terms of a

specific number of years instead of having it tied to the length of time an adult could serve for those crimes. Furthermore, by this time the court’s *inherent* authority to impose consecutive sentences in adult criminal cases had been eliminated—any such authority was codified by ORS 137.123 in 1987.

Faced with ambiguous legislative intent, the court turned to canons of construction and attempted to do what the legislature most likely would have done had it thought of the specific issue. The court observed that the legislature has chosen to limit an adult criminal court’s inherent authority and to break the link between juvenile commitments and adult sentences. The court then concluded that, if confronted with whether the juvenile court retains unlimited authority to impose consecutive commitments, the legislature would answer “no.”

The court further observed that the legislature’s intention in limiting the court’s inherent authority to impose consecutive sentences in adult criminal court was to increase the number of convictions a defendant could receive for the same criminal episode— instructing courts to record more convictions for conduct that previously would have “merged” into a single conviction so that a defendant’s records more accurately reflect the nature of their criminal conduct. In making this change, however, the legislature took care to limit the circumstances in which the additional convictions could be the basis of consecutive sentencing. Because principles of merger apply in the juvenile context, the court concluded that the same concerns the legislature had for adult criminal consecutive sentencing would apply to juvenile proceedings.

Finally, the court recognized the legislative purpose of the juvenile code: reformation, not punishment. The court observed that it is irreconcilable with the rehabilitative and reformatory purposes of the juvenile code to increase a juvenile’s maximum exposure to commitment time while limiting that exposure in adult courts.

In short, because the juvenile code does not explicitly authorize the imposition of consecutive commitments, the court concluded that the juvenile court in this case erred when it ordered that youth’s commitment run consecutive to his prior commitment. Regarding the youth’s second assignment of error—the juvenile court imposing a one-year commitment when the statutory maximum is 364 days—the court found plain error and exercised its discretion to correct the error.

## EVIDENCE

### ➤ *State v. R. J. S.*, [318 Or App 351 \(2022\)](#)

Youth appealed from a delinquency adjudication for an act that, if committed by an adult, would constitute first-degree sexual abuse. Youth raised four assignments of error, all relating to whether the juvenile court correctly applied OEC 803(18a)(b). The court found that the juvenile court correctly applied OEC 803(18a)(b).

Held: Affirmed.



During a preliminary hearing in youth's juvenile delinquency adjudication, the juvenile court found that the victim, youth's 5-year-old sister, was unavailable as a witness because of her age and inability to remember and communicate events. The state sought to admit the victim's statements to her mother, under OEC 803(18a)(b), arguing that those statements contained sufficient indicia of reliability. Youth argued that the statement should not be admitted unless the state also provided corroborative evidence of the act of abuse, relying on OEC 803(18a)(b)'s provision that in a criminal trial the state must provide corroborative evidence of the act of abuse. The juvenile court disagreed with youth and admitted the victim's statements, through her mother's testimony, finding that the statements contained sufficient indicia of reliability to be admitted under OEC 803(18a)(b).

This case turns on whether the corroboration requirements of OEC 803(18b)(b) apply to juvenile delinquency proceedings, as urged by youth, or only to criminal trials. The state argued that the rule explicitly requires corroborative evidence of abuse in a criminal trial and, further, that a juvenile delinquency proceeding is not a criminal trial. The court agreed with the state.

As a matter of statutory interpretation, the court noted that the text of the rule itself distinguishes between a juvenile delinquency proceeding and a criminal trial. Contextually, 803(18b)(c) applies subsection (18b) to all civil, criminal, and juvenile proceedings. The court concluded that the legislature demonstrated that it understood the distinction between civil, criminal, and juvenile proceedings and could have specified that the corroboration requirement applied to all of those case types but did not. Legislative history also shows that a prior version of OEC 803(18a)(b) applied the corroboration requirement to both criminal trials and juvenile court proceedings. The current version of OEC 803(18a)(b), introduced as House Bill 2395 (1991), included "all proceedings, whether civil or criminal," but later amendments carved out criminal proceedings alone for purposes of the corroboration requirement.

The court concluded that the juvenile court did not err in allowing the victim's statements describing abuse by the youth without corroborative evidence of the abuse.

## FORMER JEOPARDY

### ➤ *State v. G. E. S.*, [316 Or App 294 \(2021\)](#)

The state filed a petition alleging that the youth was in the jurisdiction of the juvenile court for second-degree theft. Youth moved to dismiss the petition, arguing that prosecution was barred by ORS 419A.190 because youth had already been adjudicated in a prior probation violation that, he argued, arose out of the same conduct. The juvenile court denied the motion to dismiss and adjudicated youth on the petition. Youth appealed the juvenile court's denial of his motion to dismiss.

Held: Affirmed.

Youth was on juvenile probation. One condition of youth's probation was that he report any contact with law enforcement officers to his probation officer. Law enforcement officers had contacted youth concerning the theft of a phone. Youth did not report the law enforcement contact, but later admitted to the failure to report. Based on his admission, the juvenile court found the youth to be in violation of his probation. The state subsequently filed a petition alleging that youth was in the jurisdiction of the juvenile court for second-degree theft, for having stolen the phone.

The court examined the juvenile court's ruling applying ORS 419A.190, the juvenile code's former jeopardy provision, for legal error. The parties agreed that ORS 419A.190 determined the outcome of the case but disagreed about the application of the statute to the facts at hand. The key issue is whether the state was barred from filing the petition for theft because the underlying allegation arose "out of the same conduct" as the allegations that were adjudicated in the prior probation violation proceeding. The youth argued for a broad interpretation of the language "out of the same conduct," asserting that, in this case, the conduct at issue (allegation of phone theft) gave rise to both the law enforcement contact and the theft allegation in the subsequent petition. The state argued for a narrower interpretation, distinguishing between the youth's conduct in the probation violation as *failure to report* law enforcement contact and the conduct alleged in the petition as the theft of the phone. The court agreed with the state.

The court noted that, in passing ORS 419A.190, the legislature intended to provide broad protection for juveniles from successive adjudications. The court further observed that there is no indication that the legislature intended youth to be protected from all proceedings alleging acts that can be connected, however tenuously or via the conduct of third parties, to some past conduct on which the youth has been adjudicated. The court found that the act by the youth that formed the basis for the probation violation was the failure to report law enforcement contact. Although the theft is what prompted police to contact youth, youth's decision not to report the contact to his probation officer is not related to the act of taking the cell phone. The two adjudications, therefore, did not arise from the same conduct within the meaning of ORS 419A.190.

## INADEQUATE ASSISTANCE OF COUNSEL; COMPETENCE

### ➤ *State v. C. L. E.*, [316 Or App 5 \(2021\)](#)

Youth was found to be in the jurisdiction of the juvenile court in 2014 for attempted sexual abuse in the first degree, based on youth's admission. The attorney who represented youth during the jurisdictional phase of the proceeding continued to represent him through multiple probation violation hearings. In 2018, a subsequent attorney assigned to youth for a probation violation hearing sought an evaluation of the youth's current competency and a retroactive assessment of his competency at the time of adjudication. The evaluating psychologist concluded that youth lacked the ability to understand the nature of the legal proceedings, to assist and cooperate with counsel, and to participate in his own defense. The psychologist also concluded that, to a reasonable degree of certainty, if she had

evaluated youth during the jurisdictional phase of the proceeding, she would have found him unfit then as well. A different evaluation conducted the same year by an OYA psychologist reached a similar conclusion.

In 2019, youth moved the juvenile court to set aside his 2014 adjudication, contending that his state and federal constitutional rights were violated because (1) youth was not competent to be adjudicated at the time he entered his plea; and (2) youth's trial counsel rendered inadequate and ineffective assistance by failing to have youth's competency evaluated. The juvenile court denied youth's motion, finding that: (1) youth had not been unfit to proceed and (2) there had otherwise been no substantial denial of the youth's rights in the proceedings, pursuant to ORS 419C.615 (the delinquency statute addressing grounds to set aside an order finding a youth to be in the jurisdiction of the court).

Held: Reversed and remanded with instructions to grant youth's motion to set aside adjudication.

The court reviewed the juvenile court's determination for legal error, being bound by findings of fact support by the evidence in the record. The court applied the constitutional standards for inadequate assistance of counsel developed at the state and federal levels in the context of post-conviction and habeas corpus relief.

Both Article I, section 11 of the Oregon Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to the adequate and effective assistance of counsel. To prevail under the Oregon Constitution, youth must prove that:

- (1) counsel failed to exercise reasonable professional skill and judgment
- and
- (2) youth suffered prejudice as a result.

A functionally equivalent standard governs such a claim under the Sixth Amendment.

Youth had spent most of his life within the jurisdiction of the juvenile court, with ODHS intervention beginning shortly after his birth in 2000. He had consistently been diagnosed as intellectually disabled since 2005. In 2009 youth was evaluated and his scores reflected "extremely low" cognitive functioning.

For the current case, the probable cause affidavit in support of his arrest noted that youth was seeing a psychologist who had diagnosed him as having a mental disorder, functioning at the level of an eight-year-old. The youth's attorney discussed the police reports with him and, based on her interactions with him, neither questioned his competency nor sought to have it evaluated. Youth subsequently entered an admission to Attempted Sexual Abuse in the First Degree and the juvenile court took delinquency jurisdiction based on that admission. As noted above, after multiple probation violation hearings spanning a four-year period, a subsequent attorney obtained an evaluation of the youth's competence, which concluded that the youth was unfit to proceed and would have been found to be unfit during the jurisdictional phase of the proceeding as well. After a hearing, the juvenile court denied youth's motion to set aside the 2014 adjudication based on ineffective assistance of counsel.

The court assessed whether youth was entitled to relief on his claim of trial counsel inadequacy, noting that, whether trial counsel failed to exercise reasonable professional skill and judgment is based on facts known to counsel at the time of the decision. The court found that youth's counsel's choice to rely on her interactions and conversations with youth to evaluate his competency reflects an absence of professional skill and judgment.

To enter a valid admission or plea to delinquency jurisdiction, a youth must be apprised of and understand the legal consequences of his admission. Whether a juvenile is competent to knowingly and voluntarily enter a plea in the context of a delinquency proceeding depends largely on the juvenile's developmental maturity, something difficult to assess without some expertise. Furthermore, the same youth may require a formal competency evaluation in some cases and not in others, depending on the complexity of the case and the available evidence of the youth's ability to understand that case. However, while what is required to demonstrate juvenile competency may vary with the nature of a particular delinquency proceeding, *a lawyer's obligation to evaluate competency against that relevant standard remains constant.*

The court cited research that concluded that about one-third of 11-to 13-year-olds and one-fifth of 14- to 15-year-olds probably are not competent to stand trial. The main difference between competency law for adults and for youth is that adult fitness may be based on a *mental disease or defect*, whereas youth fitness may be based on that or *another condition*. A primary condition uniquely relevant to juveniles is developmental immaturity.

In this case the court noted that the probable cause affidavit for the youth's arrest, which all reasonable lawyers would have reviewed as a matter of course, included mention of the youth's developmental disability and functioning at the level of an 8-year-old. To permit the youth to enter an admission to a felony sex offense in these circumstances without a competency evaluation was unreasonable and represents an absence of professional skill and judgment. Any lawyer exercising reasonable professional judgment would not have elected to evaluate their client's competence solely through discussions with the youth.

Turning to the second issue, whether youth was prejudiced by his counsel's lack of reasonable professional skill and judgment, the court found that he was. To establish prejudice, the petitioner must show that, but for the inadequate and ineffective assistance, he would have pleaded differently. The court found that if youth's attorney had evaluated his competency, youth would not have been permitted to enter his admission.

## MERGER

### ➤ *State of Oregon v. S. M. E.*, [314 Or App 113 \(2021\)](#)

Youth was found to be in the jurisdiction of the juvenile court for acts that, if committed by an adult, would constitute one count of first-degree rape, four counts of first-degree sexual abuse, one count of second-degree sexual abuse, and four counts of third-degree sexual abuse. Youth contended that the juvenile court plainly erred by (1) failing to merge the first and third-degree sexual abuse counts (Counts 3-10) into a single adjudication for

first-degree sexual abuse and (2) failing to merge the second-degree sexual abuse count (Count 2) with the first-degree rape count (Count 1).

Held: Jurisdictional judgment reversed and remanded for entry of a judgment reflecting adjudications for one count of first-degree sexual abuse and one count of first-degree rape.

Citing *State v. Nelson*, 282 Or App 427, 429, the court held that the trial court erred in not merging the eight counts of first and third-degree sexual abuse into a single adjudication for first-degree sexual abuse because there was no evidence to support a determination that each instance of sexual contact was separated by a ‘sufficient pause’ to afford the defendant an opportunity to renounce his criminal intent. The court then cited *State v. Benson*, 309 Or App 422, 439-40 (2021), which held that it was plain error to not merge a second-degree sexual abuse by sexual intercourse without consent count with a first-degree rape by ‘forcible compulsion’ count.

## SEX OFFENDER REPORTING

### ➤ *State v. A. R. H.*, [314 Or App 672 \(2021\)](#)

Youth was found to be in the jurisdiction of the juvenile court for one count of sexual assault of an animal. Near the end of the youth’s probationary term he requested the court to relieve him of the obligation to report as a sex offender under ORS 163A.030. After an evidentiary hearing, the juvenile court denied youth’s request, ruling that he had not proven by clear and convincing evidence that he was rehabilitated and did not pose a safety threat to the public. The court then ordered youth to report as a sex offender under ORS 163A.025. Youth’s sole assignment of error on appeal was that the juvenile court erred in ordering him to report as a sex offender.

Held: Affirmed.

The court explained that its function relating to the juvenile court’s findings of fact is to resolve whether there was sufficient evidence for the juvenile court to have made the required findings and not to substitute the appellate court’s own judgment in deciding whether the evidence was sufficient for youth to have met his burden. Further, the court described the facts ‘consistently with the trial court’s factual findings, reviewing for any evidence that supported those findings.’ Where the trial court had not made express findings, the court described the evidence consistently with the trial court’s implicit findings in support of its conclusion.

In applying the statute that controls requests for relief from reporting by a sex offender adjudicated in juvenile court (ORS 163A.030), the court outlined four legal principles:

1. The factual question before the juvenile court is whether a youth is rehabilitated and does not pose a public safety threat;
2. The youth bears the burden to prove those facts by clear and convincing evidence;
3. The statute lists non-exhaustive factors that the court may consider in making its decision; and

4. If the youth does not meet that burden of proof then the court must require the youth to report as a sex offender.

The youth argued that he was the “epitome of the rehabilitated youth” for whom the legislature provided relief from registration under ORS 163A.030 and that the court should view him as “one of those rare cases in which the evidentiary record would compel every reasonable trial court to find that the petitioner had met his burden of persuasion.”

The court briefly described the evidence relied on by the juvenile court and ultimately disagreed with the youth, stating that it would only disturb the juvenile court’s findings if the record would compel every reasonable juvenile court to be persuaded that the youth had met that burden. The court acknowledged the high evidentiary burden imposed on youth by ORS 163A.030 and that it would “perhaps be rare” that it would reverse a juvenile court’s findings under the statute, but imposing that burden is the legislature’s prerogative.

➤ ***State v. M. R. G.-E.*, [317 Or App 535 \(2022\)](#)**

Youth appealed the juvenile court’s judgment requiring him to register as a sex offender under ORS 163A.025. Youth assigns as error the juvenile court’s finding that he had not met his burden to prove rehabilitation by clear and convincing evidence.

Held: Affirmed

Relying on ORS 163A.030(7)(b), youth argued that the phrase “rehabilitated and does not pose a threat to the safety of the public” refers to the specific threat of a future sex offense, rather than general threats to public safety. Youth also argued that the evidence in the record did not support the juvenile court’s finding that he had not met his burden of proving rehabilitation. The state argued that the youth had failed to preserve his argument regarding statutory construction (sex offense-specific threat versus other, general threat to public safety) and that the evidence did support the juvenile court’s finding.

The court agreed with the state that the youth had failed to preserve the statutory construction argument and that the evidence supported the juvenile court’s decision. To be considered on appeal, a claimed error must be preserved in the lower court: the party must provide the trial court with an explanation of its objection that is specific enough to ensure the court can identify the alleged error with enough clarity to permit it to consider and correct the error immediately. Because the youth did not preserve his statutory construction argument the court declined to address it. The court also declined to review the argument as a matter of plain error because the youth had not asked the court to do so.

Turning to the sufficiency of the evidence, youth bore the burden to prove by clear and convincing evidence that he was rehabilitated and did not pose a threat to the safety of the public. The court will only reverse the juvenile court’s finding if the record would compel every reasonable juvenile court to be persuaded that the youth had met that



burden. The court found on this record that it could not make that finding so affirmed the juvenile court's ruling.

## Dependency

### DISCOVERY

➤ ***Dept. of Human Resources v. R. O.*, [316 Or App 711 \(2022\)](#)**

In this juvenile dependency case, the child filed a motion under ORS 419B.881(6), requesting that the juvenile court find good cause to relieve DHS from its obligation to provide her parents with her medical information, as ORS 419B.881(3) requires. The juvenile court found good cause existed to restrict disclosure, finding that, based on A's behavior, providing the information would further delay the goal of reunification. Since reunification was the goal, the court found it was appropriate to grant the motion and revisit it later. Father and mother appealed and argue (1) the court erred in determining that there was legally sufficient evidence to find "good cause," and (2) even if there was good cause, the court abused its discretion in relieving DHS of its obligation under ORS 419B.881(3) to provide their child's medical records.

Held: Affirmed.

The court has not previously addressed the question of the applicable standard of review concerning a finding of "good cause" to restrict discovery under ORS 419B.881(6). The court determined that the standard of review for a juvenile court's "good cause" determination under ORS 419B.881(6) is review for legal error.

ORS 419B.881(6) does not define "good cause" nor does the statute give guidance on what criteria the court should consider in making its determination of whether there is good cause. There was legally sufficient evidence to support the juvenile court's determination that there was good cause and the court did not abuse its discretion in temporarily restricting the parents' access to their child's medical records. The juvenile court's decision to restrict disclosure was guided by the paramount concern for A's well-being and the goal of expediting reunification. Thus, we conclude that the court's decision was based on legally permissible considerations.

### EVIDENCE

➤ ***Dept. of Human Services v. N. S.*, [318 Or App 862 \(2022\)](#)**

A juvenile court judgment establishing jurisdiction is affirmed on appeal, with the court concluding that the juvenile court did not err in admitting mother's substance-abuse treatment records into evidence under OEC 803(6), the business-records exception to the hearsay rule.

➤ ***Dept. of Human Services v. J. H.*, [320 Or App 277 \(2022\)](#)**

Father appeals a judgment of jurisdiction over his daughter, challenging the court's admission of two items of evidence as hearsay. The first was a video-recorded interview of his daughter, aged 16 at the time of the hearing. The second was testimony regarding his daughter's report that he had been raping her for at least six months.

Held: Affirmed

The record supported a conclusion that the daughter was aligned with the parents, and thus adverse to DHS, on the allegation of father's sexual abuse. The juvenile court did not err in concluding that her out-of-court statements were those of a party-opponent and therefore admissible as non-hearsay under OEC 801(4)(b)(A).

## INDIAN CHILD WELFARE ACT (ICWA)

(Note that the new [Oregon ICWA](#) was not effective at the time the permanency judgments were entered and was not applied in this case)

➤ ***Dept. of Human Services v. D. E. A.*, [314 Or App 385 \(2021\)](#)**

In this case subject to the Indian Child Welfare Act (ICWA), mother and father each appeal from permanency judgments for their three children. The juvenile court changed the children's permanency plans from reunification to guardianship and provided for the children to be placed with a maternal relative in Texas, which was the only relative placement known to be available, and which would allow the children to be placed together. The children's attorney, the children's CASA, and the Makah Tribe all supported the children's placement in Texas, which, in the Tribe's view, complied with the placement preferences in ICWA.

Mother challenges the change of plan for each child, arguing that DHS did not make "active efforts" toward reunification, as is required for Indian children under ORS 419B.476(2)(a). Father also challenges the change of plan for each child, arguing both that DHS did not make "active efforts" and that his own progress was sufficient to continue planning for reunification. Father further challenges the orders allowing the children to move to Texas, which he argues violate the placement requirements for Indian children under 25 USC § 1915(b) because it is too far away from the children's home in Portland.

Held: Affirmed. On this record, the juvenile court's findings are supported by evidence and the juvenile court did not err in changing the plans from reunification to guardianship.

Regarding the ICWA placement standards, 25 USC § 1915(b) requires that an Indian child be placed: (1) in the least restrictive setting that most approximates a family in which any special needs that the child has may be met; (2) within reasonable proximity to the child's home, taking into account any special needs that the child has; and (3) with a member of the child's extended family or in another legislatively preferred placement, unless there is

good cause not to use a preferred placement. The use of the word “reasonable” in the statute means that the juvenile court must place the child as close to home as it is objectively reasonable to do so while also satisfying the other placement requirements in section 1915(b). The circumstances relevant to whether an Indian child’s proximity to home is “reasonable” includes any special needs the child has, and the restrictiveness of different placements available to the child, the preferential status of any placements available to the child, and other considerations that go to the child’s best interests. In this case, the placement with M is the only relative placement available to the children, is the most family-like setting, allows the children to stay together, and is supported by the Tribe. Also, the children are no longer in a plan of reunification where visitation must be supported, but in a plan of durable guardianship, which is relevant to what is reasonable. Under these facts, the children’s placement in Texas is reasonably proximate to the child’s home in Portland, under the statute. The juvenile court did not abuse its discretion in determining that the placement is in the children’s best interests.

## JURISDICTION

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

#### Erratic/Volatile Behavior; Parenting Skills

- *Dept. of Human Services v. C. A. C.*, [319 Or App 625 \(2022\)](#)

Mother and father appeal from a jurisdictional judgment of the trial court that included, among other findings, that father engaged in erratic and/or volatile behavior that interferes with his ability to safely parent and that father was unwilling or unable to learn parenting skills necessary to safely parent the child. The court affirmed the trial court’s findings relating to mother and two of the allegations relating to father. However, the court agreed with father about his alleged erratic and/or volatile behavior and his unwillingness or inability to learn parenting skills.

Held: Jurisdictional judgment reversed and remanded for entry of a judgment establishing dependency jurisdiction based on allegations other than allegations 4I and 4J; otherwise affirmed.

DHS removed the child from his parents’ care shortly after birth, from the hospital, after the mother and child’s urine and the child’s meconium tested positive for methamphetamines. DHS placed the child with nonrelative foster care providers. After the trial court found the child to be in the jurisdiction of the court, both parents argued that the evidence was insufficient to find jurisdiction. The court upheld the trial court’s ruling except for father’s alleged erratic and/or volatile behavior and his unwillingness or inability to learn parenting skills.

Evidence showed that a neighbor had obtained a civil stalking order against father for shooting a BB gun in the neighbor’s direction and engaging in other unwanted contact with her. He was also found to have several sharp objects in his backpack at the hospital.

But there was no evidence that father had used, or threatened to use, a BB gun, a sharp object, or anything else to harm A or any other child. The court found that the state had not met its burden that father had engaged in erratic or volatile behavior that interfered with his ability to safely parent the child.

Regarding parenting skills, father was cooperative with the medical staff at the hospital, he asked appropriate questions and was receptive to suggestions. He admitted to both mother's methamphetamine use while pregnant and his own use. The court found that, although father lacked basic parenting skills, like many first-time parents, there was no evidence that he was unable or unwilling to learn the parenting skills necessary to safely parent the child.

### **Volatile and/or Unsafe Relationship**

➤ *Dept. of Human Services v. T. B. L.*, [320 Or App 434 \(2022\)](#)

Father appealed the trial court's judgment taking jurisdiction of K and S, raising six assignments of error on, arguing that the evidence was legally insufficient to support jurisdictional findings as to the children. After father filed his appeal, the trial court terminated jurisdiction and wardship over the children. DHS moved to dismiss father's appeal as moot.

Held: Motion to dismiss appeal denied; reversed

Regarding DHS's motion to dismiss father's appeal, father identified collateral consequences that would flow from the jurisdictional judgments, notwithstanding their dismissal prior to appeal. The court denied DHS's motion to dismiss, recognizing the disadvantages father would face in subsequent DHS investigations, his inability to obtain agency review of any future founded disposition regarding child abuse or neglect, and the effects on his right to custody, parenting time, and visitation in future domestic relations proceedings.

The court then turned to the merits of the underlying dependency case. After a series of four incidents between December 31, 2020, and June 3, 2021, where the parents' quarreling resulted in law enforcement response to the family's home, DHS filed dependency petitions alleging the children's welfare was endangered by the parents' "ongoing volatile and/or unsafe relationship." The incidents involved verbal disputes and pushing and shoving. Father was bit by mother in at least one of the incidents, his arms were scratched in another, during one incident father pushed mother and she fell, lightly scuffing her knee or elbow, and there was broken glass in the driveway. The children witnessed at least two of the incidents.

The court reviewed the legal bases for dependency jurisdiction based on ORS 419B.100(1)(c): the state must prove, by a preponderance of the evidence, that a child's welfare is endangered because, under the totality of the circumstances, there is a current threat of serious loss or injury to the child that is reasonably likely to be realized; there must be a nexus between the parent's conduct or condition and harm to the child; the state must present evidence about both the severity of the harm and the likelihood that it

will occur, and the type, degree, and duration of the harm must be such that exposure to a reasonable likelihood of that harm justifies juvenile court jurisdiction; also, the threat of serious harm cannot be speculative.

The court held that, though the evidence might be sufficient to show the parents had an “ongoing volatile and/or unsafe relationship,” it was not sufficient to show that the relationship posed a nonspeculative threat of serious loss or injury to the children that was reasonably likely to occur. The court also found no evidence that the children were ever the objects of their parents’ volatile and/or unsafe conduct nor that they were close enough to be endangered by it. And though DHS argued that the children were at risk because they could be present and could attempt to intervene in the parents’ fighting (pointing out that it is common for children to attempt to intervene when they see physical violence between parents), the court held that the juvenile court could not assert jurisdiction based on generalizations and assumptions. The court found no evidence in the record that would lead it to conclude that these specific children had, or would, attempt to intervene. On the contrary, the evidence showed the opposite—on those occasions where the children observed fighting they had not attempted to intervene. The court ultimately held that there was insufficient evidence to support a determination that the parents’ relationship posed a present, nonspeculative risk of serious loss or injury to the children that is reasonably likely to be realized.

### **Incarceration/Criminal History, Lack of Custody Order**

➤ ***Dept of Human Services v. R. D.*, [316 Or App 254 \(2021\)](#)**

Father appeals from judgments establishing dependency jurisdiction over his two teenage children, G and N. The juvenile court found jurisdiction based on father's incarceration and criminal history. Father challenges jurisdiction and certain court ordered services. G and N lived with father during periods of time when he was not incarcerated. When he was incarcerated, father made plans for his mother--G and N's grandmother--to care for them. Eventually, G and N's mother resumed their care. DHS later intervened due to reports that mother had left G and N alone for extended periods of time. Because mother objected to G and N being returned to their grandmother's care, father suggested that they be placed with his brother--G and N's paternal uncle. DHS considered the uncle to be an appropriate placement for G and N, but it nevertheless placed G and N in nonfamily, substitute care due to concern that it could not prevent mother from removing G and N from their uncle's care in the absence of a custody order between mother and father.

Held: Reversed.

The juvenile court erred in finding jurisdiction over G and N. Father acted as a custodial resource by arranging care for his children with an appropriate caregiver when he could not provide that care himself. Evidence of father's criminal history, without more, was insufficient to support a nonspeculative inference that father placed G and N at risk of harm at the time of the fact-finding hearing. The lack of a custody order was not alleged as a basis for jurisdiction and, even if it had been, the lack of such an order is not alone sufficient to establish jurisdiction.

## Sex Abuse

➤ *Dept. of Human Services v. Z. M.*, [316 Or App 327](#) (2021)

Father's children were removed after DHS learned that father and stepmother were indicted on various felony charges relating to the sexual abuse of a minor who did not live in the home. The abuse was happening while the children were at home, but without their knowledge. Mother (who did not have custody and lived in another city) informed DHS she was prepared to become the full-time custodian of the children but instead, DHS sought protective custody, and the children were placed with father's parents. The children were referred for a behavioral health assessment. DHS informed the evaluator that the children did not know what was going on and that DHS had not found any evidence of any type of abuse of father's children in the home. Both children were diagnosed with adjustment disorders based on the removal from father's care.

DHS determined that mother could safely parent the children, so it filed for a change in placement to have them returned to mother's care. Father and children opposed placement with mother. The juvenile court ordered that, although mother was a safe placement, the children should remain with grandparents so as to reduce disruption in their lives and allow them to prepare for the new living arrangement should jurisdiction be established.

At the jurisdictional trial, Officer Hicks testified he did not immediately alert DHS after father and stepmother were indicted and arrested, because he had received no evidence or reports that they had abused their children or exposed them to any type of criminal activity. DHS caseworker Eicher testified that, although DHS's assessment concluded that the presence of negative impacts on the children were unknown, DHS nonetheless had concerns given the fact that the children are not stepmother's children and the criminal allegations involved sexual abuse of minors. DHS called the medical director of a child abuse assessment center to testify regarding the risks posed by father's conduct. She testified that when a caregiver abuses a substance, such as alcohol and marijuana, there is an increased risk of the child experiencing all forms of abuse and neglect. However, if someone has been abusing a different child, there's no data to support that they are definitely going to abuse every child they are around. Father called a certified sex offender therapist who had been hired to conduct a psychosexual evaluation of him. Based on the information she had received from DHS, interviews with father, records from DHS and records regarding the police investigation, she was not finding any indicators of emotional, physical or sexual harm being imminent to the children. In addition, father's therapist reported father was making progress, and father had also engaged in drug and alcohol counseling.

The juvenile court took jurisdiction, finding that the children fall within father's class of victims, and noting it did not need to wait for the children to be harmed before intervening. The court was not persuaded that the expiration of three years since father and stepmother had engaged in a pattern of sexually grooming and supplying cannabis and alcohol to teenage girls and sexually abusing them, meant that the risk of harm to the children was no longer current. The court stated there is nothing to demonstrate that



father and stepmother's thinking errors and belief systems were any different at the time of jurisdiction than in 2017. Father appealed the court's findings that his sexual abuse of another child and criminal activities (related to that sexual abuse) interfered with his ability to safely parent his own children. The court also took jurisdiction based on mother's admission that she was unable to protect the children from father's conduct because she lacked a custody order. Father argued that the evidence was insufficient to support any of the bases for jurisdiction.

Held: Reversed.

A juvenile court may assert dependency jurisdiction over a child if the child's condition or circumstances are such as to endanger the welfare of the child or of others. ORS 419B.100(1)(c). To endanger the child's welfare, the conditions or circumstances must create a current threat of serious loss or injury to the child and there must be a reasonable likelihood that the threat will be realized.

The question on appeal is whether the evidence of father's conduct – sexual abuse of a minor and related criminal activities – created a risk of sexual abuse of his own children. In this case, the court found the record did not establish a nexus between father's sexual abuse of teens from outside the home and a risk of harm to his own children. The court has previously recognized that a person's status as a sex offender does not *per se* create a risk of harm to a child. There must be some nexus between the nature of the prior offense and a current risk to the child at issue. Here, the evidence showed that the children were present in the home during some of the abuse but were unaware that it was occurring and were not themselves subjected to sexual abuse or any other criminal activity. Testimony from the medical director of the child abuse assessment center indicated there's no data to support that if a person abuses one child, that they're definitely going to abuse other children they are around. Finally, the children were diagnosed with adjustment disorders, but it was related to their removal from father's and stepmother's care, and not to father and stepmother's conduct. The court found that generalized testimony that a child may be at an increased risk of experiencing all forms of abuse when a caregiver abuses alcohol or marijuana, without more, is insufficient to connect father's use of alcohol and drugs to an increased risk that he would sexually abuse his children. Further, although the juvenile court found that the children fall within father's class of victims, teenage girls, DHS did not present any evidence establishing that a sexual offender's interest in 14-16-year-old girls increases the risk that the offender will sexually abuse 10- and 11-year-old girls, nor was there any evidence that an offender's interest in nonrelative minors increases the risk that the offender will sexually abuse the offender's own children. There must be some evidence in the record to make these inferences.

The only evidence about a risk of harm to the children were their diagnoses with adjustment disorders, and that was due to their removal from the care of father and stepmother. Without some evidence to support how and why the children would fall within father's class of victims or to suggest a risk that he would abuse them, DHS failed to establish the necessary nexus to support jurisdiction. Therefore, mother's inability to protect the children from father based on his conduct could not provide a basis for asserting jurisdiction over the children as to her. However, even if the Court of Appeals

were to conclude otherwise, the record was insufficient to demonstrate that mother could not protect the children from father because she did not have custody.

### **Parenting Skills and Abilities**

- ***Dept. of Human Services v. A. H.*, [316 Or App 126 \(2021\)](#)**

Mother appeals a judgment asserting jurisdiction over her 14-year-old child and argues that the evidence was inadequate to support the court's finding of jurisdiction on the basis that mother's parenting skills and abilities are insufficient to safely provide for the child's particular needs. More specifically, she contends that the evidence was insufficient to establish that her parenting exposed her child to a current, nonspeculative risk of serious harm.

Held: Affirmed.

Because mother used inappropriate physical discipline during an argument with child, causing child to run away from home, and child testified that she would run away again if returned to mother's care, there is evidence to support the juvenile court's finding. As a result, the conclusion that, absent jurisdiction, there was a reasonable likelihood of harm to child's welfare due to mother's inability to care for child's particular needs was legally permissible.

### **Substance Abuse**

- ***Dept. of Human Services v. M. E. S.*, [317 Or App 817 \(2022\)](#)**

Father appeals a judgment asserting jurisdiction pursuant to ORS 419B.100(1)(c) over his one-year-old child. He argues that the evidence at the hearing was inadequate to support the court's finding of jurisdiction on the bases that father "has a substance abuse problem" and "subjects the mother to domestic violence." Specifically, he argues that the evidence was insufficient to establish a nexus between father's substance abuse or violence toward mother and a current, nonspeculative risk of serious harm to the child.

Held: Affirmed.

Father did not object or assign error to evidence that he had used methamphetamines three weeks prior to trial, that his use makes him paranoid and contributed to past violent behaviors, and that he had subjected mother to domestic violence with their child in the immediate vicinity approximately six months before the trial. On this record, there was evidence to support the juvenile court's findings, and its conclusion that there was a reasonable likelihood of harm to the welfare of the child.

### **Substance Abuse, Volatile and Erratic Household**

- ***Dept. of Human Services v. S. G. T.*, [316 Or App 442 \(2021\)](#)**

The juvenile court asserted dependency jurisdiction over mother's infant child, X, on the grounds that mother's alcohol abuse impairs her ability to safely parent and that she subjects X to a volatile and erratic household. Mother appeals. She argues that the evidence was legally insufficient to establish the jurisdictional bases.

Held: Reversed.

The juvenile court erred in asserting dependency jurisdiction. Several of the court's factual findings are not supported by evidence in the record, and, without those findings, the evidence was legally insufficient to establish jurisdiction. Although mother has a history of alcohol abuse, there is no evidence in this record that mother has drunk to the point of intoxication since X's birth or that mother's drinking has prevented her from providing minimally adequate care to X and created a nonspeculative risk of serious harm to X. DHS must prove that a parent uses alcohol in a way that puts the child at risk of serious harm. The evidence also was insufficient to establish a volatile and erratic household for purposes of creating dependency jurisdiction. There is evidence of a single instance of domestic violence in January 2019 – well over a year before X was born – when mother hit father and burned him with a cigarette lighter during an argument. Both mother and father testified that that was an isolated incident, there is no contrary evidence, and DHS's concerns regarding domestic violence as a result of that incident were fully resolved by the time X was born. There was evidence of volatility between father and grandmother, but grandmother moved out of the home and there was no evidence she would be returning. The only other evidence is that one DHS caseworker has at times seen mother and father verbally argue at the DHS office. The foregoing evidence does not add up to a current threat of serious harm to X from mother subjecting X to a volatile and erratic household.

### **Substance Abuse; Parenting Skills; Residential Instability; Volatile and Erratic Behavior**

➤ ***Dept. of Human Services v. T.N.M.*, [315 Or App 160 \(2021\)](#)**

In this juvenile dependency case, mother and father separately appeal from the judgment exercising jurisdiction over their six-month-old infant, M, a child with developmental delays. They argue that the juvenile court erred in denying their joint motion to dismiss the dependency petition for insufficient evidence, and in concluding that the six conditions and circumstances alleged in the dependency petition authorized the court's jurisdiction.

Held:

A juvenile court may assert jurisdiction over a child under ORS 419B.100(1)(c) when it finds that, considering the totality of the circumstances, the child's conditions or circumstances endanger the child's welfare. The Department of Human Resources (DHS) must show that the child's conditions or circumstances present a current threat of serious loss of injury that is reasonably likely to be realized and not merely speculative. When a parent's alleged risk-causing conduct is at issue, DHS has the burden of demonstrating a nexus between the parent's conduct and the threatened harm to the child.

The evidence was sufficient to permit the juvenile court's assertion of jurisdiction based on allegation A, that "Mother's substance abuse interferes with her ability to safely parent the child," and allegation F, that "Father does not understand the basic needs of his child and lacks the skills necessary to safely parent the child." However, the evidence was insufficient to support jurisdiction based on the remaining allegations B, C, D, and E.

As to allegation A, there was sufficient evidence from which the juvenile court could infer that mother still suffered from a current substance abuse disorder, considering her long history of recurring relapse, lack of interest in drug treatment, and inconsistent statements regarding her last use of methamphetamine. Second, there were sufficient facts to allow an inference that continued substance abuse would interfere with mother's ability to parent a child who was already high-needs, either by failing to follow through on providing recommended care or simply by being inattentive. Additionally, mother's past use during pregnancy supported an inference that she may continue to place her drug use above her baby's needs. As to allegation F, there was sufficient evidence from which the juvenile court could infer that father did not know how to care for an infant without mother's guidance, lacked knowledge of the special care that this infant requires, and lacked insight into mother's drug use such that he would be unable to protect M from that use in the future.

The court wrote to address the other allegations that were not supported by sufficient evidence. Regarding residential instability, by the time of the jurisdictional hearing, parents testified that their trailer was ready and equipped with electricity, running water, heating, air conditioning, and a refrigerator; and that they had received an award letter that would allow them to receive a subsidized housing voucher in the near future. DHS concerns about the parents' refusal to inspect their trailer and the possibility that the trailer could contain unknown risks was not affirmative evidence that the trailer posed a risk to M. In addition, DHS concerns that parents would lose their residential stability were speculative. With respect to the allegation that father's volatile and erratic behavior creates a threat of harm to the child, the record contained no evidence that father exhibited volatile or erratic behavior outside of interactions with DHS over the custody of his child. Last, there was insufficient evidence that father's substance abuse interferes with his ability to safely parent the child. Father admitted to dealing drugs in the past but denied using methamphetamine and other illegal drugs for the past three to four years. He did admit to using marijuana on a regular basis. The caseworker testified that father's behavior was often erratic, that he slurred his words and his behaviors were consistent with someone being under the influence of methamphetamine or THC. Father declined DHS's request that he complete a voluntary drug test and he slept for a good portion of parents' supervised visits while mother held and care for M. However, he was responsive to mother's requests for assistance and appropriate in all his interactions with the child. There was no evidence that father's substance abuse had harmed M in the past, and no theory presented as to how such harm would likely occur in the future. Evidence that a parent uses drugs is insufficient to establish jurisdiction without some theory, supported by the facts, as to how that use poses a risk to the child.

Jurisdictional judgment reversed and remanded for entry of a judgment establishing dependency jurisdiction based on allegations A and F only; otherwise affirmed.

## Failure to Appear

➤ ***Dept. of Human Services v. J. L. J.*, [315 Or App 87](#) (2021)**

In this juvenile dependency case, mother appeals from a combined judgment of jurisdiction and disposition over her child, J. Following a “trial readiness” hearing where mother was not present and the Department of Human Services (DHS) presented a prima facie case, the juvenile court concluded that J was within its jurisdiction under ORS 419B.100(1) because of mother's "fail[ure] to appear" as set forth in ORS 419B.815(7) and made J its ward. Mother appeared after the prima facie hearing had concluded, but before the court began to consider DHS's request for dispositional orders. She moved to set aside the court's order based on the findings in the prima facie hearing because "she wasn't aware of \* \* \* the status check." The court denied mother's request. On appeal, mother argues that she did not fail to appear under ORS 419B.815(7); and thus, the juvenile court erred in granting jurisdiction over J. DHS responds that her argument "is not preserved, and regardless, it fails on the merits."

Held: Mother did not preserve the argument that she raises on appeal because it was not specific enough to alert the court to the precise issue she now raises such that the court could identify its alleged error with enough clarity and permit it to consider and correct the error immediately. Affirmed.

➤ ***Dept. of Human Services v. C. C.*, [315 Or App 459](#) (2021)**

In this juvenile dependency case, father was served a copy of the petition and a statutorily compliant summons. The summons informed father of the time and location of the hearing and directed him to personally appear. The summons also stated if father did not appear as directed or if he did not appear at any subsequent court ordered hearing, the court may proceed in his absence without further notice and take jurisdiction of the children at the time of the hearing or on a future date. Father appeared as summoned and the court held a shelter hearing. Following that hearing, father appeared as ordered for a settlement conference. At that time, the court ordered father to appear at a jurisdiction hearing. Father failed to appear for the jurisdiction hearing, and the court set a second date for a prima facie hearing, giving father a second chance to appear (counsel for father and DHS agreed to that plan). Father again failed to appear, at which time the court heard evidence and concluded DHS had met its burden to prove and entered a judgment taking jurisdiction of A. Father moved to set aside the judgment, asserting the juvenile court had failed to provide him adequate notice of the second hearing. The juvenile court denied father's motion.

Held: Affirmed.

Once a parent has appeared in response to a summons and the juvenile court has then ordered the parent to appear personally at a later hearing under ORS 419B.816, the court may adjudicate the dependency petition in the parent's absence, either at that hearing or on a future date. ORS 419B.815(7). Once a parent has failed to personally appear at a hearing for which the parent had proper notice under ORS 419B.816, the juvenile court may choose to either immediately proceed with a hearing on the petition or postpone that

hearing to a later date. If the court takes the latter course, nothing in ORS 419B.815 or ORS 419B.816 requires the court to notify that parent of the newly set hearing date (a represented parent presumably should receive that information from the parent's lawyer).

## **Petition Amended at Trial**

➤ ***Dept. of Human Services v. M. H.*, [320 Or App 51 \(2022\)](#)**

Parents appeal from juvenile court judgments taking jurisdiction over their eight-year-old child. At the close of the hearing, the juvenile court had amended an allegation that specifically related to mother to also include father. Mother argued that the evidence was not sufficient to support a finding of jurisdiction and father argued that the trial court committed plain error by making a jurisdictional finding based on a condition that was not alleged in the petition.

Held: Affirmed

DHS filed a dependency petition alleging that 1) the child suffered emotional harm in mother's care and needed the assistance of the child caring agency to adequately address the harm and 2) the child suffered from mental health disorders and behavioral problems because of the functioning of her family system and the family needed the assistance of a child caring agency to address them. Mother contested both allegations and father stipulated to the second one.

At the close of the jurisdictional hearing, the juvenile court found that the child was within the dependency jurisdiction of the court because she suffered emotional trauma in her *parents'* care, rather than in her mother's care, as originally alleged. At that time, the juvenile court informed that parties that the court would make some "slight changes...to include both parents" and issued a jurisdictional judgment reflecting that the allegation had been amended and proven as to both parents. Father did not object when the juvenile court did so but asserted on appeal that the juvenile court committed plain error in finding the child to be within its jurisdiction based on a condition that was not alleged in the petition.

Father acknowledged both that ORS 419B.809(6) allows a juvenile court to direct that a petition be amended and that the court recently concluded that the statute does not preclude a juvenile court from amending a petition, as opposed to directing DHS to do so. However, father contends that the operative petition was never amended to include the challenged jurisdictional basis.

The court disagreed with father and found that the juvenile court told the parties that it was amending the petition to include both mother and father in the allegation. The court also found that the juvenile court then issued a judgment that explicitly affirmed that the allegation had been amended and proven as to both parents. Based on these findings, the court held that it could not conclude that the juvenile court had committed plain error.



Mother also argued that the juvenile court erred in finding that the child was in its jurisdiction as to the allegations against mother. The court found ample evidence in the record to support the juvenile court's findings and ultimate conclusion that the child was in its dependency jurisdiction.

## **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)**

➤ ***Dept. of Human Services v. J. S.*, [368 Or 516 \(2021\)](#).**

### **Case summary:**

The Oregon Supreme Court held that, under ORS 109.751(2), a juvenile court exercising temporary emergency jurisdiction has authority to enter dependency judgments making children wards of the court and continuing their placement in foster care, if the circumstances giving rise to the emergency continues to exist at the time that the court enters those orders. However, under ORS 109.751, the juvenile court lacks authority to order actions that are not "necessary to protect the children in an emergency," and, therefore, it does not have authority to order a parent to engage in specified activities to regain custody of the children. Parents were residents of Washington who were living temporarily at a motel in Oregon. The juvenile court asserted temporary emergency jurisdiction over their 15-month-old son after police, investigating the death of his infant brother, found him living in squalid and dangerous conditions in the motel room. The court later entered several dependency judgments concerning that child as well as another child later born to parents in Washington. Parents challenged the juvenile court's authority to issue dependency judgments making their two children wards of the court in Oregon. In particular, parents moved to dismiss dependency petitions filed by Department of Human Services in the juvenile court on the ground that the juvenile court, exercising temporary emergency jurisdiction under ORS 109.751(2), had authority only to enter shelter orders and did not have subject matter jurisdiction under that or any other statute to adjudicate dependency petitions for children from another state who are temporarily in Oregon. The juvenile court denied the motion. On appeal, the Court of Appeals affirmed the juvenile court's ruling.

In a unanimous opinion authored by Justice Lynn R. Nakamoto, the Court affirmed the juvenile court's denial of mother's motions to dismiss the dependency petitions, affirmed in part and reversed in part the Court of Appeals decision, and vacated certain parts of the dependency judgments. The Court observed that, under ORS 109.751(1) and (2), the juvenile court has authority make a "child custody determination" that is "temporary" and "necessary in an emergency to protect" a child who is threatened with mistreatment or abuse. The Court held that the definition of "child custody determination" set out in ORS 109.704(3) broadly includes dependency judgments, because they provide for the legal and physical custody of a child. The Court rejected mother's argument that the juvenile court lacked authority to enter dependency judgments because they are not "temporary" within the meaning of that word in the statute, holding that, under ORS 109.751(2), an order entered by a court exercising temporary emergency jurisdiction "remains in effect until an order is obtained from a court of a state" having initial child custody jurisdiction and, thus, it continues only for a limited time. The Court also rejected mother's argument that

the dependency judgments, to the extent that they made the children wards of the court and ordered the continuation of their placement in foster care, were not "necessary in an emergency" to protect the children from threatened mistreatment or abuse. Mother had not disputed that, at the time that the dependency judgments were entered, the need for the juvenile court's extraordinary jurisdiction persisted: Mother had admitted that her substance abuse and mental health issues interfered with her ability to parent the children, and she did not contest the juvenile court's determinations that V and M were threatened with mistreatment as a result. Moreover, as of the time that the juvenile court entered the dependency judgments, mother had not taken steps to address those issues. However, the Court agreed with mother that some parts of the judgments were not necessary in an emergency to protect the children. The Court held that parts of the dependency judgments that required mother to take specific actions to regain custody of the children, while beneficial to the children in the long term, do not ensure the children's safety in the short term, and, therefore, the Court held, they exceeded the juvenile court's temporary emergency jurisdiction. Accordingly, the Court vacated those parts of the dependency judgments.

**Case note:**

When the children were present in Oregon and the juvenile court's exercise of jurisdiction was necessary at the shelter hearing to protect them in an emergency from actual or threatened mistreatment, the predicates for temporary emergency jurisdiction under ORS 109.751(1) were met. The emergency continued to exist at the time the jurisdictional judgments were entered and when the juvenile court denied the parents' motions to dismiss so ORS 109.751 continued to apply. Under ORS 109.751(2) the juvenile court was not required to contact an out of state court because there was no existing out of state child custody order or ongoing out of state child custody proceeding. Under ORS 109.751(2), a child custody determination made pursuant to the court's temporary emergency jurisdiction continues in force until someone obtains an order of the home state court declining or assuming jurisdiction. In addition, the scope of temporary orders permissible under the provision for temporary emergency jurisdiction in the UCCJEA is not limited to shelter orders and may encompass jurisdictional judgments focused on the placement of the child being protected. However, the aspects of the jurisdictional judgments that required the parents to take specific actions to regain custody of the children were not necessary in an emergency to protect the children, and exceeded the juvenile court's temporary emergency jurisdiction in this case.

➤ ***Dept. of Human Services v. P. D.*, [368 Or 627](#) (2021)**

The Oregon Supreme Court held that, under ORS 109.751(2), a juvenile court exercising temporary emergency jurisdiction has authority to enter dependency judgments making children wards of the court and continuing their placement in foster care, if the emergency giving rise to the removal of the children continues to exist at the time that the court enters those orders. However, under ORS 109.751, the juvenile court lacks authority to order actions that are not "necessary to protect the children in an emergency," and, therefore, it does not have authority to order a parent to engage in specified activities to regain custody of the children.

Parents were residents of California who had traveled to Oregon with their children, two and nine years old, to visit relatives for the weekend. The juvenile court asserted temporary emergency jurisdiction over their children after mother took methamphetamine and had a "mental breakdown," during which she assaulted and injured the two-year-old child. The court later entered dependency judgments concerning the children. Parents challenged the juvenile court's authority to issue dependency judgments making their two children wards of the court in Oregon. In particular, parents moved to dismiss dependency petitions filed by the Department of Human Services on the ground that the juvenile court, exercising temporary emergency jurisdiction under ORS 109.751(2), had authority only to enter shelter orders. Parents contended that the court did not have subject matter jurisdiction under that or any other statute to adjudicate dependency petitions for children from another state who are temporarily in Oregon. The juvenile court denied the motion. On appeal, the Court of Appeals affirmed the juvenile court's ruling.

In a unanimous opinion authored by Justice Lynn R. Nakamoto, the Court affirmed the juvenile court's denial of mother's motion to dismiss the dependency petitions but vacated certain parts of the dependency judgments that required parents to take various actions that were not necessary to protect the children during the emergency. The Court accordingly affirmed in part and reversed in part the Court of Appeals decision. Relying on its recent decision in *Dept. of Human Services v. J. S.*, 368 Or 516, \_\_ P3d \_\_ (Sept 17, 2021), the Court rejected mother's argument that the juvenile court lacked authority to enter dependency judgments. As in *J. S.*, the Court held that dependency judgments issued pursuant to the juvenile court's temporary emergency jurisdiction under ORS 109.751(2), are temporary and, to the extent that they make a child a ward of the court and order the continuation of the child's placement in foster care, they are "necessary in an emergency" to protect the child from mistreatment or abuse if it is shown that the threatened mistreatment or abuse persists at the time that the dependency judgment is entered. In this case, the Court held, mother had not disputed that the need for the juvenile court's emergency jurisdiction persisted at the time that the dependency judgments were entered: Mother's substance abuse issues interfered with her ability to parent the children, and she did not contest the juvenile court's determinations that her children were threatened with mistreatment as a result. However, the Court agreed with mother that some parts of the dependency judgments were not necessary in an emergency to protect the children. The Court held that parts of the dependency judgments that required mother to take specific actions to regain custody of the children exceeded the scope of the juvenile court's temporary emergency jurisdiction. Accordingly, the Court vacated those parts of the dependency judgments.

## MOTION IN LIMINE

- ***Dept. of Human Services v. E. J.*, [316 Or App 537](#) (2021)**

Mother was a ward of the court between 2009 and 2016. She gave birth to S in 2014 and continued to be a ward of the court for the first 16 months of S's life. In 2020, mother admitted that her children were endangered because of an ongoing pattern of traumatic events she has suffered throughout her life leading to an inability to recognize unsafe

individuals and chaos, which interfere with her ability to safely parent the children. At disposition, the referee ordered mother to participate in a psychological evaluation. DHS had records in its possession about mother from when she was a ward of the court that it wanted to provide to the examining psychologist for consideration during that examination.

Mother filed a motion *in limine* to deny disclosure of all records and information that relate to her history and prognosis appearing in the record of the case or supplemental confidential file. The juvenile referee ordered that DHS records compiled during mother's wardship that were relevant for understanding her past trauma were to be submitted for an *in camera* inspection. The court further determined that it would release those records to the psychologist if they were necessary for the psychologist to view and rely upon in forming a diagnosis and recommendation for services. Mother appealed the referee's order to the juvenile court. That court denied the motion and held that the report at issue could be used as evidence against Mother in the juvenile court proceeding under ORS 419A.255(3)(b), because it is in connection with a proceeding in a juvenile court concerning her. Mother appealed.

Held: Reversed and remanded.

The juvenile court erred by interpreting ORS 419A.255(3)(b) as authority for granting DHS access to mother's records, because mother is not the ward in this action. DHS argues that ORS 409.225, not ORS 419A.255, should control the disclosure of the records because DHS possesses the records, not the court. DHS claims that it can use mother's juvenile records in the dependency matter involving her child because it is directly connected with the administration of child welfare laws.

In 2013, the legislature amended ORS 419A.255 to identify the location of "history and prognosis" information in either "the supplemental confidential file or the record of the case." ORS 419A.255(2)(a). After examining the legislative history of amendments made to ORS 419A.255(2)(a), the court interpreted the statute to mean that if any "history or prognosis" material is located in either the court's supplemental confidential file or the record of the case, the privilege attaches to this material, and it applies regardless if these materials exist in duplicate elsewhere (such as DHS files).

In this case, DHS, as the proponent of the records, has not demonstrated that the records at issue overcome the privilege codified in ORS 419A.255. DHS had the burden to show that the records were not (1) history and prognosis information and (2) that they were not located in the supplemental confidential file or record of the case. The record here fails to establish either. The trial court erred in ordering disclosure.

## MOTION TO DISMISS

➤ ***Dept. of Human Services v. V. M.*, [315 Or App 775 \(2021\)](#)**

In this consolidated juvenile dependency case, mother appeals the juvenile court judgments denying her motion to dismiss jurisdiction over her children, J and K, and

changing the children's permanency plan from reunification to guardianship. Mother argues that the juvenile court erred when it denied her motion to dismiss jurisdiction as untimely. She also argues that the juvenile court erred when it denied her motion on the merits, because the court relied, at least in part, on facts extrinsic to the jurisdictional judgment. Similarly, mother argues that the juvenile court erred by relying, at least in part, on facts extrinsic to the jurisdictional judgment when it changed the children's permanency plan from reunification to guardianship.

Held: Reversed and remanded.

Under the procedure outlined in *Dept. of Human Services v. T. L.*, 279 Or App 673, 688, 379 P3d 741 (2016), mother could move to dismiss jurisdiction "at any time" prior to termination of parental rights; therefore, the juvenile court erred in denying her motion as untimely when she filed her motion three days prior to the permanency hearing. In a footnote, the Court explained that the juvenile court was not required to postpone the permanency hearing. Rather, it could have proceeded with the scheduled permanency hearing and then address the dismissal motion after holding the permanency hearing. A juvenile court has authority to postpone a hearing on a motion to dismiss or to allow parties additional time to adequately prepare their opposition to a motion.

Additionally, in denying mother's motion to dismiss jurisdiction on its merits, and in changing the permanency plan, the juvenile court erred by relying, at least in part, on facts that were neither explicitly stated nor fairly implied by the jurisdictional judgment. The bases of jurisdiction included: (1) the mother has not parented the child for over four years, during this time (without a legal custody agreement) the children were in the care of relatives who used excessive physical discipline and unsafe parenting practices; (2) over the last year, the mother did not visit in person while the children were residing in an unsafe situation and were placed at risk of harm; and (3) the children do not currently want to return to the care of their mother and the family needs services to repair their relationship. It was error for the juvenile court to rely on mother's age and health issues, which were facts extrinsic to the jurisdictional judgment.

➤ ***Dept. of Human Services v. M. E. M.*, [320 Or App 184 \(2022\)](#)**

Mother appealed from juvenile court orders denying her motions to dismiss dependency jurisdiction and terminate wardship over two children, A (10) and M (8). Mother argued that the juvenile court erred in concluding that continued jurisdiction was warranted because the adjudicated bases of jurisdiction had not yet been ameliorated.

Held: Affirmed

DHS removed mother's children from her care in October 2019 after mother did not return home one night and the children were unable to reach her. The case was not tried until more than a year later, but in December 2020 the court asserted jurisdiction over the children and made them wards of the court. The adjudicated bases of jurisdiction for mother were 1) involvement in criminal activities that interfered with her ability to safely parent and 2) residential instability and chaotic lifestyle that also interfered with her

ability to safely parent. Mother was ordered to engage in a number of services and to comply with all of the terms of her criminal probation.

Mother filed a motion to dismiss jurisdiction. By the time of the hearing in August 2021, mother had not engaged in court-ordered services, faced open criminal charges stemming from the incident leading to the children's removal, had dropped a baggie of cocaine as she exited her PO's office, tested positive for methamphetamine three separate times (while denying methamphetamine use after each test), served a 7-day jail sanction for drug-related PVs, then tested positive for methamphetamine again, after the jail sanction and less than a week before the hearing. At the time of the hearing, mother had two additional open criminal matters pending, for which she had failed to appear, resulting in arrest warrants (the warrants had been cleared by the time of the dependency hearing).

Mother was also living with her boyfriend, with a known methamphetamine user in an attached apartment, in a home that had only recently been found to be "minimally appropriate." Mother testified at the hearing that she was working full time and had a network of friends and family to care for the children if she returned to jail. However, no friends or family testified that they were available to care for the children.

In a motion to dismiss hearing, DHS has the burden to prove that continued jurisdiction is warranted, by a preponderance of the evidence, that the adjudicated bases persist, and that they still pose a current threat of serious injury to the child that is reasonably likely to be realized. DHS must also demonstrate a nexus between the allegedly risk-causing conduct and the harm to the child, that the risk is not speculative, and that it is present at the time of the hearing.

Mother argued at the hearing that jurisdiction was no longer warranted because, at the time of the hearing, she had not been convicted of any new crimes, had been living in a stable home for several months, and had a full-time job. Mother contended that DHS's evidence of her drug use was extrinsic to the adjudicated jurisdictional bases and that, in any event, drug use alone is insufficient to support jurisdiction. The juvenile court denied the motion to dismiss, concluding that mother's ongoing criminal activities, including probation violations, demonstrated that she had not ameliorated either of the underlying jurisdictional bases.

The court agreed with the juvenile court. Although substance use or abuse were not adjudicated bases of jurisdiction, mother's ongoing methamphetamine use, particularly given that such use violated the conditions of probation that the trial court had ordered her to comply with, such use was evidence of mother's lack of insight into the effect of that conduct on her availability to safely parent her children. Mother's lack of insight about the harm to her children caused by the repeated risk of incarceration links directly to the jurisdictional bases and makes the risk of harm current, not speculative. The same evidence concerning drug use and PVs also established that mother had not yet ameliorated the jurisdictional basis related to her chaotic lifestyle. Notwithstanding mother's achievement of several months of residential stability, her ongoing pattern of drug use, PVs, and sanctions was evidence of an ongoing chaotic lifestyle that persisted at the time of the hearing.



➤ ***Dept of Human Services v. A.H.*, [320 Or App 511 \(2022\)](#)**

Mother filed a motion to terminate wardship and dismiss jurisdiction about two years after entry of jurisdictional judgments, arguing there was insufficient evidence to establish that the children's welfare was endangered while they were in her care. After a contested hearing, the trial court denied mother's motion, concluding that the original bases for jurisdiction continued to pose a threat. Mother appealed from the trial court's denial of her motion. Father did not separately file motions to dismiss, but supported mother's motions, arguing that mother had ameliorated the bases for jurisdiction.

Held: Affirmed

Three of the parents' children, C, L, and M, were found to be in the jurisdiction of the juvenile court based on multiple allegations relating to the parents' conduct toward other siblings who were not part of these consolidated cases. (The trial court also found L in jurisdiction for allegations against both parents relating to the educational neglect of L.) The court's disposition ordered the parents to complete a psychological evaluation and any recommended services, a mental health evaluation and any recommended services, and in-home safety and reunification services and any recommended services.

In delivering its ruling, the court stated that the parents had exhibited a pattern of abuse and neglect of the eldest two of their five children, that mother was unable or unwilling to identify the behavior or circumstances that led to the abuse and neglect, including the non-accidental injury of one of the children, and persistent conditions of abuse and neglect that had led to her first child's removal. The court continued that, although mother did not need to take full accountability for the abuse and neglect of her elder two children or to separate from the father, she had not undergone the counseling needed achieve the independence and clarity necessary to protect the children.

Mother argued that the trial court erred because it based its decision on evidence that was extrinsic to the adjudicated jurisdictional bases: mother's codependency or mental health conditions as posing a risk of serious harm to L, C, and M. Mother also argued that the original jurisdictional bases did not provide her with constitutionally adequate notice that she must overcome a codependent relationship with father or otherwise learn to protect the children from him.

The court noted that the juvenile court has jurisdiction over a child who is under 18 years old and whose conditions or circumstances are such as to endanger the welfare of the person or another. A child's welfare is endangered 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, DHS must set forth in ordinary and concise language 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 proceeding. A juvenile court may not continue wardship if the facts supporting the jurisdictional bases no longer exist nor may the court continue wardship based on facts not alleged in a jurisdictional petition. Only the petition or the jurisdictional judgment can provide a parent with adequate notice.

The court upheld the trial court's ruling, finding that mother had made no apparent progress toward ameliorating the underlying causes of the neglect and abuse of her children: she refused to acknowledge her role in their removal, declined services offered to her, exhibited a pattern of not being forthcoming and denying the abuse of her two older children, scapegoating one of her sons, and not meaningfully engaging in the services she did participate in. The court observed that mother's argument narrowly focused on the fact that she did not have specific notice to ameliorate her codependency to father, ignoring that the jurisdictional bases were about abuse and neglect, regardless of the underlying cause or whomever the primary abuser. The court concluded that mother had been given notice that she needed to ameliorate the concerns involved in the abuse and neglect of her children, the services ordered having fairly implied that codependency or a personality disorder were conditions mother would need to address regarding her role in the abuse and neglect of her children.

## MOTION TO SET ASIDE DEFAULT JUDGMENT

➤ ***Dept. of Human Services v. A. L. S.*, [318 Or App 665 \(2022\)](#)**

Father's parental rights were terminated in his absence after he failed to appear at the first day of a scheduled termination trial. He moved to set aside the judgment under ORS 419B.923(1), contending that his failure to appear was the product of excusable neglect. Specifically, he claimed that his absence was due to the Department of Human Services (DHS) failure to provide him with transportation after he requested it. The juvenile court denied the motion, concluding the evidence was insufficient to establish excusable neglect.

Held:

A parent's nonappearance at a scheduled hearing can qualify as excusable neglect under ORS 419B.923(1). When faced with a motion to set aside a judgment based on excusable neglect, the juvenile court must engage in a two-step analysis: (1) determine whether the parent has established as a matter of law that the nonappearance resulted from excusable neglect, and (2) if so, the court retains some range of discretion to determine whether, in the totality of the circumstances to allow the motion. In this case, the trial court found father's assertion that DHS failed to provide him with transportation noncredible. Instead, the court found that, had father asked DHS for transportation, it would have been provided. In light of the credibility finding, which is binding on the appellate court, the court did not err. Affirmed.

➤ ***Dept. of Human Services v. J. J. J.*, [317 Or App 188 \(2022\)](#)**

Mother's parental rights were terminated in her absence after she failed to appear at the termination trial, which was conducted remotely. Mother, who was homeless, was late for the trial on the second day because she overslept; someone she was sharing a hotel room with turned off her alarm clock. Mother was supposed to be present in court with her lawyer, but instead she called her lawyer when she woke up. The proceeding had already

started and her lawyer did not inform the court that mother was on the line, but instead instructed mother to call in to the number to be connected to the remote proceeding. Mother tried several times to call into the trial but was unable to connect, so she left a voicemail with the court. After DHS finished presenting its case, the juvenile court terminated mother's rights in her absence. At that point, mother's lawyer told the court that mother had called and planned to call in to the remote proceeding. Mother's voicemail was recorded approximately 10 to 12 minutes after the hearing ended. She later moved to set aside the judgment under ORS 419B.923(1), contending that her failure to appear was the product of excusable neglect. The juvenile court denied the motion, concluding that the evidence was insufficient to establish excusable neglect.

Held: Reversed and remanded.

Evaluating a motion to set aside a judgment under ORS 419B.923(1)(b) entails a two-step process: (1) a court must determine whether the parent has established excusable neglect, and if established must (2) decide whether to exercise its discretion to grant the motion to set aside. In this case, the juvenile court concluded that the facts mother presented in support of her motion were not sufficient to constitute excusable neglect. The excusable neglect standard in ORS 419B.923 must be construed liberally in favor of a parent's fundamental interest in not having their parental rights terminated in their absence. The standard simply requires a showing there are reasonable grounds to excuse the default. The facts demonstrate that while the hearing was in progress, mother was attempting to call in but could not connect. The court is aware of no basis for precluding a parent who shows up late to court from participating in a termination trial from that point forward. In view of the uncontroverted evidence that mother's failure to appear was the product of her reasonable, but unsuccessful, efforts to connect to the hearing in progress, the facts demonstrate that her failure to appear was a product of excusable neglect.

➤ ***Dept. of Human Services v. L. L.*, [316 Or App 274](#) (2021)**

DHS filed dependency petitions regarding mother's children. At a scheduled court appearance, the court ordered mother to call for a status conference at a later date. When mother failed to do so, the court held an *in-absentia* trial and ruled that the children were within its dependency jurisdiction. Mother moved to set aside the jurisdictional judgments under ORS 419B.923, averring – through declaration of counsel – that mother had misunderstood that her appearance was required at the status conference because her understanding was that it was only for attorneys to set a date for an all-day trial. Without holding a hearing, the court denied mother's motions. Mother appeals that ruling.

Held: The only memorial of the court's ruling, or reasoning, is a hand-written notation in the upper corner of a document reading:

“Denied! [Initials] 1/29/21

Mom advised on record on 12/17/20 to call in at 7:45 a.m. On 12/22/20, mother failed to call in at that time despite given call in info on record on 12/17/20.”

A parent's nonappearance at a scheduled hearing can qualify as excusable neglect under ORS 419B.923. As we explained in *Dept. of Human Services v. K. M. P.*, 251 Or App 268 (2012), when faced with a motion to set aside a judgment based on excusable neglect, a juvenile court must engage in a two-step, sequential analysis. The first step requires the court to determine whether the parent has established as a matter of law that the nonappearance resulted from excusable neglect. If the parent makes the predicate showing of excusable neglect, the court retains some range of discretion to determine whether, in the totality of the circumstances, to allow the motion.

In this case, the trial court's bare notation in the upper corner of a document, without more, and without any reasoning expressed on the record, does not sufficiently inform us where on the two-step process the juvenile court's decision lies. We therefore remand to the trial court for clarification and explanation of its ruling, so that meaningful appellate review can occur.

## ORDER FOR PSYCHOLOGICAL EVALUATION

➤ *Dept. of Human Services v. B. F.*, [318 Or App 536 \(2022\)](#)

Father appeals a juvenile court judgment asserting dependency jurisdiction over his child. He contends that the juvenile court failed to provide him with actual notice of the trial readiness hearing and then, when he failed to appear, wrongly adjudicated the dependency petition in his absence and made his child a ward of the court. Alternatively, he contends that the juvenile court erred in ordering him to complete certain evaluations and other tasks.

### Held:

Father's claim of error regarding notice was not adequately preserved, thus limiting review to plain error. The record is ambiguous as to whether father received actual notice from the court, which impedes plain-error review. In any event, the Court of Appeals declined to exercise its discretion to correct any plain error, because it was clear from father's counsel's statements at the beginning of the hearing that father knew of the hearing and chose not to attend. As for father's other assignments of error, the Court of Appeals accepted the state's concession that the juvenile court plainly erred by ordering father to submit to a psychological evaluation without making the necessary findings required by *Dept. of Human Services v. W.C.T.*, [314 Or App 743 \(2021\)](#) (decided after the hearing in this case, but controlling for purposes of the court's plain-error determination). Jurisdictional judgment affirmed; dispositional judgment vacated and remanded as to order that father submit to a psychological evaluation; otherwise affirmed.

➤ *Dept. of Human Services v. W. C. T.*, [314 Or App 743 \(2021\)](#)

The juvenile court took jurisdiction over parents' daughter and directed parents to cooperate in the plan for reunification. Mother and father assert ten assignments of error in the decision to take dependency jurisdiction. Both parents assign error to the court's

order that they participate in psychological evaluations, arguing that a line of cases relying on ORS 419B.337(2) as authority for such evaluations should be overruled as plainly wrong and that under their preferred statutory authority, ORS 419B.387, the juvenile court failed to justify psychological exams as a component of treatment or training by tying the exams to substance abuse. In addition, mother assigns error to the court's order that she engage in consistent visitation, obtain safe and stable housing, sign information releases, and complete a "protective capacity assessment."

Held:

The juvenile court has jurisdiction under ORS 419B.100(1)(c) in any case involving a child whose condition or circumstances are such as to endanger the welfare of the child or of others. The juvenile court considers the totality of circumstances in determining whether there is a reasonable likelihood of harm to the welfare of the child. A child is endangered if exposed to conditions or circumstances that present a current threat of serious loss or injury. In this case, the court found the record contained substantial evidence of circumstances that present a current threat to R. This included evidence that mother had characteristics associated with personality disorders, was addicted to methamphetamine, failed to successfully complete drug and alcohol treatment, and suffered from residential instability. In addition, R is a high needs child and mother and father had failed to attend special education planning meetings or provide her with medical care. Finally, father did not consider himself to be a parental resource because he lived in a primitive trailer and needed to care for his own father. The juvenile court found that a present risk to R was evident in delays in her social and education development. Based on the foregoing, the juvenile court did not err in taking dependency jurisdiction.

Regarding the order for a psychological evaluation, the juvenile court has authority under ORS 419B.337(2) and ORS 419B.343(1)(a), at the time of a jurisdictional judgment, to approve a plan of services that includes directions for the parents' cooperation in those services, such as a psychological evaluation. After an evidentiary hearing, a juvenile court may order a psychological evaluation when finding that (a) the evaluation is rationally related to the jurisdictional findings, (b) it serves as a predicate component to the determination of treatment and training, (c) there is a need for treatment or training to ameliorate the jurisdictional findings or to facilitate the child's return, and (d) the parent's participation in needed treatment or training is in the best interests of the child.

In this case, there was substantial evidence for the juvenile court's findings that there was a need for the services that DHS recommended as to mother, that those services had a rational basis to the jurisdictional findings, that a psychological evaluation would provide insight in determining services, and that it was in R's best interests that mother engage in those services. The evidence included: mother's multiple failures to complete drug and alcohol treatment; her missed appointment for a drug and alcohol assessment; mother's unspecified adjustment disorder and unspecified personality disorder as well as her mention of depression in her testimony; and mother admitted to using some of her limited income to pay for drugs and admitted to being addicted to methamphetamine, using it once or twice a month.

Regarding the order for a psychological evaluation for father, there was insufficient evidence upon which the juvenile court could have made a finding that a psychological evaluation was a predicate component to treatment or training. In contrast to mother, he had successfully completed drug and alcohol treatment and there was no present indication of substance abuse. Father completed parental training but was otherwise not engaging in services. He was reported to be angry at DHS, but there was no evidence to infer that a disorder contributed to that anger.

Finally, the Court of Appeals affirmed juvenile court orders requiring mother to engage in consistent visitation, obtain safe and stable housing, sign information releases, and complete a "protective capacity assessment."

➤ ***Dept. of Human Services v. T. L. M.*, [316 Or App 39 \(2021\)](#)**

In this juvenile dependency case, mother appeals a juvenile court judgment requiring that she undertake a psychological evaluation. On appeal, mother argues, among other points, that the juvenile court erred by ordering her to undertake the psychological evaluation because the record is insufficient to show that a psychological evaluation is rationally related to the established jurisdictional bases. The jurisdictional bases include: (1) that mother's substance abuse interferes with her ability to safely parent and (2) that while in the care of the parents the child tested positive for methamphetamine and the mother was not able to protect the child from the unsafe environment.

Held: Reversed and remanded.

The psychological evaluation in this case was not for a service that was rationally related to the findings that brought the child into the juvenile court's jurisdiction, as required by *Dept. of Human Services v. W. C. T.*, 314 Or App 743, 745, \_\_\_ P3d \_\_\_ (2021). The standard in *W.C.T.* provides that the court may order a psychological evaluation of a parent, after an evidentiary hearing, by making findings that:

- The psychological evaluation is for a service that is rationally related to the findings that bring the child into the court's jurisdiction (ORS 419B.337(2); ORS 419B.343(1)(a));
- The psychological evaluation is a predicate component of treatment or training of a parent (ORS 419B.387);
- There is a need for treatment or training to correct the circumstances that caused the jurisdictional findings or to prepare the parent for the child's return (ORS 419B.343(1)(a); ORS 419B.387); and
- The parent's participation in such treatment or training is in the child's best interest (ORS 419B.387).

As set forth above, a juvenile court is authorized to order a psychological evaluation only where such an evaluation is for a service that is rationally related to the findings that bring the child into the court's jurisdiction. That is because under ORS 419B.337(2) the juvenile court may specify the services that will comprise the case plan and ORS 419B.343(1)(a)



requires that services be rationally related to jurisdictional findings. The bar is low to establish a rational relationship between a psychological evaluation of a parent and a jurisdictional basis. However, it does not mean any proof suffices.

In this case, the juvenile court's order for a psychological evaluation was not for reasons related to mother's substance abuse and inability to protect the child from the unsafe environment that caused her to test positive for methamphetamine. Instead, the juvenile court's ruling reflects that it believed an evaluation would assist in understanding the relationship between the parents, as there was something about the relationship the juvenile court did not understand which it found could be harmful to the child. The juvenile court also observed that what the parents really need is help making a parenting plan and noted that perhaps an understanding of mother and father's relationship would assist in making such a plan. The juvenile court's ruling is consistent with that portion of DHS's request that the juvenile court order a psychological evaluation because it would be beneficial in assessing the relationship between the mother and father and would be helpful to have a fuller understanding of mother and father's relationship. That is not a psychological evaluation for a service that is rationally related to the findings that bring the child into the court's jurisdiction.

➤ ***Dept. of Human Services v. N. S. C.*, [316 Or App 755 \(2022\)](#)**

Mother appeals a permanency judgment continuing the plan of reunification for her child, who is currently a ward of the court. Mother contends that the juvenile court erred in ordering mother to submit to a psychological evaluation, because the legal requirements to make such an order were not met.

Held: Affirmed.

The juvenile court did not commit reversible error in ordering mother to submit to a psychological evaluation. Under the standard recently articulated in *Dept. of Human Services v. W. C. T.*, 314 Or App 743, 745, \_\_\_ P3d \_\_\_ (2021), four findings are required before ordering a parent to submit to a psychological evaluation:

- The psychological evaluation is for a service that is rationally related to the findings that bring the child into the court's jurisdiction (ORS 419B.337(2); ORS 419B.343(1)(a));
- The psychological evaluation is a predicate component of treatment or training of a parent (ORS 419B.387);
- There is a need for treatment or training to correct the circumstances that caused the jurisdictional findings or to prepare the parent for the child's return (ORS 419B.343(1)(a); ORS 419B.387); and
- The parent's participation in such treatment or training is in the child's best interest (ORS 419B.387).

Three of those findings were made by the juvenile court and are supported by legally sufficient evidence. With regard to the second *W. C. T.* requirement – that the psychological evaluation is a predicate component of treatment or training of a parent – there is evidence to support the juvenile court’s findings regarding mother’s lack of progress in ordered services for domestic violence and substance abuse. A growing body of our case law establishes that, when a parent has failed to sufficiently engage in services over time, at some point the court may find a psychological evaluation to have become a necessary component of the ordered services. The court’s findings that there is a need for treatment or training to correct the circumstances that caused the jurisdictional findings or to prepare mother for B’s return, and that mother’s participation in such treatment or training is in the best interest of B- are also supported by the record. The juvenile court did not make an express finding as to whether the psychological evaluation is for a service that is rationally related to the jurisdictional findings. Jurisdiction was based on a finding that substance abuse and a chaotic lifestyle interfere with mother’s ability to safely parent B, and that mother exposes B to domestic violence. Given the particular circumstances, the Court of Appeals exercised its discretion to make this finding *de novo*.

## PERMANENCY HEARING

### **ORS 419B.498(2) Determinations (Compelling Reason and Permanent Placement with a Relative)**

➤ *Dept of Human Services v. A.H.*, [320 Or App 65 \(2022\)](#)

Mother appealed from a permanency judgement changing the case plan for her child, M, from reunification to adoption. Mother made three primary arguments, the first two of which were addressed and rejected in *Dept of Human Services v. A. H.*, [317 Or App 697](#); the court adopted the facts and findings of that earlier case in this case as well. Mother’s third argument was that the court erred in finding “no compelling reason” to relieve DHS of its obligation to file a petition to terminate mother’s parental rights to M.

Held: Affirmed

In arguing that the trial court erred in finding no compelling reason to relieve DHS of its obligation to file a petition to terminate mother’s parental rights, mother had the burden to prove the existence of that compelling reason. The court reviewed for whether there was evidence in the record to support the juvenile court’s findings of fact upon which its conclusion was based and agreed with the juvenile court that any delay in moving toward adoption would be reasonable if it were “a very short, short period.”

At the permanency hearing, witnesses testified that, for mother to make adequate progress she must acknowledge her role in the harm done to her two oldest children and take accountability for her role in their removal. Mother had not successfully participated in services and continued to deny that she had caused any harm to any of her children, nor did she prove that she had participated in additional services that would allow for M to safely return to her in a reasonable period of time. As such, the court agreed with the

juvenile court that it was not feasible to conclude that mother could make sufficient progress in that short time.

➤ ***Dept. of Human Services v. J.H.*, [320 Or App 658 \(2022\)](#)**

Parents challenged the juvenile court’s judgment changing their daughter’s permanency plan from reunification to adoption, asserting that the court erred in denying their motion to dismiss dependency jurisdiction and in finding that no exception preventing the change of permanency plan applied.

Held: Judgment changing permanency plan to adoption reversed and remanded; otherwise affirmed.

Parents are both incarcerated. Their daughter was four years old at the time of the permanency hearing and had been living with the maternal grandmother and great grandmother, with whom she was closely bonded. She had been unsuccessfully returned to mother’s care several times and had been a ward of the court for more than 15 of the prior 22 months. The trial court granted DHS’s request to change the permanency plan from reunification to adoption.

The court declined to address the parents’ assignment of error regarding the juvenile court’s denial of their motion to dismiss, finding that neither party had filed a written motion, thus failed to preserve their argument. The court also upheld without elaboration the trial court’s findings relating to reasonable efforts, finding them legally sufficient.

The court then turned to ORS 419B.498(1)(a), which requires DHS to file a petition to terminate parental rights and proceed with adoption when a child has been in substitute care for 15 of the prior 22 months, unless an exception applies. It is the parents’ burden to establish that such an exception exists. One such exception is that a child is “being cared for by a relative and that placement is intended to be permanent.” ORS 419B.498(2)(a).

Parents argued that their daughter was being cared for by a relative in a placement that was intended to be permanent. The great grandmother testified that she was in good health and wanted to continue to care for the child but expressed a preference to serve as a permanent guardian. On appeal, the court disagreed with the trial court’s finding that placement with the great-grandmother was not intended to be permanent. While she did express hope that the child could someday live with mother, her testimony that her intention was to permanently care for the child was undisputed. As the record compels a finding that the child is in a permanent placement with a relative, the exception to adoption under ORS 419B.498(2)(a) applies. The court consequently reversed the trial court’s change of plan to adoption and remanded the case to determine whether durable guardianship, permanent guardianship, or some other permanent plan would be the most appropriate plan for the child.

### **Reasonable Efforts**

➤ ***Dept of Human Services v. L. M. K.*, [319 Or App 245 \(2022\)](#)**

Mother and father separately appeal a judgment changing the permanency plan for their child from reunification to guardianship. Both parents challenge the juvenile court's determinations that Department of Human Services (DHS) made reasonable efforts to reunify the family and that they did not make sufficient progress to allow reunification.

Held:

The Court of Appeals concluded that the record supported the juvenile court's determinations as to mother. However, the juvenile court erred in determining that DHS's efforts afforded father a reasonable opportunity to become a minimally adequate parent.

Reasonable efforts are those 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. The efforts must go on long enough to allow for a meaningful assessment of whether the service (or services) will permit the parent to become a minimally adequate parent. The court considers efforts over the life of the case, but the focus is on the period before the hearing.

In this case, DHS did not afford father an adequate opportunity to demonstrate progress. The juvenile court ordered DHS to provide a number of services aimed at overcoming the parenting deficits that existed in prior cases, addressing father's ongoing mental health concerns, and addressing his failure to understand C's basic needs and to protect C from the safety risks that mother posed. Yet DHS moved to change C's plan from reunification to guardianship a mere four months after the juvenile court asserted jurisdiction over C as to father. In that time, several of the services that DHS identified as being necessary to offer father an opportunity to address his parenting deficits were unavailable. And, over the course of the next 14 months before the court ruled on the permanency plan change, the services provided by DHS continued to be insufficient.

The parenting classes at Options did not begin until nearly a year after the juvenile court took jurisdiction over C as to father, and, even then, the trainer that Options provided was not satisfactory to DHS. DHS referred father to a DBT course but, due to a waitlist, father could not begin that program until nearly a year after the permanency hearing began, and father did not complete the course until after the conclusion of the hearing. And the record is devoid of evidence that DHS provided any services to father that would enable him to ameliorate the jurisdictional basis that he failed to understand and protect C from the safety risks posed by mother.

Reversed and remanded.

➤ ***Dept. of Human Services v. M. W.*, [319 Or App 81 \(2022\)](#)**

The juvenile court took jurisdiction over mother's children on the bases of mother's substance abuse and anger control issues in April 2019. In March 2021, the court instructed DHS to offer mother an opportunity to participate in a dual diagnosis residential treatment program, which would simultaneously treat her substance abuse and mental health issues. In July 2021, while mother was in the Oregon State Hospital, a

permanency hearing began. DHS had referred her to three dual diagnosis programs, but each program required a recent mental health evaluation and DHS had not been able to obtain the evaluation that had been completed at the state hospital. When the permanency hearing was resumed on August 19, DHS still had not received the evaluation even though they had made efforts to get it. Nevertheless, the juvenile court granted DHS's request to change the permanency plan from reunification to adoption. Mother appealed, arguing that the juvenile court erred in determining that the Department of Human Services (DHS) made reasonable efforts to effect reunification.

Held: Reversed and remanded.

DHS's efforts qualify as reasonable only if those efforts supply a parent with a reasonable opportunity to demonstrate the ability to become a minimally adequate parent. Although the court takes into account DHS's efforts over the life of the case, the focus is on the period of time leading up to the permanency hearing. For efforts to be reasonable, they must go on long enough to allow for a meaningful assessment of whether parents are making sufficient progress to permit reunification.

In this case, DHS efforts had not gone on long enough to afford mother a reasonable opportunity to become a minimally adequate parent. Because of institutional barriers, DHS had not yet been able to submit the evaluation necessary for the dual diagnosis programs to assess whether mother qualified for their services. Institutional barriers do not categorically excuse DHS from meeting its obligation under ORS 419B.476(2)(a), an obligation that includes allowing enough time to give parents a reasonable opportunity to use those efforts to ameliorate the risk of harm to their child caused by the jurisdictional bases. Given that the juvenile court previously commented that mother's addiction and mental health issues could sabotage each other and instructed DHS to provide mother with a dual diagnosis program, it was error to change the plan away from reunification before DHS had taken the administrative steps necessary to give mother that opportunity.

➤ ***Dept. of Human Services v. A. H.*, [317 Or App 697 \(2022\)](#)**

The juvenile court took jurisdiction of C, L, and M based on allegations that: (1) parents failed to provide for J's basic daily needs, medical care, and nutritional requirements and that J suffered malnutrition in parents' care, (2) J suffered a nonaccidental injury that was at variance with the explanation given by parents and that the circumstances that led to termination of mother's parental rights to J's half-brother had not been ameliorated and interfered with her ability to safely parent her children, and (3) parents were unable or unwilling to provide for the educational needs of L, who was removed from school due to behavioral issues.

Mother moved to dismiss jurisdiction and terminate wardship and the juvenile court denied her motions. During the hearing on those motions, DHS presented evidence that it had provided mother with services, including two psychological evaluations, mental health services, parenting services, in-home safety reunification services, a parenting coach, supervised visitation, family counseling and ongoing case planning. Clausel evaluated mother and provided a report describing mother as "an intellectually modest

young woman functioning in the Borderline Mentally Retarded range.” He was extremely concerned that mother was not acknowledging parents’ significant physical abuse, starvation and neglect of mother’s two oldest sons or father’s abuse of mother. He encouraged mother to engage in therapy in a way that she is able to fully, freely address her parenting issues in an atmosphere of maximal privacy and trust. Mother participated in weekly therapy for over a year with her chosen therapist (Whitaker), however, she did not address all of the issues identified by Clausel. DHS provided Whitaker with a copy of Clausel’s evaluation once it was completed (after treatment had begun), but Whitaker did not adjust her treatment plan based on that report. Whitaker disputed Clausel’s diagnosis of mother but testified that she believed that her approach was consistent with Clausel’s evaluation and that she was able to meet all of his recommendations. However, her approach was primarily cognitive behavioral therapy to address stress, anxiety, and sleep, and did not address issues related to mother’s role in the abuse of her two oldest sons. Even though mother’s therapy did not engage the issues that Clausel recommended, she was offered other wraparound services that would have served the same purpose.

At the permanency hearing, the court entered into evidence a recording of the hearing on mother’s motion to dismiss. In an oral ruling at end of the hearing, the court found that DHS made reasonable efforts, but expressed concern that mother’s therapy didn’t address the core issue relating to mother’s abuse of her sons. The court noted that the DHS caseworker had spoken with mother about developing a course of treatment with Whittaker that is consistent with Clausel’s recommendation. The court stated its finding of reasonable efforts was close because DHS was aware of the determination that mother had borderline intellectual functioning and had not made sure the therapy was consistent with the evaluator’s recommendation. The court encouraged DHS to increase its role in helping mother find therapy that addressed the issues that Clausel recommended, but also found that the record did not indicate that mother was unable to understand or follow instructions. The court found that efforts by DHS were reasonable but despite the changes in the plans for the children from reunification to guardianship, services to mother would continue. The court ordered DHS to provide more active oversight to the course of treatment to make sure it is in compliance with Clausel’s report, rather than relying on mother to relay that necessity to the counselor.

The court incorporated its oral findings into the written judgments, and DHS prepared and served mother with the judgments. Receiving no objection from mother, DHS submitted the judgments to the court 10 days later.

Mother appeals from the permanency judgment changing the case plans for two of her children, C and L, from reunification to guardianship. First, she argues that the trial court erred in entering the judgments because it failed to include all the findings required by ORS 419B.476(5). Mother acknowledges that she did not raise that issue below but contends that she had no practical ability to do so because it did not arise until entry of those judgments. Second, mother asserts that the court erred by concluding, as necessary to change the plan, that the reunification efforts of the Department of Human Services (DHS) were reasonable.

Held: Affirmed.



Mother had an opportunity to object to the lack of findings in the judgment, and any error was not plain because the court's oral findings were incorporated into the judgment. Regarding the reasonable efforts determination, DHS allowed mother to choose her own therapist, despite its awareness of Clausel's diagnosis regarding her intellectual functioning. However, that decision was consistent with his recommendation for highly confidential treatment that would allow mother to address her issues in an "atmosphere of maximal privacy and trust." Moreover, DHS provided mother's therapist with a copy of Clausel's evaluation and she testified that she reviewed it and believed her approach was consistent with what he recommended. Although one may dispute the therapist's testimony in that regard, we don't conclude that any mistake by the therapist in applying Clausel's recommendation was attributable to DHS. Also, mother was offered other services that would have addressed the issues identified by Clausel, but declined them, and she exhibited a pattern of not being forthcoming and denying the abuse of her two oldest sons. The juvenile court did not err in concluding that DHS made reasonable efforts toward reunifying the family.

### **Reasonable Efforts; Sufficient Progress**

➤ *Dept. of Human Services v. R. C.*, [320 Or App 762 \(2022\)](#)

Father appealed the juvenile court's judgment changing the permanency plan for his son, G, from reunification to adoption. Father claims error in the trial court's determination that DHS made reasonable efforts toward reunification and that father had made insufficient progress toward reunification.

Held: Affirmed

DHS removed G from his mother shortly after birth, in March 2020, due to prenatal exposure to methamphetamine and his mother's methamphetamine addiction and inability to safely parent him. Father was legally established as G's legal father in February 2021. G had been placed in a foster home with his half-sister K (from a different father), where he remained. Father was incarcerated at the time paternity was established and the trial court took jurisdiction based on his admission that he was unable to be a custodial resource, lacked the parenting skills necessary to safely and appropriately parent G, and needed DHS's assistance to obtain those skills.

After starting his work with DHS, father complied with DHS's requirements, engaging in twice monthly visits with G, reading parenting books that DHS sent him, providing DHS with written summaries of the books, and sending drawings and photographs to G. He participated in the programming available where he was incarcerated, though programs were limited due to COVID-19 (parenting programs that would otherwise have been available to father had been eliminated). Father maintained good conduct and was in a minimum-security facility. He was eligible for the AIP early release program, with a likely release date in April or May 2022. Father also provided DHS with information about relatives who were potential placement resources (none of those relatives were able to take G, due to their individual circumstances).

DHS sought to change G's plan from reunification to adoption based on father's continued incarceration and G's need for consistency and stability. Two days before the contested permanency hearing, father was involved in a fight with another inmate, resulting in him being placed in segregation, transferred to a medium-security facility, and losing his eligibility for AIP early release. Father's release date was delayed by at least 6 months. DHS argued that father's continued incarceration and the extension of his possible release date due to the fight demonstrated that he had not made sufficient progress to allow G to be placed with him within a reasonable period of time, based on G's specific needs and age.

At the permanency hearing, DHS presented expert witness evidence specific to G, describing his prenatal substance exposure and increased risk for developmental, emotional, and behavioral problems. The expert testified that there would be a very high risk of short and long-term harm to G's mental health and relational abilities if he were to be removed from his foster home at the age of two-and-a-half, despite any services DHS was able to provide. The trial court found that DHS had made reasonable efforts under ORS 419B.476(2)(a) to reunify the family.

DHS's reunification efforts included providing visits, parenting books, an action letter, an opportunity to identify other potential caregivers since he could not himself, engaging with father monthly and talking with him about what he had learned, where G was, and providing him with updates and photos. The juvenile court read the summaries that father had prepared about the parenting books he read, finding them insightful. But the juvenile court ultimately found that father's behavior, particularly the fight, had lost him the ability to be involved in G's life, losing visits and AIP eligibility. The trial court concluded that a best-case scenario for reunification, given the circumstances, would result in G being placed with his father after 35 months in care—G's whole life—almost certainly resulting in lasting mental health and behavioral issues. Based on these findings, the trial court changed G's plan from reunification to adoption.

In reviewing the case, the court noted that it would defer to the juvenile court's findings of fact if supported by any evidence in the record, that it would assume that the juvenile court implicitly found predicate facts necessary to support its disposition and viewed the evidence in the light most favorable to the juvenile court's disposition. Based on this, the court assessed whether the record was legally sufficient to permit the juvenile court's change of plan. The court agreed with the juvenile court in its determination that DHS had made reasonable efforts and that father's progress was insufficient for errors of law.

Regarding reasonable efforts, the court noted that, although a parent's incarceration alone does not excuse DHS from making reasonable efforts toward reunification, the juvenile court can properly consider the length and circumstances of a parent's incarceration and evidence of their willingness and ability to participate in services. DHS must give the parent a reasonable opportunity to demonstrate their ability to adjust their conduct and become a minimally adequate parent. The trial court should evaluate DHS's efforts throughout the case, with an emphasis on a period before the hearing sufficient in length to afford a good opportunity to assess parental progress. Although father argued that he had insufficient time for DHS's efforts to be considered reasonable, in light of COVID-19 restrictions, the court observed that DHS had offered a broad scope of services and father

had fully engaged in them. The record contained no evidence about any specific additional efforts that would have made a material improvement.

The court also found that the record supported a finding that father had not made sufficient progress toward reunification. Given the length of time remaining on his sentence and father's lengthy criminal history and recent fight, it was reasonable for the trial court to believe reunification may be further delayed. The court also found that the record supported the juvenile court's ultimate determination that 17 months was too long for G to wait, given G's greater need for permanency due to his prenatal controlled substance exposure and vulnerability in early adaptive skills.

## TERMINATION OF PARENTAL RIGHTS

### Best Interest

➤ *Dept. of Human Services v. D. F. R. M.*, [313 Or App 740 \(2021\)](#)

Mother appeals a juvenile court judgment terminating her parental rights to her son. She does not challenge the juvenile court's finding that she is unfit to be a custodial resource for child but contends that the Department of Human Services (DHS) failed to meet its burden to establish by clear and convincing evidence that termination of her parental rights is in child's best interests. She contends that a continuing relationship with her and with grandmother is in the child's best interests and that a permanent guardianship would secure that relationship while allowing the court to determine whether the child should have continuing contact with mother.

For the two years preceding the termination trial, the child has been placed in a home with his two older siblings with foster parents who would like to adopt him. He is attached to the foster parents, his siblings, and according to the caseworker, his grandmother and mother. Mother's parental rights to the two older children were terminated by default in a separate proceeding the year before the termination trial. Grandmother was very involved in the lives of all three children, frequently serving as caregiver prior to their removal, and participating in visitation prior to the termination of mother's parental rights. A mediation with foster parents regarding continuing contact with the two older children, who the foster parents have adopted, was attempted but terminated by foster parents. Mother has a history of drug use, arrests, criminal convictions, and periods of incarceration. At the time of the termination hearing, she acknowledged that she was not yet in a position to be a custodial resource for the child, but that she intended to engage in a medically assisted treatment program and was optimistic she could eventually attain sobriety.

The caseworker and child's psychologist testified that adoption was in the child's best interest. They equated permanency with adoption in their testimony, with the caseworker opining that adoption was the most permanent option and that with guardianship, a parent retains the ability to take the foster parents back to court to try and obtain custody of the child. Both witnesses' testimony emphasized the importance of preserving child's

placement with foster parents and assumed that adoption was the only way to do so. Both also emphasized the fact that child's siblings had been adopted and speculated that child would suffer if he did not have the same legal status as his siblings. The caseworker also testified that the child calls the foster parent's mom and dad and views them as parental figures. In concluding that termination was in child's best interests, the juvenile court accepted the framing offered by DHS and its witnesses, emphasizing the serious risk of negative effects if child's secure placement with the foster parents was disrupted.

Held: Reversed. On de novo review pursuant to ORS 19.415(3)(a), the Oregon Court of Appeals concluded that DHS did not establish that termination of mother's parental rights is in child's best interests by clear and convincing evidence.

To grant a petition to terminate parental rights, the juvenile court must find that DHS has proved at least one basis for terminating parental rights under ORS 419B.502 to 419B.510 and that termination is in the child's best interest under ORS 419B.500. In this case, the Court of Appeals found the juvenile court erred in deciding that DHS met its burden to establish by clear and convincing evidence that termination of mother's parental rights is in the child's best interests. The court rejected the idea that permanency can only be achieved through adoption. A permanent guardianship is permissible only if the juvenile court finds that the grounds for termination of parental rights are met and finds that it is in the child's best interest that the parent never have physical custody of the child. A parent cannot seek to vacate a permanent guardianship. ORS 419B.368(7). It follows that the child is not necessarily subjected to a realistic fear that his placement is insecure if he is not adopted. The court found it was the responsibility of the adults to communicate to the child what he needs to know about the permanence of his legal relationships. Finally, the court gave significant weight to the importance of preserving the child's relationship with his biological parent where it is possible to do consistent with his best interests.

➤ ***Dept. of Human Services v. J. S. E. S.*, [315 Or App 242](#) (2021)**

Mother appeals from a juvenile court judgment terminating her parental rights to her daughter, S, who was four years old at the time of the termination hearing. She challenges only the court's finding that termination was in S's best interest, arguing that the court erred given the availability of a permanent guardianship.

Mother has a history of co-occurring substance abuse disorders and major depressive disorder that progressively worsened over the lifetime of this case. Her disorders cause her to become emotionally dysregulated, out of touch with reality, and neglectful of her children's needs. Although she consistently attends visits with S, the visits are often problematic and cause harm to S. Mother's reactions and needs dominate the visits; she becomes emotionally dysregulated and cries inconsolably in nearly every visit. S often asks to end visits early and appears withdrawn and distant following visits. S also expressed that she is in foster care because mother does not want her, does not like her, and does not take care of her. S is in a foster placement with her adult sister and brother-in-law, with whom she has a healthy attachment. She prefers to remain with them, and they are willing to adopt her. S's foster parents and mother do not have a good relationship, and the foster parents have concerns about keeping S safe with mother

involved. During one incident, S's foster mother dropped S off for a visit, and mother charged at the foster mother's car.

Held: Clear and convincing evidence established that termination was in the best interest of S. Affirmed.

ORS 419B.500 provides that the parental rights of the parents of a ward may be terminated only if the court finds it is in the best interest of the ward. That determination is focused on the needs of the child. The fact that a parent is unfit does not necessarily establish that termination of their parental rights is in the child's best interest.

The record in this case demonstrates that mother's unregulated behavior negatively impacts S, resulting in S functioning in a parental role centering on mother's needs in a way that is unhealthy for S, even when their visits are supervised. Moreover, a permanent guardianship would be difficult to maintain with her proposed adoptive parents, given that mother is not on good terms with them and they have valid concerns that she will not respect their boundaries. The record also establishes that maintaining that placement is in S's best interest.

➤ ***Dept. of Human Services v. D. E. P.*, [315 Or App 566 \(2021\)](#)**

Mother appeals from a juvenile court judgment terminating parental rights to her child, B, who was nearly nine years old at the time of the termination hearing. Mother stipulated at trial to the allegation that she was "unfit by reason of conduct or conditions seriously detrimental to the child," but asserted that terminating her parental rights was not in B's best interest. The juvenile court terminated mother's rights, finding termination was in B's best interest.

B has been thriving in a stable foster care placement and is bonded to her foster mother of two years. Mother has a history of drug use and is a victim of domestic violence. She's had minimal success in drug treatment and continued to see her abuser within a week before the termination hearing. She participated in visits with B while the case was pending, although she missed visits for months at a time, which was troubling for B. There was no dispute among the trial witnesses that B and her siblings were all strongly bonded to mother and desired to live with her. Although the majority of witnesses recommended adoption, they all recognized that maintaining a relationship with mother would be beneficial to B.

Held: Reversed.

Parental rights may be terminated under ORS 419B.500 only upon a finding that it is highly probable that doing so is in the particular child's best interests. DHS must make that showing by clear and convincing evidence.

It is well established that a permanent guardianship is a permanent arrangement that may not be challenged by a parent and that adoption is not the only means of fulfilling a child's need for permanency. The Court rejected the assumptions made at trial that adoption is

the most permanent option, that permanent guardianship is a temporary arrangement, and that mother can disrupt a permanent guardianship. All witnesses acknowledged that B is attached to mother and maintaining a relationship with mother is important to B's well-being. The Court gives significant weight to the importance of preserving a child's relationship with her biological parent where it is possible to do so consistent with her best interests.

In this case, the record lacks clear and convincing evidence that B's best interests require severance of mother's legal relationship with her so that any further contact is entrusted entirely to the good will of an adoptive parent. Even though DHS and the court appear to have assumed that B's adoptive parent would allow further contact, that does not substitute for the required evidence that B's best interest requires termination of mother's parental rights. Given child's attachment to mother and the availability of permanent guardianship, the juvenile court erred in finding that terminating mother's parental rights was in B's best interest.

➤ ***Dept. of Human Services v. D. T. P.*, [317 Or App 810 \(2022\)](#)**

Father appeals a judgment terminating his parental rights to his children, I and M. Father will be incarcerated until 2024 and does not contest that he is currently unfit to parent the children but contends that termination is not in the children's best interest because a permanent guardianship could provide them the necessary permanency.

Held: Affirmed.

Termination of parental rights is in the children's best interest. The children's current caretaker where they had lived for the preceding three years before trial was designated as their adoptive placement, and she was not willing to agree to a permanent guardianship. Under the circumstances of this case, it was in the children's best interest to terminate parental rights to allow the children to maintain their stability and permanency with their current caretaker who was also willing to agree to post-adoption contact.

## **Best Interest and Reasonable Time**

➤ ***Dept. of Human Services v. A. D. G.*, [314 Or App 290 \(2021\)](#)**

Mother appeals a judgment terminating her parental rights to her now three-year-old son, M. M was born prematurely and had been affected by mother's drug use while pregnant. The Department of Human Services (DHS) removed M from his mother's care and initially placed him with his mother's sister after the sister was granted certification for a temporary and emergency placement. Initially, mother's sister showed interest for full certification, but later rescinded her willingness to participate. Since then, M has had a history of transitions from caregiver to caregiver. A termination hearing took place and the juvenile court terminated mother's parental rights.



Held: On de novo review, the Court of Appeals affirmed the juvenile court's termination decision.

To terminate parental rights under ORS 419B.504, a juvenile court must find, by clear and convincing evidence that: (1) the parent is unfit by reason of conduct or condition seriously detrimental to the child or ward; (2) integration of the child into the home is improbable within a reasonable amount of time due to conduct or conditions not likely to change, and (3) termination is in the child's best interests. ORS 419B.500. In this case, mother does not dispute that she is not fit. Regarding the second prong, the court was not persuaded that M could be reintegrated into mother's home within a reasonable amount of time, even viewing reintegration broadly to include a private arrangement that mother might make to have her sister care for M. Although mother expressed an interest in formally placing M in her sister's care from the start through a private arrangement, she failed to pursue a private adoption or guardianship over the course of two years, and testified at trial that her objective for at least part of that time was to have M in her custody. Regarding the third prong, the court found termination is in M's best interests based on expert testimony at trial that M needs permanency and that it is critical that it happen soon so that he can form attachments to his caregivers. DHS determined it could not approve a guardianship with mother's sister (a decision that was not before the court) and no other potential guardians have been identified. The court's conclusion was influenced by DHS counsel's representations that mother's sister, though not eligible to be approved as guardian, could be considered as an adoptive placement.

## Relinquishment and Revocation

➤ *Dept. of Human Services v. K. J. V.*, [320 Or App 56 \(2022\)](#)

Mother signed documents relinquishing her parental rights to the child, J, giving DHS the right to consent to J's adoption. Approximately ten months later, mother asked the juvenile court for a review hearing, stating that she had revoked her relinquishment. After a hearing, the juvenile court entered two judgments: one finding that mother had failed to prove that her relinquishments were rendered out of fraud, the adoptive placement had been designated legal risk and as such the relinquishments could not be revoked, and a second terminating DHS's jurisdiction and wardship over J. J's adoption was finalized on September 22, 2021.

Held: Review judgment and judgment terminating jurisdiction and wardship vacated and remanded

On October 2, 2020, mother signed two documents related to J: 1) a "release and surrender," agreeing that mother was "absolutely, permanently, and irrevocably" relinquishing "full custody, guardianship and control" of J to DHS and 2) a "certificate of irrevocability and waiver," stating that the release and surrender "shall become irrevocable as soon as the child is placed by" DHS in the custody of those who intend to adopt the child. DHS designated J's adoptive placement on May 20, 2021.

In August 2021, mother filed a motion and requested a review hearing, asserting that she had revoked the release and surrender and her consent to adoption. At that hearing, DHS presented testimony about the process around mother signing the relinquishment documents and about subsequent contacts with mother about those documents. Mother's caseworker testified that she and a prior caseworker had met with mother directly, after receiving permission from mother's attorney, to explain the relinquishment process to mother and answer her questions. The caseworkers testified that they answered several questions for mother and mother indicated that she "completely understood."

Mother also testified at the hearing and agreed that the DHS caseworkers had gone over the relinquishment documents with her, answered her questions, and that she thought she understood everything in the documents. However, about a month after signing them, mother realized she had made a mistake and texted her caseworker at that time, saying she wanted to revoke the relinquishment, but did not receive a response. Mother testified that she contacted the caseworker again, about 60 days later, telling the caseworker that she wanted to revoke her relinquishment, but again did not receive a response. Although mother was represented by counsel through March 11, 2021, she testified that, when she tried to contact her attorney about revoking the relinquishments, she did not receive a response.

During the hearing, DHS noted that J had been placed with an adoptive family, the adoption was close to finalization, and that the time for mother to revoke had passed—that she could not at that time revoke unless she could prove fraud or duress. DHS cited ORS 418.270(4), which provides that, after placement for adoption, a parent can only have a relinquishment set aside if they prove fraud or duress. J's attorney echoed DHS's argument.

The juvenile court denied mother's motion, finding that mother had signed the relinquishments on October 2, 2020, the adoptive placement was designated on May 20, 2021, and the documents stated that mother was "absolutely, permanently, and irrevocably" relinquishing her parental rights. The juvenile court further concluded that it found no fraud or duress proven and denied mother's motion. In response to the court's findings, mother's attorney asked the juvenile court if it was interpreting the term "irrevocably" to indicate that at the time mother signed the document it could not be revoked. The juvenile court responded, "I'm noting for the record that the word appears, it says 'irrevocably.' I'm noting that and basing the decision on that, but primarily on subsection (4) of ORS 418.270." The juvenile court then entered two judgments: one finding that mother had failed to prove that her relinquishments were rendered out of fraud, the adoptive placement had been designated legal risk and as such the relinquishments could not be revoked, and a second terminating DHS's jurisdiction and wardship over J. J's adoption was finalized on September 22, 2021.

DHS argued that mother's appeal was moot. The court rejected this argument, finding that, if mother had in fact revoked her relinquishment, then DHS did not have the authority to consent to J's adoption. Furthermore, ORS 109.381(3) provides that a judgment of adoption shall be binding on all persons, irrespective of jurisdictional or other defects, after the expiration of one year from the entry of judgment. Under that statute, though J's adoption was final it was not yet conclusively binding irrespective of

any defects. The court further found that the outcome of the appeal could have significant practical effects on mother and her legal relationship with J. The appeal, therefore, was not moot.

The court found that the juvenile court erred when it concluded that mother had “irrevocably” relinquished J, based on the release and surrender document. The court noted that a release or surrender for adoption under ORS 418.270(4) “*shall become irrevocable as soon as the child is placed by the agency in the physical custody of a person or persons for the purposes of adoption.*” A relinquishment becomes irrevocable, then, after placement for adoption. After such placement, the certificate of irrevocability and the release or surrender may not be revoked by the parent or guardian unless fraud or duress is affirmatively proved. The question for the court on appeal, then, was whether mother revoked her relinquishment before May 20, 2021, the date J was placed for adoption.

The court remanded the matter to the juvenile court to determine whether mother revoked her relinquishment before May 20, 2021, the date the relinquishment became irrevocable under ORS 418.270(4).

## Appeal issues

### ASSIGNMENT OF ERROR—DEPENDENCY

➤ ***Dept of Human Services v. R.H.*, [320 Or App 383 \(2022\)](#)**

In this juvenile dependency case, father appeals a juvenile court judgment establishing dependency jurisdiction, requesting de novo review, and assigning error to the ultimate ruling of jurisdiction over the children without separately assigning error to any individual jurisdictional findings.

Held: Affirmed.

The court declined to exercise de novo review, finding that this was not an “exceptional case” that would warrant such review. The court further found the evidence sufficient to allow the trial court to make a jurisdictional finding relating to a sexual abuse allegation, which was father’s focus on appeal. In his appeal, father noted that the court need only review the remaining allegations if the court overturned the sexual abuse allegation. Having upheld the trial court’s finding on the sexual abuse allegation, which was sufficient to uphold the ultimate jurisdictional finding, the court declined to review the other allegations, finding father did not seek independent review of those findings.

Recognizing that the Oregon Rules of Appellate Procedure may not be clear about what they require in terms of assigning error to individual jurisdictional findings, the court clarified best practices:

If an appellant wants [the court] to review a particular jurisdictional finding *independent* of [the court’s] conclusion as to whether dependency jurisdiction

exists, the best practice is to assign error to that individual jurisdictional finding (in addition to assigning error to the ultimate jurisdictional ruling), and then incorporate that issue into the questions presented, the argument, and the relief requested. Alternately, if a party seeks review only of the ultimate jurisdictional ruling as to a child, it is sufficient and compliant with the rules to assign error only to that one ruling.

## PRESERVATION—DELINQUENCY

### ➤ *State v. A. E. J.*, [317 Or App 363 \(2022\)](#)

Youth appealed from a juvenile delinquency proceeding finding her within the jurisdiction of the court for acts that, if committed by an adult, would constitute the crimes of harassment (ORS 166.065) and attempted fourth-degree assault (ORS 161.405(2)). Youth raised three assignments of error on appeal: first that the juvenile court found she had not acted in self-defense and second and third that the juvenile court had found the evidence legally sufficient to find her in jurisdiction for harassment and fourth-degree assault. The court found that youth did not preserve her assignments of error advanced on appeal and declined to address the claims on a “plain error” basis.

Held: Affirmed

Neither party requested *de novo* review. The court therefore reviewed the juvenile court’s legal conclusions for errors of law and bound itself to the juvenile court’s findings of fact, as long as those findings were supported by the evidence in the record.

Youth alleged various errors on appeal relating to the juvenile court’s denial of her self-defense claim: that the juvenile court applied an incorrect legal standard by applying a “parental discipline” defense on behalf of her father and by failing to apply a “reasonable child” standard when assessing the youth’s self-defense claim. The state argued that the youth failed to preserve those arguments at trial. Youth responded that she preserved those issues in her closing argument, having argued that the state had failed to disprove her self-defense claim beyond a reasonable doubt.

The court agreed with the state. Although a party may preserve a challenge to the legal sufficiency of the evidence in closing arguments, to successfully do so the argument must sufficiently identify the asserted legal insufficiency as such, and not merely argue that the trial court should not be persuaded by the state’s evidence. The court found that the youth’s closing argument failed to include any discussion of the asserted legal insufficiencies of the state’s case and just argued that the juvenile court should find her version of the facts to be credible (thus conclude the state had failed to meet its burden to disprove the self-defense claim). The court also found that youth had not requested plain error review and so declined to address that question.

## REVIEWABILITY--DELINQUENCY

➤ ***State v. F. T.*, [316 Or App 772 \(2022\)](#)**

Youth appealed a juvenile court order committing her to the Oregon Youth Authority for placement in a youth correctional facility (YCF) to serve time for both Class A and Class B misdemeanors. Youth argued that the juvenile court erred because ORS 420.011 prohibits a youth from serving time in a YCF for a Class B Misdemeanor. The court dismissed the appeal as moot because youth's commitment period of 388 days had ended.

Held: Appeal dismissed as moot.

In determining whether to address the merits of the youth's moot appeal, the court first determined whether the appeal satisfied the requirements of ORS 14.175 and, if so, whether to exercise its discretion to consider it. The parties agreed that ORS 14.175 (1) and (2) were satisfied: youth had standing and the challenged act was capable of repetition. However, the parties disagreed about whether (3) was satisfied: whether the challenged act was "likely to evade judicial review in the future."

Youth argued that the maximum period of commitment for a Class B misdemeanor when attached to a Class A misdemeanor is 18 months, an insufficient amount of time to achieve appellate review. She also argued that the average length of stay for all youth in a YCF is shorter than the average duration of appeal. The state countered that the question of whether time related to a Class B misdemeanor can be served in a YCF could arise for youth who have been adjudicated for both Class B misdemeanors and felonies. Because felonies have a maximum commitment period of five years or greater, those appeals would not be likely to evade review.

The court agreed with the state: the question is not whether a person in youth's circumstances would also fail to obtain appellate review, but whether the general type or category of challenge at issue is likely to evade being fully litigated. Because it appears unlikely that the issue would evade review if presented in a case where a youth had been adjudicated for both a felony and a Class B misdemeanor, the requirements of ORS 14.175 were not satisfied and the court dismissed the appeal as moot.

## REVIEWABILITY—DEPENDENCY

➤ ***Dept. of Human Services v. T. B. L.*, [320 Or App 434 \(2022\)](#)**

Father appealed the trial court's judgment taking jurisdiction of K and S, raising six assignments of error on, arguing that the evidence was legally insufficient to support jurisdictional findings as to the children. After father filed his appeal, the trial court terminated jurisdiction and wardship over the children. DHS moved to dismiss father's appeal as moot.

Held: Motion to dismiss appeal denied; reversed

Regarding DHS's motion to dismiss father's appeal, father identified collateral consequences that would flow from the jurisdictional judgments, notwithstanding their

dismissal prior to appeal. The court denied DHS's motion to dismiss, recognizing the disadvantages father would face in subsequent DHS investigations, his inability to obtain agency review of any future founded disposition regarding child abuse or neglect, and the effects on his right to custody, parenting time, and visitation in future domestic relations proceedings.

The court then turned to the merits of the underlying dependency case. After a series of four incidents between December 31, 2020, and June 3, 2021, where the parents' quarreling resulted in law enforcement response to the family's home, DHS filed dependency petitions alleging the children's welfare was endangered by the parents' "ongoing volatile and/or unsafe relationship." The incidents involved verbal disputes and pushing and shoving. Father was bit by mother in at least one of the incidents, his arms were scratched in another, during one incident father pushed mother and she fell, lightly scuffing her knee or elbow, and there was broken glass in the driveway. The children witnessed at least two of the incidents.

The court reviewed the legal bases for dependency jurisdiction based on ORS 419B.100(1)(c): the state must prove, by a preponderance of the evidence, that a child's welfare is endangered because, under the totality of the circumstances, there is a current threat of serious loss or injury to the child that is reasonably likely to be realized; there must be a nexus between the parent's conduct or condition and harm to the child; the state must present evidence about both the severity of the harm and the likelihood that it will occur, and the type, degree, and duration of the harm must be such that exposure to a reasonable likelihood of that harm justifies juvenile court jurisdiction; also, the threat of serious harm cannot be speculative.

The court held that, though the evidence might be sufficient to show the parents had an "ongoing volatile and/or unsafe relationship," it was not sufficient to show that the relationship posed a nonspeculative threat of serious loss or injury to the children that was reasonably likely to occur. The court also found no evidence that the children were ever the objects of their parents' volatile and/or unsafe conduct nor that they were close enough to be endangered by it. And though DHS argued that the children were at risk because they could be present and could attempt to intervene in the parents' fighting (pointing out that it is common for children to attempt to intervene when they see physical violence between parents), the court held that the juvenile court could not assert jurisdiction based on generalizations and assumptions. The court found no evidence in the record that would lead it to conclude that these specific children had, or would, attempt to intervene. On the contrary, the evidence showed the opposite—on those occasions where the children observed fighting they had not attempted to intervene. The court ultimately held that there was insufficient evidence to support a determination that the parents' relationship posed a present, nonspeculative risk of serious loss or injury to the children that is reasonably likely to be realized.



## Other Cases of Interest

### REFEREE/PRO TEM APPOINTMENT

➤ ***Dept. of Human Services v. J. H.*** [320 Or App 85 \(2022\)](#)

In this juvenile dependency case, father moved to set aside a judgment of jurisdiction over his child, asserting that the judge pro tempore who presided over the hearing and entered the judgment lacked authority to do so because his pro tempore appointment had expired several months earlier. The trial court denied father's motion, stating that the "de facto judge" doctrine operated to validate the judgment. Father appealed, contending that the de facto judge doctrine did not apply.

Held: Affirmed.

Jason Thomas was sworn in as a judge pro tem on April 12, 2018, and presided over the jurisdictional and dispositional hearings in this case on May 7 and 11, 2021, respectively. Father appealed the judgment of dependency. While that appeal was pending, on July 16, 2021, father's counsel was notified by email that Thomas's pro tempore status had expired on April 11, 2021. On September 3, 2021, father moved to set aside the jurisdictional judgment, asserting that it was entered without legal authority. The court denied the motion, indicating that the de facto judge doctrine applied and that the issue should have been raised at the time of trial.

On appeal, father argued that the judgment was not merely voidable, but void, because Thomas was not acting "under color of any law that purported to confer authority upon him to do so." In the alternative, he asserted that even if the judgment were merely voidable, it can permissibly be challenged under ORS 419B.923.

The court found that the judgment was not void, citing Oregon courts' consistent recognition that an action taken by a judge who lacks the authority to take the action is voidable rather than void so long as the court had subject matter jurisdiction over the case. Moreover, where there is a performance of official duties, with the acquiescence of the public, creating the appearance of lawful authority, it would be unjust and unreasonable to undo acts performed in that capacity. Because he had continued in his role as a judge pro tempore under claim or color of right and with the legal indicia of the title, Thomas was a de facto judge when he rendered the judgment. The acts of a de facto judge are valid and binding and cannot be collaterally assailed; any challenge to authority must be made before the adverse judgment is rendered. The court also disagreed with father's assertion that Thomas had committed a jurisdictional violation, finding that ORS 1.645(2) does not deprive the court of jurisdiction to hear a case and enter judgment, nor does it deprive the appellate court of jurisdiction to hear an appeal of said judgment. Father does have the right to appeal the underlying jurisdictional judgment and has not been deprived of due process.

The court also rejected father's claim that his motion was not an impermissible collateral attack on a voidable judgment, stating a challenge to the actions of a de facto judge must

be made prior to the adverse judgment being entered, notwithstanding the party's ignorance of the jurist's lack of authority.

## REVIEW OF AGENCY'S (DHS) FINAL ORDER

➤ ***Querbach v. Dept. of Human Services*, [369 Or 786](#) (2022)**

In this judicial review proceeding, petitioner sought to overturn a final order of DHS that determined that four reports to DHS that petitioner had abused two children were "founded," meaning that there was "reasonable cause to believe that the abuse had occurred." The circuit court assumed that "reasonable cause to believe" is a "probable cause" standard and concluded that only two of DHS's four "founded" determinations could be sustained under that standard. The Court of Appeals rejected the circuit court's application of a "probable cause" standard and, instead employed a "reasonable suspicion" standard and concluded that three of DHS's founded determinations must be sustained.

Held: The decision of the Court of Appeals is affirmed. The judgment of the circuit court reversing DHS's "founded" disposition for physical abuse is reversed but is otherwise affirmed.

DHS has defined the terms "founded," "unfounded," and "unable to determine," as they relate to reports of child abuse, in its administrative rules. A "founded" determination means that "there is reasonable cause to believe [that] the abuse occurred," OAR 413-015-1010(2)(a). This same standard triggers a mandatory reporter's duty to make a report to DHS, under ORS 419B.010. An "unfounded" determination means that "there is no evidence [that] the abuse occurred." OAR 413-015-1010(2)(b). "Unable to determine" means that "there is some indication [that] the abuse occurred, but there is insufficient evidence to conclude that there is reasonable cause to believe [that] abuse occurred." OAR 413-015-1010(2)(c). "Reasonable cause" means "a subjectively and objectively reasonable belief, given all of the circumstances and based on specific and articulable facts." OAR 413-015-0115(58).

Any report of child abuse that results in a "founded" determination must be included in a central state registry that DHS is required to maintain. ORS 419B.030(1). Once a "founded" determination is included in the registry, it is part of the history of the child and the family that DHS must consider in any later child abuse assessment. ORS 413-015-0415(1)(a)(B), (b). However, the "founded" determination has no independent legal significance in criminal, juvenile dependency, domestic relations, or other proceedings.

The final step in the agency review process is the entry of a final order regarding the "founded" determination. The final order may be reviewed in court by the subject of DHS's determination, as an order "in other than [a] contested case." The trial court's review is limited to certain specified claims, one of which is a claim that the order is "not supported by substantial evidence in the record." ORS 183.484(5)(c). The record for the trial court's review is developed by the parties in a trial-like proceeding and is not limited to the evidence that was before the agency when it issued its order. This provides the parties with an opportunity to place evidence in the record that responds to or

supplements the evidence that the agency reviewed that formed the basis of its decision. The court's role, then, is to decide whether the agency's determination is supported by substantial evidence in the expanded record, that is, whether the evidence would permit a reasonable person to make the determination the agency made in that particular case.

After a contested hearing, the trial court held that a "founded" determination must be supported "to a *probable cause* standard" and concluded that two of DHS's founded dispositions were supported by substantial evidence.

The Court of Appeals interpreted the "reasonable cause to believe" standard in the DHS rules as equivalent to the "*reasonable suspicion*" standard in criminal law and found that three of DHS's founded determinations were supported by substantial evidence in the record, and one was not.

The Supreme Court found that "reasonable cause to believe" differs from "probable cause to believe," in that the latter refers to evidence that would support a belief that it is *probable* that the specific circumstance exists, that is, *more likely than not*. In contrast, DHS's definition of "reasonable cause" means a subjectively and objectively *reasonable belief*, given all of the circumstances and based on specific and articulable facts. In other words, *based on reasonableness, not probability*. So, whether or not the Court of Appeals was correct in using "reasonable suspicion" as a proxy for "reasonable cause," it was correct when it rejected the trial court's use of a "probable cause" standard and held that the relatively lower "reasonable cause" standard set out in the rule applies.

The Supreme Court further held that judicial review of an order in other than a contested case, whether by the circuit court or an appellate court, is based on the entire record as developed in the circuit court and is conducted applying the substantial evidence standard.

Turning to the case at hand, the Supreme Court agreed with the Court of Appeals, finding that it could not say that the record as a whole would not permit a reasonable person to determine, as DHS did, that the three allegations were founded—that there was reasonable cause to believe them to be true.