

# JUVENILE APPELLATE UPDATE

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## Indian Child Welfare Act

➤ *Dept. of Human Services v. K.S.W.*, [299 Or App 668 \(2019\)](#)

Father appeals judgments establishing temporary guardianships over his two children who are enrolled members of the Confederated Tribes of the Siletz Indians. Father argues that the Department of Human Services (DHS) failed to prove, as is required under the Indian Child Welfare Act (ICWA), 25 USC §§1901-63, that it had made "active efforts" to provide services to prevent the breakup of the Indian family and that those efforts failed. DHS responds that the juvenile court had made the necessary "active efforts" findings when it changed the children's permanency plans from reunification to guardianship, and that it did not need to make the findings again when it established the guardianships.

Held: The juvenile court did not err in establishing the guardianships over both children. *Under Dept of Human Services v. J. G.*, 260 Or App 500, 317 P3d 936 (2017), the juvenile court was not required to make a new "active efforts" finding when it actually ordered the guardianships, because the court had made that finding at a prior permanency hearing where it approved the placements. Affirmed.

➤ *Dept of Human Services v. T. J.* , [302 Or App 531 \(2020\)](#)

T (an infant) is eligible to enroll in the Klamath Tribes through his father's membership, and is therefore covered by the Indian Child Welfare Act. He was removed after father was arrested for assaulting mother. The incident occurred when mother and father drank heavily in mother's apartment. Mother's two oldest children were awakened by the fighting and witnessed father pulling mother's hair and striking her face and head, causing a one-inch bleeding laceration for which mother received staples. Father also attempted to punch the five-year old, but mother intervened. The other children, including T, were asleep in a bedroom during the incident. Father eventually entered a non-contest plea and was convicted of fourth-degree assault constituting domestic violence. Mother initially denied that father attacked her, later admitted he had injured her and subsequently equivocated again, saying she was too intoxicated to remember much. Concerned about mother's denials, DHS removed all of the children.

At the jurisdictional hearing, father denied beating mother or attempting to punch her five-year old, and asserted that he had pleaded no-contest to the assault charge under threat. However, he had abided by the no-contact order and intended to do so as long as the order remained in effect. Father's therapist testified that he had taken several steps before and after the incident to address his anxiety, anger management, childhood trauma, grief and loss. She gave him an excellent prognosis and said he had been going above and beyond to address his issues. Although mother testified she didn't recall who attacked her, she acknowledged that father poses a risk to the children when he drinks. She also stated her relationship with father was over and their last contact had been the night of the incident. She didn't rule out the possibility of seeking a restraining order against father should the need arise. She was also engaged in a variety of services to address substance abuse, anger management, mental health services and parenting skills. The caseworker testified that mother's denial of father's violence and her previous expressed desire for father to come home prevented the child from staying with mother. The tribal expert witness testified that the Tribes' support for T's return to mother was contingent on provider recommendations that the home is clean and substance and violence free.

The juvenile court took jurisdiction over T as to both parents on the domestic violence and substance abuse issues; mother's belief that father does not pose a risk to T; and her lack of understanding of T's needs and lack of skills to adequately and appropriately parent and protect T. Father appealed, contesting the assertion of jurisdiction as to him and the court's order that T be placed in foster care rather than returned to mother.

Held: Reversed and remanded as to part of judgment ordering out-of-home placement; otherwise affirmed.

- (1) Jurisdiction. Under ORS 419B.100(1)(c), jurisdiction is warranted if a child's condition or circumstances are such as to endanger the child's welfare – that is, if they give rise to a threat of serious loss or injury. DHS must prove that the threat is current, nonspeculative, and causally connected to the allegedly risk-causing conduct or circumstances. The court concluded the record was sufficient for the juvenile court to assert jurisdiction based on a nonspeculative and current risk of harm to T from father's domestic violence. A child need not be physically harmed by or even aware of the domestic violence surrounding the child to be at risk. Although T was asleep in another room, had the altercation escalated and spilled into his area of the small apartment, he would have had no ability to protect himself, nor would either parent have been in the right state of mind to consider his safety. Given father's continued denials and opposition to being ordered into treatment for domestic violence, the risk of harm to T was current at the time of the hearing.
- (2) Out of home placement. Under ICWA, a foster placement can't be ordered in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. The evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage. At issue is whether DHS proved by clear and convincing evidence that continued custody of T by mother was likely to result in serious emotional or physical damage to T.

In this case, although the juvenile court found mother was not credible when she testified she could not recall the identity of her attacker, father was out of the home and both parents were abiding by the no-contact order. Mother's minimization of domestic violence to protect father does not necessarily equate to her inability or unwillingness to protect T. Although mother initially stated she wanted father to return home, it appears from the record that she last expressed that wish five days after the incident and 40 days before the jurisdictional hearing. The record lacks any evidence to suggest that DHS talked to mother between those times about her view of father. Mother testified that she and father had not been in contact since the incident, that their relationship was over, and that father poses a risk to the children when he drinks. To infer that mother continued to want father to return home, that mother would violate a no-contact order to make it happen, and that serious emotional or physical damage to T would likely result is a leap that is unsupported by the clear and convincing evidence that ICWA requires. Also, contrary to DHS's assertion that mother has a history of abusive partners, the record reveals only one other, in which mother obtained a restraining order and left with the children, demonstrating her ability and willingness to protect her children from abuse. In addition, mother was participating in a number of services at the time of the jurisdictional hearing to address the safety concerns DHS had identified. Finally, the tribal expert witness offered only conclusory assertions as to the ultimate issues rather than evidence regarding the specific circumstances of the family that posed a

danger. In sum, the court erred in ordering an out of home placement for T, because DHS failed to prove by clear and convincing evidence that returning T to mother was likely to result in serious emotional or physical damage.

➤ ***Department of Human Services v. M. A. N.*, [303 Or App 600 \(2020\)](#)**

This is a termination of parental rights case subject to the Indian Child Welfare Act of 1978. Mother appeals the court's judgment terminating her parental rights contesting, among other things, the court's determination that she is unfit to parent her child and that termination of her parental rights is in the child's best interest.

**Held:** On de novo review, the Court of Appeals concluded that, while mother is not currently fit to parent the child herself, the child is placed long-term with extended family members with whom he is bonded, and the state did not prove, beyond a reasonable doubt, facts that would support the conclusion that terminating mother's parental rights is in the child's best interest. Reversed.

**Case note:** In this case subject to ICWA, judgment terminating mother's parental rights reversed when on de novo review, Court of Appeals found DHS failed to prove beyond a reasonable doubt that termination was in J's best interests. The juvenile code requires that the court decide whether termination is in the child's best interests based on the particular needs and circumstances of the child. While evidence was presented that J needed permanency, there was no evidence that mother had sought, or threatened to, interfere with J's or T's (J's sibling) living arrangement (and in T's case, guardianship) with grandmother, nor could mother move to vacate a permanent guardianship under the juvenile code. Since J's older sibling T was already living with grandmother under a guardianship, an adoption would alter J's legal relationship with T, in a way that may not be beneficial to J in the event of unexpected death or disability of mother or grandmother in the future.

## Dependency

### Appealability

➤ ***Dept of Human Services v. C. M. H.*, [301 Or App 487 \(2019\)](#)**

In this juvenile dependency case, appellant challenges the juvenile court's judgment that disestablished her parentage of child. Appellant argues that ORS 419B.395(1) does not confer subject matter jurisdiction on the juvenile court to decide the issue of parentage before adjudicating whether the child is within its dependency jurisdiction. The Department of Human Services (DHS) argues that the juvenile court had subject matter jurisdiction to enter the judgment of nonparentage but raises the preliminary question of whether the Court of Appeals has jurisdiction because that judgment does not fit under any of the dispositions listed as judgments in ORS 419A.205(1).

**Held:** The Court of Appeals has jurisdiction to hear the appeal from a judgment of parentage or nonparentage. ORS 419A.205(1) does not limit the type of juvenile court judgments that may be appealed under ORS 419A.200(1). Appellant's rights or duties are adversely affected by the judgment, and the juvenile court was authorized under ORS 419B.395(1) to issue the judgment. Because the juvenile court had subject matter jurisdiction when child was taken into protective custody, it had

subject matter jurisdiction to adjudicate the parentage dispute before making a determination on whether to assert dependency jurisdiction. Affirmed.

## Claim and Issue Preclusion

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

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

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

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

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

## Disposition

➤ *Dept. of Human Services v. A.M.B.*, [299 Or App 361 \(2019\)](#)

Mother admitted two bases for juvenile court jurisdiction, including that her substance abuse, if left untreated, interfered with her ability to safely parent. The juvenile court ordered mother to complete a substance abuse evaluation and follow recommendations for treatment. DHS assigned mother to participate in random observed urinalysis. At a dispositional review hearing, mother objected to being observed while producing a urine sample and asked the court for an order permitting unobserved urinalysis. During the hearing, no sworn testimony or documentary evidence was presented – only legal arguments. The parties were allowed to submit a written brief following the hearing. Mother submitted a two-page affidavit with her brief that described the process of the observed urinalysis, her reaction to that process, and why she was seeking a court order for unobserved urinalysis. The juvenile court denied mother’s motion for an order allowing unobserved urinalysis testing, and mother appealed.

Held:

Affirmed. On appeal, the only issue under review was whether the juvenile court erred in denying mother’s motion for an order permitting unobserved urinalysis. Mother argued that DHS’s requirement to participate in observed urinalysis violated her right to be free from unreasonable searches under Article I, section 9, of the Oregon Constitution, and the Fourth Amendment to the United States Constitution. She also argued that her right to privacy and bodily integrity under the Fourteenth Amendment to the U.S. Constitution was violated. Mother’s state constitutional argument focused on three conditions of reasonableness discussed in *Weber v. Oakridge School District 76*, 184 Or App 415, *rev den*, 335 Or 422 (2003), for an administrative search to pass constitutional muster.

The Court found mother failed to provide evidence to substantiate her constitutional claims. Other than mother’s affidavit, the majority of the factual assertions in the record derived from unsworn statements by the parties’ lawyers and their respective legal arguments, which are not evidence. Given the inadequate record, the court could not assess the adequacy of mother’s state or federal constitutional claims.

## Order for Psychological Evaluation

➤ ***Dept. of Human Services v. P.W.*, [302 Or App 355 \(2020\)](#)**

In this juvenile dependency case, the court changed the permanency plan for Z from reunification to adoption in 2017. In April 2018, mother’s parental rights were terminated. Finalization of the adoption was delayed pending an appeal and an open ineffective assistance of counsel proceeding in the termination of parental rights case. At a permanency hearing in the dependency case, DHS moved the court to order mother to submit to a psychological evaluation, arguing it would help inform continued case planning, including how to facilitate post-termination contact between mother and Z. Mother objected and requested a separate hearing to address the issue. The court overruled her objection, ordered the psychological evaluation, and continued Z’s permanency plan of adoption. Mother appealed, arguing the court lacked authority to enter the order because it did not first establish the need for the evaluation at a hearing.

Held: The question on appeal is whether the court had authority to order the biological mother to submit to a psychological evaluation after the case plan was changed to adoption and after her parental rights had been terminated. ORS 419B.387 authorizes the court to order a psychological evaluation, but only after considering evidence at an evidentiary hearing regarding the need for treatment or training to

correct the circumstances that resulted in wardship or to prepare the parent to resume care of the ward. However, since mother's parental rights had already been terminated in this case and she was not preparing to resume care of the child, the court held ORS 419B.387 does not provide authority for the court's order in this case.

Reversed and remanded with instructions to enter a judgment deleting the requirement that mother submit to a psychological evaluation. Otherwise affirmed.

➤ ***Dept. of Human Services v. L.J.W.*, [302 Or App 126 \(2020\)](#)**

Father appeals a judgment of jurisdiction and disposition. The juvenile court took jurisdiction over child and ordered father to submit to a psychological evaluation. Father assigns error to that order, arguing that the Department of Human Services (DHS) failed to offer evidence that the psychological evaluation was a necessary component of "treatment or training" as ORS 419B.387 requires. Father did not preserve that issue as he currently raises it on appeal.

Held: The juvenile court did not plainly err in ordering the examination. Although, under ORS 419B.387, DHS must establish at an evidentiary hearing the need for the psychological evaluation as part of "treatment or training," that statute is not the only basis for the juvenile court's authority. Under ORS 419B.337(2), the court may also order a psychological evaluation when rationally related to a basis of the juvenile court's jurisdiction. Given the record, the jurisdictional bases, and two potential sources of authority for a psychological evaluation, any asserted error is not plain. Affirmed.

➤ ***Dept. of Human Services v. D.R.D.*, [298 Or App 788 \(2019\)](#)**

In this juvenile dependency case, father appeals from a review hearing judgment ordering him to submit to a psychological evaluation. On appeal, father argues that the juvenile court erred because, although ORS 419B.387 allows the juvenile court to order a parent to participate in "treatment or training," the statute does not authorize ordering parents to submit to a psychological evaluation that is invasive and potentially incriminatory by nature. In response, the state argues that the juvenile court has broad authority to make orders that further the best interests of its wards. In particular, the state contends that the juvenile court has specific authority under ORS 419B.387 to order a parent to participate in needed "treatment or training," including ordering assessments to determine the type and extent of needed treatment or training.

Held: ORS 419B.387 authorizes the juvenile court to order a parent to participate in treatment or training but conditions that authority on a finding of need, following an evidentiary hearing. ORS 419B.387 does not imbue the juvenile court with the authority to order a parent to comply with a discovery mechanism to determine if there is a need for treatment or training. Here, in accordance with ORS 419B.387, the juvenile court was within its statutory authority when it ordered father to participate in needed treatment or training, including a psychological evaluation, after considering the evidence presented at the review hearing. Affirmed.

Additional note: In this case, the juvenile court heard testimony that father continued to use methamphetamine after jurisdiction was established, failed to engage in services, and that a psychological evaluation could help provide insight into why father was not engaging in substance abuse treatment. The Court of Appeals found the juvenile court was within its

statutory authority under ORS 419B.387 when it ordered father to participate in a psychological evaluation, after considering the evidence presented at the hearing.

➤ ***Dept. of Human Services v. T.L.H.*, [300 Or App 606 \(2019\)](#)**

As to father, the juvenile court asserted dependency jurisdiction over child due to: (1) father having done nothing to assert custody of his child despite his awareness of the allegations against mother, and (2) his residential instability which interfered with his ability to provide for his child. Over the next year and a half, father secured housing and the child began therapeutic visits at father's residence. Father was also invited to participate in his son's therapy appointments but missed about half. When he did attend, he appeared "scattered," and he came in and out during the therapy time. That, as well as reports of father's continued substance abuse, and diluted and missed UA's, raised red flags for DHS.

DHS filed a motion requesting that the juvenile court order father to submit to a psychological evaluation. DHS noted the child's several diagnoses and argued the evaluation was necessary to evaluate the father's ability to maintain a stable residence while trying to parent a child with high needs. DHS noted that father had only recently started engaging in services addressing his ability to provide a safe and stable home for the child, without parenting the child full time. DHS also noted father's past insobriety. DHS attached an affidavit from the caseworker which stated the evaluation was necessary to determine whether the father will be able to meet the high needs of the child and, if so, what services may be necessary to help him meet the child's high needs. There were multiple exhibits attached to the affidavit demonstrating the child's high needs. There was also a drug and alcohol assessment of father which noted that father had suffered childhood abuse; had PTSD; needed treatment for his use of methamphetamine; and that he was difficult to track and immature for his age. The caseworker believed father needed a complete and accurate evaluation to ensure his treatment gains are sustainable after his child is placed in his home given the child's high needs. Father presented evidence regarding his progress, including the recommendation by the counselor that DHS allow overnight visits. After a hearing, the juvenile court granted DHS's motion and ordered father to submit to a psychological evaluation. Father appealed, arguing the psychological evaluation does not qualify as treatment or training necessary to effectuate family reunification, as authorized under ORS 419B.387.

Held:

Affirmed.

Under ORS 419B.387, the court may order a psychological evaluation when the evidence indicates that the parent may require it as a component of additional treatment or training needed to prepare the parent to resume the care of the child because of the child's particular needs. In this case, the court found the juvenile court did not exceed its authority under ORS 419B.387 in ordering father to submit to a psychological evaluation. The record contains evidence to support the conclusion that the evaluation was a component of additional treatment or training that father needed to resume care of his child.

The court rejected father's argument that the psychological evaluation cannot be a part of treatment or training because it was forensic in nature, not therapeutic, lacking confidentiality and intended as evidence against him in a judicial proceeding.

## Evidence

➤ *Dept. of Human Services v. M.T.J.*, [304 Or App 148 \(2020\)](#)

Father appealed a juvenile court judgment taking jurisdiction over his daughter, E, contending the trial court erred in granting mother's motion *in limine* to exclude father's evidence. E had primarily lived with father, although no custody order was in place. When E was six, DHS filed a dependency petition alleging mother had been unable to protect E from father's behavior, that mother had been subjected to domestic violence by father, had been unable to protect E from exposure to father's violence and unable to successfully assert custody to protect E. As to father, DHS alleged that E had been injured by father's physical outbursts, and that father has anger and domestic violence issues that are harmful to E. At the start of the jurisdictional hearing, mother made an oral motion *in limine* to limit father's presentation of evidence to what was within the confines of the petition. Father objected, arguing mother's history was relevant to the case, including impeachment evidence relating to periods of time she was not able to reach out to E, to show that father was not preventing her from doing so. He also made reference to inconsistent statements, but his argument was cut short by the court and he did not make a formal offer of proof. The court granted the motion *in limine*, reasoning that evidence that goes beyond what is in the petition is a basis for reversal of the jurisdictional judgment if the case is later appealed. Following a trial, the court found that DHS proved the allegations and that E was within the court's jurisdiction.

Father appealed, contending that the court's decision to grant the motion *in limine* was legally erroneous and the error was not harmless, because it denied father his right to call and cross-examine witnesses, participate in the hearing, and present a defense as provided under ORS 419B.875(2), rendering the proceeding fundamentally unfair.

Held: Reversed and remanded.

The court explained that the line of appellate cases starting with *Dept. of Human Services v. G.E.*, 243 Or App 471, *adh'd to as modified on recons*, 246 Or App 136 (2011) restrict the use of "extrinsic facts" as a basis for establishing or continuing dependency jurisdiction or for changing a child's permanency plan away from reunification. However, that line of cases does not prescribe the evidence that can be admitted in a jurisdictional hearing to prove the facts alleged in a petition. In other words, the case law does not categorically preclude the admission of evidence of facts not pleaded as a bases for asserting jurisdiction. The court went on to explain that previous cases have recognized the possibility that evidence of extrinsic facts may come in during a dependency proceeding even though, absent an amendment to the underlying petition, those facts may not be used to establish or maintain jurisdiction, or to change the permanency plan away from reunification. Whether that type of extrinsic evidence may be excluded on the basis of relevance is a different question – and not one that was addressed in this case.

The court found that father's lack of an offer of proof did not preclude him from raising the issue on appeal, finding the nature of the juvenile court's ruling was skin to a situation in which the court did not allow an offer of proof to be made. The court found the trial court's error was prejudicial because it deprived father of his rights under ORS 419B.875 to participate and present evidence of mother's circumstances beyond those alleged in the petition without regard to relevance.

➤ ***Dept. of Human Services v. R.A.B.*, [299 Or App 642 \(2019\)](#)**

This case was remanded to the Court of Appeals from the Oregon Supreme Court in light of *State v. Black*, 364 Or 579 (2019). The juvenile court had excluded the testimony of one of mother's expert witnesses as a discovery sanction for failing to produce a report. On the first appeal, the Court of Appeals determined the juvenile court erred, but that it was harmless because the testimony was tantamount to providing the expert's view on whether the child witnesses were likely telling the truth in their interviews (impermissible vouching). However, when considering the case again on remand, in light of *Black*, testimony as to interview methods could potentially be admissible. Because the juvenile court had excluded the testimony for discovery reasons, neither the litigants nor the juvenile court proceeded to a point where they considered the evidentiary admissibility of the expert's proposed testimony. Mother could argue that at least some of the expert's testimony is admissible, and the juvenile court could potentially conclude that the Oregon Evidence Code does not prohibit admission. Reversed and remanded.

## Inadequate Assistance of Counsel

➤ ***Department of Human Services v. C. M. W.*, [300 Or App 561 \(2019\)](#)**

Appellant in this juvenile dependency case appeals two judgments terminating her parental rights. Appellant asserts first that the juvenile court plainly erred in terminating her parental rights in her absence when she had not received statutorily required notice of the time and place of trial. Second, appellant asserts that she received inadequate assistance of counsel because her lawyer did not object to the juvenile court proceeding without her when the required notice had not been given.

**Held:** First, the record does not establish that the juvenile court plainly erred because it does not reflect whether or not appellant received the required notice. Second, appellant presents a colorable argument that she might have received ineffective assistance of counsel because of a lack of notice, and a hearing on that claim is therefore required. Vacated and remanded.

**Commentary:** When a parent responds to a TPR summons by denying the allegations under ORS 419B.819(2)(b) or (c), the court is required to provide the oral or written order under ORS 419B.820. An Order to Appear form that is compliant with the statutory requirements is available on the JCIP website: <https://www.courts.oregon.gov/programs/jcip/ModelCourtForms/Pages/default.aspx> In this case, the court didn't make a record of whether the order was provided to the parent in person at the status conference, or whether it was subsequently mailed to the parent. Making a record of how the order was provided, or alternatively, reading the specific requirements of ORS 419B.820 orally into the record, may have prevented the remand in this case.

## Jurisdiction

### Admissions

➤ ***Dept. of Human Services v. T.S.J.*, [300 Or App 36 \(2019\)](#)**

Mother and father admitted to jurisdictional allegations in amended dependency petitions and waived their rights to an evidentiary hearing. The juvenile court specifically confirmed with mother that she understood that she was giving up her right to have a hearing where the State has to prove that more likely than not the allegations in the petition are true. The juvenile court also admitted, as an exhibit, dispositional reports that DHS had prepared. Those reports provided that mother has not been able to demonstrate impulse control, she acts on her urges and desires, she has not been able to use resources necessary to meet her children's basic needs including providing shelter, safety and food, she has not been able to use acceptable and appropriate means for treating her mental illness and she struggles to understand the cause and effect relationship between her own actions and the results for her children.

Mother appealed, arguing the court plainly erred in taking jurisdiction over her children because the allegations to which she and father admitted were insufficient to support jurisdiction. Specifically, she argued that those admissions do not support a conclusion that the children were exposed to a current, nonspeculative threat of serious loss or injury, which is required for dependency jurisdiction under ORS 419B.100(1)(c). Under *Dept. of Human Services v. D.D.*, 238 Or App 134, rev den 349 OR 602 (2011), mother argued that a parent can stipulate to facts supporting jurisdiction but cannot stipulate to juvenile court jurisdiction itself.

Held:

Affirmed.

When a parent waives the right to have DHS prove its allegations, the court is not concerned with the sufficiency of evidence on appeal. Rather, the court considers whether, pursuant to the allegations, DHS would have been allowed to offer evidence that would establish juvenile court jurisdiction. The *key inquiry* is whether the allegations would permit the introduction of evidence of danger to the child's welfare.

In this case, mother admitted that her mental health problems interfere with her ability to safely parent her children. Liberally construing that allegation in favor of DHS, DHS would have been permitted to put on evidence that mother's mental health problems present a current, nonspeculative risk of harm to her children because those problems interfere with mother's ability to safely parent. In addition, father admitted that he is unable to protect the children from the mother's neglectful behavior. DHS would have been permitted to put on evidence that father could not protect the children from the current, nonspeculative risk of harm to the children presented by mother's mental health problems. Thus, the allegations to which the parents admitted can be construed to contain facts that bring the children within the jurisdiction of the court because it would show that the children's condition or circumstances expose them to a current threat of serious loss or injury that is likely to be realized absent juvenile court intervention.

Under the standard articulated in *D.D.*, the court found mother's and father's admissions were sufficient to support juvenile court jurisdiction over the children.

Conditions and Circumstances: ORS 419A.100(1)(c)

➤ *Dept. of Human Services v. C. W.*, [305 Or App 75 \(2020\)](#)

The children (age 9 and 10) were removed from the home three different times due to the unsanitary condition of parents' home. The removal related to this case occurred in October 2018 and the jurisdictional hearing was held in late February and early March 2019. The juvenile court determined that despite some progress that was made before the jurisdictional hearing was held, the conditions and circumstances – persistent hunger, chronic school absenteeism, unsanitary and unsafe conditions in the home, and parents' volatility, mental health issues, and substance abuse – posed a risk of serious injury or loss to the children. Parents argue that (1) although children missed school, performed below grade level, and were experiencing some anxiety, the children's circumstances were insufficient to establish the children were at risk of serious loss or injury; and (2) even if those circumstances were endangering, they were merely historical risks by the time that the juvenile court established jurisdiction over children. Further, they argued that if father became incarcerated, paternal grandmother, who lived together in the same household, could help care for the children.

Held: Affirmed.

A juvenile court has jurisdiction under ORS 419B.100(1)(c), when a child's condition or circumstances are such as to endanger the welfare of the child. A child is endangered if the child is exposed to conditions or circumstances that present a current threat of serious loss or injury. DHS has the responsibility to prove that the threat is current, and to prove a connection between the allegedly risk-conduct and the harm to the children. The threat of harm to the child cannot be speculative; there must be a reasonable likelihood that the threat will be realized.

The court rejected parents' contention that the children's circumstances were not a serious threat of harm. The circumstances were dangerous: (1) the home was unsanitary and unsafe; (2) the children's routine school absences and lateness were detrimental to their education; (3) the children were regularly hungry; (4) mother has substance abuse disorders and bipolar disorder; and (5) father has PTSD, which leads to threatening and aggressive encounters with authority figures, causing frequent incarceration. Those conditions, and parents' deficits, caused children anxiety, tiredness, inability to focus, and interfered with their ability to learn. The court distinguished this case from others in which the court found that a parent's less than ideal parenting did not warrant the state's intervention. The court also found the risk of harm was current. Father had much more progress to make in therapy to reduce his reactivity toward authority figures. Mother had made negligible or no progress in treating her bipolar disorder and substance abuse disorder. The court also distinguished this case from other cases where the parents entrusted care of the children to a third party. Here, parents did not actually cede custody or entrust the primary care of children to the paternal grandmother. Also, any assistance grandmother had provided in the past was not enough to prevent the chronic hunger, unsafe living conditions, and chronic absenteeism of children while they were in parents' care.

Because the circumstances leading to removal of children were dangerous and parents had made insufficient progress to address their mental-health and substance abuse issues, the juvenile court did not err in its determination that children's circumstances presented a current risk of serious loss or injury to children that was likely to be realized if they were in parents' care.

### **Child Abuse and Reasonable Efforts**

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

In 2018, the juvenile court took jurisdiction over two children, E and J, based on mother's and father's stipulations that E "was diagnosed with child physical abuse, traumatic subdural hemorrhage, and retinal hemorrhage in the right eye" while in the care of her parents. During the following months, neither parent provided information about how E was injured and suggested that E's injuries may have been due to a genetic condition, though genetic testing later ruled that out. In 2019, father was charged with assault and criminal mistreatment for causing E's injuries. Due to a related no-contact order, father moved out of the family home and was only allowed supervised visits. Several months later, DHS filed new petitions asserting as an additional basis for jurisdiction that father had been criminally charged and mother failed to appreciate the risk he poses as a result.

Mother and father each filed motions to dismiss, arguing that the record no longer supports maintaining jurisdiction on the bases asserted in 2018 and that the new 2019 petitions fail to allege facts sufficient to support taking jurisdiction. The trial court denied their motions and they both appeal renewing the same arguments.

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

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

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

The 2019 jurisdictional judgments are reversed and remanded and the judgments denying the motions to dismiss are affirmed.

➤ ***Department of Human Services v. D. L.*, [303 Or App 286 \(2020\)](#)**

Mother appeals a juvenile court judgment taking dependency jurisdiction under ORS 419B.100(1)(c) over her 13-year-old daughter, A, on the grounds that mother had physically assaulted A by hitting her with a stool and that mother "has anger and impulse control problems which interfere with her ability to safely parent the child." Mother contends that (1) the evidence is insufficient to support the court's determination that it has dependency jurisdiction over A, (2) the court erred in concluding that DHS made reasonable efforts to reunify A with mother as required by ORS 419B.340, and (3) the court plainly erred in ordering mother to participate in a psychological evaluation.

**Held:** (1) The juvenile court did not err in concluding that mother's assaultive conduct (and her minimization of it) was sufficient to support its determination that it had dependency jurisdiction over A, (2) the court erred in concluding that DHS made reasonable efforts to reunify A with mother, and (3) the court did not plainly err in directing mother to undergo a psychological evaluation. Reversed and remanded for correction of reasonable efforts determination; otherwise affirmed.

**Additional notes:** The Court of Appeals did not spell out what reunification efforts were provided in this case. The juvenile court noted that A did not want to return to mother and that mother was potentially facing criminal charges for hitting A with a stool. The Court of Appeals said these circumstances do not allow the court to lessen the standard for reasonable efforts. DHS is required to make reasonable efforts until excused by the juvenile court of that requirement under ORS 419B.340(5).

### **Domestic Violence and ICWA**

➤ ***Dept of Human Services v. T. J.*, [302 Or App 531 \(2020\)](#)**

T (an infant) is eligible to enroll in the Klamath Tribes through his father's membership and is therefore covered by the Indian Child Welfare Act. He was removed after father was arrested for assaulting mother. The incident occurred when mother and father drank heavily in mother's apartment. Mother's two oldest children were awakened by the fighting and witnessed father pulling mother's hair and striking her face and head, causing a one-inch bleeding laceration for which mother received staples. Father also attempted to punch the five-year old, but mother intervened. The other children, including T, were asleep in a bedroom during the incident. Father eventually entered a non-contest plea and was convicted of fourth-degree assault constituting domestic violence. Mother initially denied that father attacked her, later admitted he had injured her and subsequently equivocated again, saying she was too intoxicated to remember much. Concerned about mother's denials, DHS removed all of the children.

At the jurisdictional hearing, father denied beating mother or attempting to punch her five year old, and asserted that he had pleaded no-contest to the assault charge under threat. However, he had abided by the no-contact order and intended to do so as long as the order remained in effect. Father's therapist testified that he had taken several steps before and after the incident to address his anxiety, anger management, childhood trauma, grief and loss. She gave him an excellent prognosis and said he had been going above and beyond to address his issues. Although mother testified she didn't recall who attacked her, she acknowledged that father poses a risk to the children when he drinks. She also stated her relationship with father was over and their last contact had been the night of the incident. She didn't rule out the possibility of seeking a restraining order against father should the need arise. She

was also engaged in a variety of services to address substance abuse, anger management, mental health services and parenting skills. The caseworker testified that mother's denial of father's violence and her previous expressed desire for father to come home prevented the child from staying with mother. The tribal expert witness testified that the Tribes' support for T's return to mother was contingent on provider recommendations that the home is clean and substance and violence free.

The juvenile court took jurisdiction over T as to both parents on the domestic violence and substance abuse issues; mother's belief that father does not pose a risk to T; and her lack of understanding of T's needs and lack of skills to adequately and appropriately parent and protect T. Father appealed, contesting the assertion of jurisdiction as to him and the court's order that T be placed in foster care rather than returned to mother.

Held: Reversed and remanded as to part of judgment ordering out-of-home placement; otherwise affirmed.

(3) Jurisdiction. Under ORS 419B.100(1)(c), jurisdiction is warranted if a child's condition or circumstances are such as to endanger the child's welfare – that is, if they give rise to a threat of serious loss or injury. DHS must prove that the threat is current, nonspeculative, and causally connected to the allegedly risk-causing conduct or circumstances. The court concluded the record was sufficient for the juvenile court to assert jurisdiction based on a nonspeculative and current risk of harm to T from father's domestic violence. A child need not be physically harmed by or even aware of the domestic violence surrounding the child to be at risk. Although T was asleep in another room, had the altercation escalated and spilled into his area of the small apartment, he would have had no ability to protect himself, nor would either parent have been in the right state of mind to consider his safety. Given father's continued denials and opposition to being ordered into treatment for domestic violence, the risk of harm to T was current at the time of the hearing.

(4) Out of home placement. Under ICWA, a foster placement can't be ordered in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. The evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage. At issue is whether DHS proved by clear and convincing evidence that continued custody of T by mother was likely to result in serious emotional or physical damage to T.

In this case, although the juvenile court found mother was not credible in testifying she could not recall the identity of her attacker, father was out of the home and both parents were abiding by the no-contact order. Mother's minimization of domestic violence in an attempt to protect father does not necessarily equate to her inability or unwillingness to protect T. Although mother initially stated she wanted father to return home, it appears from the record that she last expressed that wish five days after the incident and 40 days before the jurisdictional hearing. The record lacks any evidence to suggest that DHS talked to mother between those times about her view of father. Mother testified that she and father had not been in contact since the incident, that their relationship was over, and that father poses a risk to the children when he drinks. To infer that mother continued to want father to return home, that mother would violate a no-contact order to make it happen, and that serious emotional or

physical damage to T would likely result is a leap that is unsupported by the clear and convincing evidence that ICWA requires. Also, contrary to DHS's assertion that mother has a history of abusive partners, the record reveals only one other, in which mother obtained a restraining order and left with the children, demonstrating her ability and willingness to protect her children from abuse. In addition, mother was participating in a number of services at the time of the jurisdictional hearing to address the safety concerns DHS had identified. Finally, the tribal expert witness offered only conclusory assertions as to the ultimate issues rather than evidence regarding the specific circumstances of the family that posed a danger. In sum, the court erred in ordering an out of home placement for T, because DHS failed to prove by clear and convincing evidence that returning T to mother was likely to result in serious emotional or physical damage.

### **Jurisdiction – Domestic Violence, Mental Health**

➤ ***Dept. of Human Services v. A. J. G.*, [304 Or App 221 \(2020\)](#)**

This case involves parents' child, age 8, who requires a lot of one-on-one attention, a lot of structure, and services tailored to children with developmental disabilities. DHS received a referral of concern for the child and his half-siblings when mother applied for a domestic violence grant from DHS. The next day, mother filed for a restraining order against father, alleging father had strangled her, left bruises on her and used his palm and knee to push mother down. The court granted the restraining order and granted temporary physical custody of child to mother. The court also mandated that father have no contact with mother or the children. Around the same time, a DHS caseworker visited child and his siblings at school. During that meeting, child disclosed that father had to leave the home because he had hit his mother and choked her, with child demonstrating the choking on his own throat. Child's sibling told the caseworker that she had seen father push mother and that was why father had to leave the home. Father twice violated the restraining order by having contact with mother and was found in contempt. Several weeks after obtaining the restraining order, mother moved to dismiss it, asserting that child wanted to see father, which the juvenile court granted. The same day, DHS visited mother and father, who denied that the children had been having contact with father. While the caseworker was there, the children arrived home and informed the caseworker they had been in contact with father. DHS removed the children.

At the jurisdictional hearing, the court heard evidence relating to father's domestic violence, mother's failure to protect, and father's failure to maintain his mental health appointments and medication regimen (resulting in mood swings and unstable behaviors). Mother testified that she did not view father as a threat to the children, that she was living with father at the time of the trial, and that she planned to continue living with him. She testified that father is mentally and emotionally abusive when he is off his pills, that he was back on his pills when she moved to dismiss the restraining order, and that they were the only thing that was keeping him stable. She also testified father gets mood swings, gets irritated easily and starts yelling when he is not taking his medication. Father testified he was not taking his medication for three weeks preceding the strangling incident, and that the children were with their grandparents when the incident occurred. The juvenile court found the parents were not credible, and that the children were present and observed domestic violence between the parents. The juvenile court asserted jurisdiction based on all four allegations. Father appealed.

**Held:** The trial court did not err by asserting jurisdiction over child based on the first two allegations involving exposure to domestic violence, but it did err by asserting jurisdiction on the allegation involving the failure to maintain an adequate mental health regimen. The court found there was

evidence in the record to support the juvenile court's finding that the children were present during the incidents of domestic violence, and the court did not disturb the juvenile court's credibility determination regarding father's statements that the children were not present during the domestic violence incidents. In addition, the court found DHS established a nexus between the exposure to domestic violence and a current threat of harm through the caseworker's testimony that children exposed to domestic violence can be physically harmed, and emotionally and mentally affected by those situations that can affect their developmental status. In this case, the court found the child was particularly vulnerable to domestic violence exposure given his need for structure and developmental disability services, and his low IQ. Finally, mother testified that she was living with father and would remain living with him, creating a current risk of harm.

The court found DHS did not prove there was a current threat of harm to the child at the time of the jurisdictional trial from father's failure to take his medication. Father had resumed taking his medication after the domestic violence incidents and DHS did not present any evidence that his prior three week episode of missing his medications and appointments was indicative of a pattern of behavior. DHS conceded the juvenile court erred in entering jurisdiction based on the substance abuse allegation. Finally, the court found that under the totality of the circumstances, the juvenile court did not err in asserting jurisdiction based on the domestic violence allegations.

#### **Jurisdiction – Parenting Skills, Substance Abuse**

➤ ***Dept. of Human Services v. W. M.*, [303 Or App 384 \(2020\)](#)**

Father appeals the juvenile court's judgment taking jurisdiction over his child, A. Father contends that the Department of Human Services (DHS) failed to present sufficient evidence that father's substance abuse and parenting skills, either individually or collectively, exposed A to a nonspeculative risk of serious loss or injury at the time of the dependency hearing, and, therefore, the juvenile court erred when it took jurisdiction on those bases.

**Held:** DHS failed to carry its burden to demonstrate that father's alleged substance abuse or deficits in parenting skills posed a current risk of loss or serious injury to A. Therefore, the trial court erred in taking jurisdiction on those bases. Reversed.

**Additional notes:** The court found that the evidence DHS presented about father's parenting skills did not address how A (two years old) had been affected by father's purported deficits or how those deficits exposed A to a current nonspeculative risk of serious loss or injury. The evidence included that father failed to immediately remove scissors from the child's hand that were left out in a DHS visit room; that he physically was unable to quickly follow the child to a nearby visit room where the child's mother was waiting; that the apartment where he lived had a steep set of stairs that may be difficult for the child to navigate without help (and father's back injury may prevent him from providing help); that his apartment has a raised board that could be a tripping hazard; and that he did not have knowledge about whether A was potty trained or her clothing size. In addition, the court found there was no evidence that father's history of substance abuse posed a risk of harm to A. Father had tested positive for methamphetamine five months before the hearing, had missed non-court ordered UAs and treatment after his back surgery, and had voluntarily tested negative two weeks before the hearing. Finally, the court found there was no evidence that father's alleged substance abuse contributed to the overall risk that father would be inattentive to A's needs.

## **Jurisdiction – Parents Delegate Care to Third Party**

➤ ***Dept. of Human Services v. F.Y.D., Jr.*, [302 Or App 9 \(2020\)](#)**

Father appeals the juvenile court's judgment establishing jurisdiction over child, arguing that, because his sister was available to care for child while father served about four to five more months of incarceration, DHS failed to present sufficient evidence of a current threat of harm to child.

Held: Because father entrusted child to his sister for only the few months that he would be in prison, the juvenile court did not err in taking jurisdiction based on its finding that it was likely that father would assume his parental responsibilities when released and that that posed a risk of harm to child given father's poor judgment and decision making. Affirmed.

➤ ***Dept of Human Services v. M. E.*, [302 Or App 571 \(2020\)](#)**

After an incident in which mother hit one of her children while she was intoxicated, DHS and mother entered into a protective action plan with mother's aunt. Under the plan, the children were to stay with the aunt, with mother only having supervised contact. Mother complied with the plan, however, DHS removed the children five days later based on 20 year old founded allegations involving the aunt's husband. The allegations stemmed from an incident in which the husband was intoxicated and got into an altercation with a friend that resulted in an injury to a child. The aunt's husband stopped drinking shortly thereafter, and no other incidents have occurred. Mother continued to work on a plan to care for the children with the aunt, pending adjudication of the petition. At the time of the jurisdictional hearing, mother had been in inpatient treatment for a week, and argued that the children were not presently at a risk of harm because she had made arrangements for the children's care. She cited previous appellate decisions that found DHS failed to establish the children faced the sort of loss or harm that would justify jurisdiction viewed in light of the available caregivers who were available to care for the children. The juvenile court rejected mother's argument, distinguishing those cases on the ground that the third-party care arrangement predated DHS involvement, while the one in mother's case did not. Mother appealed.

Held: Reversed and remanded.

The fact that a parent has not established a third-party caregiving arrangement before DHS involvement does not preclude a juvenile court from taking that arrangement into account in assessing whether a child faces the type of current risk of injury or harm that allows for dependency jurisdiction. In this case, evidence of the caregiving arrangement would permit, but not compel, the conclusion that the children were not at risk from mother's alcohol problem at the time of the jurisdictional hearing. Although the juvenile court did not exclude evidence of the arrangement, its statements on the record demonstrate that it erroneously determined that it was not required to consider the arrangement in determining whether the criteria for jurisdiction was met.

## **Jurisdiction – Residential Instability**

➤ ***Dept. of Human Services v. J.C.H.*, [299 Or App 212 \(2019\)](#)**

The juvenile court found jurisdiction over A based on mother's substance abuse, mental health problems and residential instability. Although it was clear from the record that mother had experienced

residential instability much of A's life, the Court of Appeals found there was insufficient evidence to show that A was harmed by the instability. The court reversed and remanded for entry of a jurisdictional judgment omitting allegation 2(C) regarding mother's residential instability.

## UCCJEA

➤ ***Department of Human Services v. J. S.*, [303 Or App 324 \(2020\)](#)**

While parents and their two children were living temporarily in Oregon, the juvenile court asserted temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in Oregon at ORS 109.701 to 109.834. The juvenile court entered shelter orders and then dependency judgments for both children. Parents unsuccessfully moved to dismiss for lack of subject matter jurisdiction, arguing that, due to the nature of temporary emergency jurisdiction, the juvenile court could enter shelter orders but lacked authority to enter dependency judgments.

**Held:** The juvenile court did not err in denying parents' motions to dismiss for lack of subject matter jurisdiction. Under the UCCJEA, the juvenile court has authority to make custody determinations for the children, including in dependency proceedings, while exercising temporary emergency jurisdiction. Because there were no prior custody determinations from another state and no custody proceedings had been commenced in another state, the juvenile court's orders were subject to ORS 109.751(2), which did not limit the juvenile court to entering shelter orders. Affirmed.

**Additional notes:** This case makes clear that if a child custody proceeding has not been initiated in another state and no previous custody determination exists, an Oregon court exercising temporary emergency jurisdiction under ORS 109.751 at shelter may continue to have subject matter jurisdiction for purposes of the jurisdictional hearing. In other words, there is no time limit to the exercise of temporary emergency jurisdiction under ORS 109.751 as long as a child custody proceeding has not been initiated in another state. Under ORS 109.751(2), "...[i]f a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under ORS 109.741 to 109.747, a child custody determination made under this section becomes a final determination if the determination so provides and this state becomes the home state of this child." However, the court also indicated in dicta that in cases where the court has exercised temporary emergency jurisdiction, the court is limited to issuing a jurisdictional judgment that meets the requirements for temporary emergency jurisdiction (child must be present in Oregon and have been abandoned or subjected to or threatened with mistreatment or abuse). For example, the court explained that the juvenile court could not rely on TEJ to issue a dependency judgment based on neglect.

## Motion to Dismiss

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

In 2018, the juvenile court took jurisdiction over two children, E and J, based on mother's and father's stipulations that E "was diagnosed with child physical abuse, traumatic subdural hemorrhage, and retinal hemorrhage in the right eye" while in the care of her parents. During the following months, neither parent provided information about how E was injured and suggested that E's injuries may have been due to a genetic condition, though genetic testing later ruled that out. In 2019, father was charged

with assault and criminal mistreatment for causing E's injuries. Due to a related no-contact order, father moved out of the family home and was only allowed supervised visits. Several months later, DHS filed new petitions asserting as an additional basis for jurisdiction that father had been criminally charged and mother failed to appreciate the risk he poses as a result.

Mother and father each filed motions to dismiss, arguing that the record no longer supports maintaining jurisdiction on the bases asserted in 2018 and that the new 2019 petitions fail to allege facts sufficient to support taking jurisdiction. The trial court denied their motions and they both appeal renewing the same arguments.

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

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

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

The 2019 jurisdictional judgments are reversed and remanded and the judgments denying the motions to dismiss are affirmed.

➤ ***Department of Human Services v. T. N.*, [303 Or App 183 \(2020\)](#)**

In this juvenile dependency case, mother stipulated to two bases for juvenile court jurisdiction: (1) that her mental health problems interfere with her ability to safely parent and (2) that she does not understand the basic needs of child and she lacks necessary parenting skills. Mother later moved to dismiss dependency jurisdiction over child, and she appeals from the juvenile court's decision to deny that motion. She contends that the court erred in continuing jurisdiction, maintaining that the

Department of Human Services (DHS) did not prove that the two original bases for jurisdiction still exist and pose a continuing risk of serious loss or injury to her child that will likely be realized should the court terminate jurisdiction.

**Held:** The juvenile court erred in denying mother's motion to dismiss dependency jurisdiction. Although DHS presented sufficient evidence to establish mother's mental health conditions, her lack of parenting skills, and her lack of understanding of child's basic needs, DHS failed to present sufficient evidence that those issues present a current threat of serious loss or injury to child that is reasonably likely to be realized. Reversed.

**Additional notes:** With respect to the mental health allegation, mother had been diagnosed with depression, anxiety, insomnia and a psychotic disorder in the months before jurisdiction was established. At the time of the motion to dismiss, a psychologist found none of those problems were present, and instead, diagnosed mother with dependent and antisocial personality features. The court assumed for purposes of the opinion that a parent may have mental health issues later that are different than those that were apparent at the time of jurisdiction. In this case, there was insufficient evidence of a risk to J that mother's codependency would lead her to put her needs in front of J's when mother had abstained from such relationships for three years. There was no other evidence of current or recent abusive relationships, and no testimony explaining how likely it was that mother's dependent features posed a risk to J. In addition, there was no evidence that mother's antisocial personality features posed a risk to J. The psychologist's general testimony that the features have to do with a pattern of irresponsibility, not fulfilling obligations, and endangering other's lives, doesn't establish a nexus between mother's mental health and a serious risk of loss or harm to J that is likely to be realized. Finally, although there was sufficient evidence of mother's poor parenting skills and lack of understanding of her child's basic needs, resulting in J being scared, upset, confused and emotional, that is not the type of significant psychological harm that justifies juvenile court jurisdiction.

➤ ***Dept. of Human Services v. L.S.*, [300 Or App 594 \(2019\)](#)**

The juvenile court took jurisdiction over Z when he was two based in part on father's conviction and incarceration for sexually abusing another child in his care. Mother subsequently died. At a permanency hearing, father filed a motion to dismiss arguing that child's maternal grandmother (who was also the child's foster placement) could take care of Z in a probate guardianship while father is in prison. The juvenile court conducted a combined hearing on the request to change Z's plan and father's motion to dismiss.

At the time of the hearing, Z was four years old. DHS presented evidence that Z has confusion about who is father is and anxiety about his video visitation with father. It took him nearly a year to feel safe with his grandmother. He had symptoms suggestive of post-traumatic stress disorder that dissipated over time but could return with disruption to that placement. Any question about who is going to care for him causes him anxiety. Z's caseworker testified that guardianship doesn't offer the ongoing level of stability and security that Z would need. Grandmother is willing to adopt, or if that is not possible, she is willing to be his permanent guardian. However, she does not believe father's plan would be good for Z because efforts by father to dissolve the guardianship or resolve disputes over Z's care in court would further disrupt Z's life. Father's friend, proposed as an alternate guardian, has not had recent contact with Z, nor did he follow through with paperwork to become a foster parent of Z. Father testified that he would like to get his son back when his appeal goes through. He also testified he doesn't like

members of grandmother's immediate family and that is why it is best that Z be taken care of by father. He had not discussed his plan of care for Z with grandmother, nor can he contribute financially to care for Z.

The juvenile court denied father's motion to dismiss and changed Z's permanency plan from reunification to adoption. The juvenile court found that father's continued incarceration for his conviction of sex crimes involving a child he lived with, combined with father's continued denial of his crime and focus on his own circumstances rather than Z's, continues to pose a threat to Z. The court further found father's plan of guardianship with his friend or Z's grandmother did not mitigate the threat. The juvenile court found father's plan for his friend to serve as guardian would not ameliorate the risk to Z because the friend had made no effort to establish a relationship with Z, and appears to view his role as being a placeholder who would warehouse Z until father came to get him. The court found guardianship with grandmother would also not ameliorate the risk because of father's lack of insight into his parenting deficits, and his plan to dissolve the guardianship once he gets out of prison. After finding father made no effort to ameliorate his parenting deficits and adjust his conduct to become a minimally adequate parent, the court changed the permanency plan to adoption. Father appealed, assigning error to the juvenile court's denial of his motion to dismiss jurisdiction and the change in permanency plan.

Held:

Affirmed.

A motion to dismiss presents a two-part inquiry: (1) the court must determine whether the original bases for jurisdiction continue to post a current threat of serious loss or injury, and (2) if the court determines that they do, it then must assess the likelihood that the risk will be realized. Evidence that another person is available to assist the parents in providing care for the child is relevant to the inquiry. Because the plan was reunification, DHS, as the proponent of continued jurisdiction, bore the burden of proof.

In this case, the court found the evidence supported the juvenile court's findings that father's plan did not ameliorate the threat of harm to Z posed by the jurisdictional bases. Father continues to deny his crimes, does not recognize a connection between his crimes and his parenting skills, denies that he has any parenting deficits, and was focused throughout his testimony on his own circumstances. The court also found that father's plan would prevent Z from having his health and safety needs met, which include his heightened need for security, permanency and secure attachment. Finally, the court noted that this is not a case in which a parent was working cooperatively with a caregiver to obtain stability and permanency for his or her child outside of the dependency process. Rather, father had not discussed his plan with grandmother, who opposed the plan and believed it would harm Z's welfare.

➤ ***Dept. of Human Services v. C.L.M.*, [300 Or App 603 \(2019\)](#)**

The juvenile court took jurisdiction over child based on an admitted allegation that mother uses inappropriate discipline and needs the assistance of DHS to manage the behavior of the child and safely parent. Mother moved to dismiss jurisdiction after completing services. The child opposed mother's motion, arguing that the jurisdictional basis was not ameliorated because she still needed a safe place to live while completing family counseling with mother. DHS agreed that mother had ameliorated the sole basis of jurisdiction but asked that jurisdiction continue for another 90 days while family counseling

continued. The juvenile court found that everyone agreed that the jurisdictional basis had been ameliorated, denied mother's motion, and ordered that the dependency petition be amended to include a new allegation to reflect the child's current circumstances of mother being unable to meet the child's emotional needs. A trial was scheduled on the new allegation. Mother appealed.

Held:

Reversed.

If the bases for the juvenile court's jurisdiction cease to exist, then the juvenile court must terminate the wardship and dismiss the case. In this case, there was no evidence that mother would again engage in inappropriate discipline of the child or that the jurisdictional basis exposed the child to a current risk of serious loss or injury that was reasonably likely to occur. The court noted that the Supreme Court recently stated that the juvenile court may be able to assert jurisdiction based on new circumstances that endanger a ward's safety, when the original factual bases for jurisdiction no longer exist. The Court of Appeals interpreted that statement to reflect that the court may continue jurisdiction where it has adjudicated additional jurisdictional facts based on new allegations that have been added to an amended petition, but not that a court may continue jurisdiction and hold a case open to allow an amended petition to be filed at a later date when the original factual basis ceased to exist.

➤ ***Dept. of Human Services v. T.D.G.*, [301 Or App 465 \(2019\)](#)**

In this juvenile dependency case, father appeals the juvenile court's denial of his motion to dismiss jurisdiction. The juvenile court asserted jurisdiction over father's son, N, in October 2017, based on threats of harm to N from father's physical abuse of N's older brother J, father's use of physical discipline, and father's driving behavior. In March 2019, father moved to dismiss jurisdiction as to N, arguing that there was no evidence that the conditions that initially endangered N persisted. The juvenile court denied the motion. Father appeals.

Held: The trial court erred in denying father's motion. The state did not meet its burden to prove that the factual bases for jurisdiction continue to pose a current threat of serious loss or injury to N that is reasonably likely to be realized. Reversed and remanded.

**Commentary:** When a parent files a motion to dismiss and the child's plan is reunification, the general rule is that DHS must show, by a preponderance of the evidence, that the factual bases for jurisdiction persist to the degree that they pose a current threat of serious loss or injury that is reasonably likely to be realized.

In this case, the Court of Appeals reversed the juvenile court's denial of father's motion to dismiss because there was inadequate evidence in the record to show that a current threat of serious loss or injury persisted. DHS presented no evidence regarding father's current driving behavior or marijuana use, nor any evidence that father continued to use physical discipline or is likely to do so in the future. The Court of Appeals explained that father's refusal to admit to past acts of physical abuse or discipline can only be a basis for continued jurisdiction if there is also evidence that the parent's failure to do so makes it likely that the parent will engage in the conduct again. The court also explained that father's hostility toward DHS, his blaming of N's grandparents for poor parenting, his failure to obtain DHS approval for services he received, and his failure to sign releases of information to DHS do not allow the court to continue jurisdiction

without additional evidence that the circumstances or conditions that gave rise to jurisdiction continue to pose a serious risk of injury or loss to N that is reasonably likely to be realized.

## Motion to Set Aside Judgment

- *Dept. of Human Services v. K.H.H.*, [304 Or App 530 \(2020\)](#)

Father appeals from the juvenile court's denial of his motion to set aside a jurisdictional judgment under ORS 419B.923, asserting, among other arguments, that the juvenile court erred as a matter of law when it denied his motion on the basis that it was not filed within a "reasonable time". The Department of Human Services argues that the juvenile court did not abuse its discretion in denying father's motion on that basis.

**Held:** Consistent with its prior cases, the Court of Appeals concluded that the meaning of "reasonable time" is a question of statutory construction, which is reviewed as a matter of law, and the juvenile court's determination that father's motion was not filed within a reasonable time is reviewed for an abuse of discretion. Because father's motion and accompanying affidavit did not sufficiently allege facts explaining the reason for the delay, the juvenile court did not err. Affirmed

### Additional notes:

The court discussed the standard for evaluating whether a motion to set aside under ORS 419B.923 is filed within a reasonable time. The juvenile court's determination includes, but is not limited to, the emotional and developmental needs of the child. The court also considers the circumstances surrounding the filing, including the length of the delay and any reasons for it. In this case, the court found the juvenile court did not abuse its discretion when it denied father's motion to set aside a jurisdictional judgment that was filed 20 months after its entry, and alleged no facts describing the circumstances surrounding his motion.

## Parentage

- *Dept of Human Services v. C. M. H.*, [301 Or App 487 \(2019\)](#)

In this juvenile dependency case, appellant challenges the juvenile court's judgment that disestablished her parentage of child. Appellant argues that ORS 419B.395(1) does not confer subject matter jurisdiction on the juvenile court to decide the issue of parentage before adjudicating whether the child is within its dependency jurisdiction. The Department of Human Services (DHS) argues that the juvenile court had subject matter jurisdiction to enter the judgment of nonparentage but raises the preliminary question of whether the Court of Appeals has jurisdiction because that judgment does not fit under any of the dispositions listed as judgments in ORS 419A.205(1).

**Held:** The Court of Appeals has jurisdiction to hear the appeal from a judgment of parentage or nonparentage. ORS 419A.205(1) does not limit the type of juvenile court judgments that may be appealed under ORS 419A.200(1). Appellant's rights or duties are adversely affected by the judgment, and the juvenile court was authorized under ORS 419B.395(1) to issue the judgment. Because the juvenile court had subject matter jurisdiction when child was taken into protective custody, it had

subject matter jurisdiction to adjudicate the parentage dispute before making a determination on whether to assert dependency jurisdiction. Affirmed.

## Permanency Hearing

- *Dept. of Human Services v. R.A.H.*, [299 Or App 215 \(2019\)](#)

The Court of Appeals reversed a juvenile court's permanency judgment because it did not comply with the requirements of ORS 419B.476(5)(a). Specifically, the court found the judgment did not contain a description of the department's efforts with regard to the case plan when it referred to an attached Exhibit 1, but no exhibit was attached. Although the record contained three exhibits labeled "Exhibit 1", it was unclear which exhibit the juvenile court intended to reference.

## Compelling Reasons

- *Dept. of Human Services v. A. D. J.*, [300 Or App 427 \(2019\)](#)

In this juvenile dependency case, mother appeals from judgments of the juvenile court changing the permanency plans for her children from reunification to adoption. Mother argues on appeal that there were two compelling reasons to forgo changing the permanency plans from reunification to adoption--first, that she was successfully participating in services, and, second, that a plan of "durable" or general guardianship was better suited to meet the children's needs. The Department of Human Services contends that the record supports the finding of the juvenile court that mother had not made adequate progress and was not successfully completing services in a way that would allow the children to be returned to her within a reasonable time and that, in light of their special needs, the children needed permanency that the foster family was able to provide through adoption.

Held:

Affirmed.

Evidence in the record supports the trial court's findings that mother had missed multiple UAs, which supports the trial court's finding that there was not enough information in the record to determine if she is maintaining sobriety. Also, there was evidence to support the trial court's findings that mother had missed several individual and group sessions, had not engaged with a mentor, and observed visits with the children revealed that mother had not made progress in her parenting skills. Expert testimony indicated both children had a need for permanency, with one of them needing permanency as soon as possible. The trial court found, in part, that a general guardianship does not offer the level of permanency that the children need since a parent may move to vacate it. The trial court's determination that the general guardianship--as distinct from a permanent guardianship--proposed by mother did not best serve the interest of both children is permissible given the evidence in the record.

- *Dept. of Human Services v. C.M.D.*, [300 Or App 175 \(2019\)](#)

At the time of the permanency hearing, R was eight years old and had been in DHS care for almost four years. He had been living with very experienced foster parents for the past three years. Prior to being in care, R had experienced severe trauma. While in foster care, he had engaged in extreme behaviors,

including killing small animals, breaking his teacher's jaw, and breaking his foster father's toe. After R had been in care for almost three years, the juvenile court changed his permanency plan from reunification to placement with a fit and willing relative. The court found mother had not been able to attain the skills necessary to safely parent R, despite DHS efforts. The court also found that the mother, child bond constituted a compelling reason to forego moving forward with a termination of parental rights.

After the permanency hearing, DHS was not able to qualify the foster parents as a relative for purposes of the placement with a fit and willing relative plan. They also were not able to reach an agreement with foster parents on a guardianship plan. At a later permanency hearing, the court determined that mother was not participating in services that would make it possible for R – who is exceptionally difficult to parent – to return home within a reasonable time. The court also found that a failed reunification would have a significant negative effect on his well-being and future success. The court concluded that DHS had failed to demonstrate a compelling reason why filing a petition to terminate parental rights would not be in the best interests of the child and changed the plan to adoption.

A couple of months later the court held the permanency hearing that resulted in this appeal. DHS and mother argued R's plan should be changed back to reunification while R's attorney opposed that request. The court explained that guardianship with R's foster parents would be in R's best interests, but because that plan is not achievable, the court determined adoption is the best plan. The juvenile court found DHS failed to demonstrate a compelling reason why filing a petition to terminate parental rights was not in R's best interests. Mother appealed.

### Held

Affirmed. On appeal, mother emphasizes that R has repeatedly expressed a desire to live with her and points to progress she has made in her ability to parent him. DHS also argues that R is unlikely to be adopted given his significant behavioral problems.

Under ORS 419B.498(2)(b), DHS is required to file a petition to terminate parental rights when a child has been in substitute care for 15 of the most recent 22 months, unless an exception applies. One of those exceptions is when there is a compelling reason documented in the case plan to determine that filing a petition would not be in the child's best interests. If such a compelling reason exists, a plan of adoption cannot be continued. The court has also recognized that a child's permanency plan should not be changed to adoption when there is persuasive evidence that adoption is unlikely to be achieved.

In this case, neither DHS nor mother put on any direct evidence regarding the present likelihood of R being able to achieve adoption. Also, the indirect evidence is not so clear as to require a singular inference that adoption is unlikely to be achieved. Although R has a long history of violent and dysregulated behavior, R's foster mother testified that some aspects of R's behavior had improved. The DHS caseworker also testified R was making really good progress academically. Also, mother had recently identified R's uncle as someone willing to be an adoptive resource.

On this record, the court could not say that the juvenile court erred in continuing the plan of adoption.

### **Notice of Hearing**

- *Dept. of Human Services v. G.S.*, [304 Or App 542 \(2020\)](#)

Mother failed to appear for a review hearing in which the juvenile court set the time and date for the permanency hearing at issue on appeal. The court did not subsequently send mother written notice of the permanency hearing, and she later failed to appear for it. Mother appealed the resulting permanency judgment changing her son's permanency plan from reunification to adoption. She claimed the court erred by holding the permanency hearing without providing her the required notice under ORS 419B.473(2), which requires a court to provide notice of the time and place of the permanency hearing to a parent whose rights haven't been terminated. DHS conceded that the record provided no basis to conclude that mother had received notice of the permanency hearing in some other form or fashion. The court found the juvenile court erred because it did not provide any type of notice of the permanency hearing as it was required to do under ORS 419B.473(2). Vacated and remanded.

## Reasonable Efforts

### ➤ *Department of Human Services v. C. S. C.*, [303 Or App 399 \(2020\)](#)

In these consolidated cases, father appeals a juvenile court judgment changing his child's permanency plan from reunification to adoption. Father argues that the juvenile court erred in concluding that the Department of Human Services (DHS) had made reasonable efforts to enable either father or mother to become a minimally adequate parent for their child. DHS responds that father's arguments with respect to mother are not preserved and that its efforts as to father were reasonable under the circumstances.

**Held:** The juvenile court did not err. Father's arguments regarding DHS's services to mother are unpreserved. Although DHS's efforts with respect to father may have been less than ideal, the Court of Appeals concluded that they were sufficient to support the juvenile court's reasonable-efforts determination. Affirmed.

**Additional notes:** In this case, the court found the efforts DHS was providing to father were extensive prior to his incarceration for serious crimes. After that, DHS's efforts dropped off as to father for a seven-month period. DHS had arranged for phone visitation, had paid money towards father's prison account to facilitate video calls, and had made efforts towards having father transferred to a prison closer to A to make in-person visits possible. The issue on appeal is whether the juvenile court erred in finding DHS made reasonable efforts given the lack of efforts over the seven-month period. The court distinguished this case from other recent cases where the court found efforts were insufficient in that *father was not asking to be a physical caretaker or a decision maker about the child's care, custody and control*. The court acknowledged that the law requires reasonable efforts be made for each parent but noted father's lack of availability as a placement resource helps place the services that DHS provided to father in perspective. The court also noted that while DHS had provided extensive services to father up to the time of the first permanency hearing, there was no indication that father had ameliorated the bases of jurisdiction over that period. The court suggested there was little evidence that father would have benefited from additional services. Finally, the court noted services to mother were extensive.

### ➤ *Department of Human Services v. M. C. C.*, [303 Or App 372 \(2020\)](#)

Father appeals from a permanency judgment that changed the plan for his child from reunification to adoption. Father argues that the juvenile court erred in concluding that the Department of Human Services (DHS) had proved that it made reasonable efforts to reunify father and his child, a required

predicate to changing a child's permanency plan away from reunification. Because he will be incarcerated in federal prison for many years, father's argument focuses on DHS's failure to facilitate placing his child with father's sister in Georgia, who was willing and able to be a permanent resource for the child.

Held: Father's incarceration and the fact that his care resource for his child is located in another state might make providing reasonable efforts more challenging and time-consuming, but that does not excuse DHS from making reasonable efforts for reunification before obtaining a change in the child's plan to adoption. Here, DHS did not demonstrate that it had made those reasonable efforts by the time of the permanency hearing. Reversed and remanded.

**Additional notes:** In this case, DHS refused to allow S's aunt to be a placement resource while the plan was reunification, because the aunt lived out of state. DHS may require this so the child is close to the parents who are working towards reunification. However, in this case, the mother had not had any contact with DHS for two months prior to father's request that S's aunt be considered. The court found that at a minimum, once father identified his sister as a potential resource to ameliorate the risk of harm to S from the jurisdictional basis, which in this case was father's unavailability to parent, DHS was required to allow father a reasonable amount of time to enlist his sister's help. At the time of the permanency hearing, contact between the aunt and S still had not occurred. The court also noted that father's use of inappropriate language with the caseworker and foster parent early in the case had no bearing on whether DHS met its burden to make reasonable efforts. And finally, the court noted that delays caused by the federal prison do not categorically excuse DHS from making reasonable efforts before seeking to change a child's plan away from reunification.

➤ ***Dept. of Human Services v. D.M.D.*, [301 Or App 148 \(2019\)](#)**

Father appeals from judgments changing the permanency plan for his two children from reunification to adoption. He assigns error to the juvenile court's conclusion that the Department of Human Services (DHS) made reasonable efforts to reunify him with his children. Father specifically argues that DHS's efforts were unreasonable because it delayed referring father to batterer's intervention treatment for nearly seven months after the juvenile court ordered DHS to do so.

Held: The juvenile court did not err. DHS delayed father's referral because (1) father was arrested in the week following the order and (2) a psychologist recommended that father needed to demonstrate at least one year of sobriety before ensuring that batterer's intervention would be effective, which he had not yet done. Given those two facts, and in light of the particular circumstances of father and children, the juvenile court did not err. Affirmed.

➤ ***Dept. of Human Services v. D.M.R.*, [301 Or App 436 \(2019\)](#)**

In this juvenile dependency case, father appeals from a judgment changing his child's permanency plan from reunification to adoption. At the permanency hearing, the juvenile court ruled that the Department of Human Services (DHS) satisfied its burden to prove that it made reasonable efforts to assist father in ameliorating the jurisdictional basis, father's "chaotic lifestyle and chaotic relationship with mother." On appeal, father asserts that, although DHS provided bus passes, a referral to parent training, and a referral to "Womenspace," DHS has not met its burden to prove that those services were sufficiently related to resolving the jurisdictional basis. DHS responds that, because it referred father to Womenspace only after it was clear that he was a victim of domestic violence, the court can reasonably

infer that Womenspace provides assistance to victims of domestic violence, which could have assisted father in his chaotic relationship with mother, had he chosen to utilize those services.

**Held:** DHS failed to present evidence from which the juvenile court could reasonably infer that the services provided could help father ameliorate the jurisdictional basis, and, thus, did not satisfy its burden. Reversed and remanded.

**Commentary:** In this case, there was no evidence in the record indicating which programs were available to father through Womenspace, or how any programming available “...served to ameliorate father’s ‘chaotic relationship’ or prevented that chaotic relationship from endangering the child.” In other words, the evidence did not show that DHS efforts were specifically tailored to the problems identified in the jurisdictional basis for father.

➤ ***Dept. of Human Services v. V. A. R.*, [301 Or App 565 \(2019\)](#)**

Mother appeals permanency judgments changing the permanency plan for her 13-year-old son, W, from reunification to placement with a fit and willing relative. She contends that the juvenile court erred when it determined that the Department of Human Services (DHS) made reasonable efforts to reunify W with mother as required by ORS 419B.476(2)(a) because only five sessions of hands-on parenting training before the permanency hearing did not reasonably allow her the opportunity to demonstrate that she could be a minimally adequate parent for W. DHS argues that its efforts were reasonable and that, in any event, mother's intellectual disability is an insurmountable barrier to reunification.

**Held:** DHS's efforts to reunify W with mother were not reasonable because, at the time of the hearing, mother's training had not been going on long enough to allow for a meaningful evaluation of whether mother could become a minimally adequate parent. Reversed and remanded.

**Commentary:** Consider reviewing DHS efforts in light of the service recommendations in a parent’s psychological evaluation early in the case, to the extent those recommendations are within the scope of the bases of jurisdiction. If the service is not being provided, an appropriate order requiring DHS to provide the service may help prevent this type of delay. In this case, the psychological evaluation indicated in July 2017 that mother required hands-on, in-person parent training, where the parent trainer works with mother and the child together. Instead of providing the recommended training, DHS offered parenting training through Skype visits. DHS didn’t offer the recommended training until the court ordered it to do so (approximately a year after the evaluation). As a result, mother only received five sessions of the hands-on parenting training before the permanency hearing. The Court of Appeals found this was not sufficient for mother to be able to demonstrate she could be a minimally adequate parent for W.

## Reviewability

➤ ***Department of Human Services v. L. C.*, [303 Or App 37 \(2020\)](#)**

In this consolidated juvenile dependency case, mother and father appealed judgments in which the juvenile court asserted dependency jurisdiction over their children. Since the time that they filed their appeals, the juvenile court dismissed its dependency jurisdiction. The Department of Human Services filed a notice of probable mootness, suggesting that the appeals are moot because they seek reversal on

judgments that have already been dismissed. Mother and father claim that the judgments will still have collateral consequences if not reversed.

Held: The Court of Appeals concluded that the jurisdictional judgments will not significantly affect either parent's rights in the ways that they identified, that a decision on the merits will have no practical effect, and that the appeals are moot. Appeals dismissed.

**Case note:** The court found parents' appeals were moot when: (1) the findings involved in this case would not affect the legal standards for evaluating father's care in future dependency proceedings; (2) the findings that father was unable or unwilling to protect children from mother's unsafe behavior and that he failed to maintain a safe environment for his children because he allowed them to live in an unsafe and unsanitary home do not create a significant risk of stigma; and (3) mother did not assert how people would learn of the juvenile court's findings thereby preventing her from volunteering with the art association or becoming an EMT.

## Termination of Parental Rights

### Best Interests

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

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

Held: The juvenile court did not legally err in its analysis. ***If a child's likely adoptive placement informs whether freeing that child for adoption is in the child's best interest due to the child's particular needs and circumstances, then evidence of where, and with whom, that placement may be is a permissible consideration for the court.*** Further, on de novo review of the record, DHS did not carry its burden to demonstrate by clear and convincing evidence that freeing child for adoption was in his best interest. Affirmed.

#### Additional notes:

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

Expert testimony established child's close bonds are primarily with foster mother and grandmother, while child has an insecure attachment to mother who is more like a friend to the child. The child has one overnight visit with grandmother every week, and a psychologist testified any disruption in the

relationship with grandmother could cause a deterioration in behavior. Also, witnesses testified that a permanent, stable placement is required to address child's particular needs. DHS also identified maternal relatives (a couple) in Alaska as an adoptive resource for the child, however, the child had only met one of them a few times. According to DHS administrative rule, the maternal relatives would be given preference over the current foster parent, since they were relatives and the foster mother had not yet achieved "current caretaker" (419A.004(11)) status. The trial court found that based on testimony regarding how well the child had done in the current placement, the testimony about how it would be difficult for the child to transition, and the fact that DHS would likely move the child to Alaska if the child was freed for adoption, termination was not in the child's best interest.

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

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

➤ ***Department of Human Services v. M. A. N.*, [303 Or App 600 \(2020\)](#)**

This is a termination of parental rights case subject to the Indian Child Welfare Act of 1978. Mother appeals the court's judgment terminating her parental rights contesting, among other things, the court's determination that she is unfit to parent her child and that termination of her parental rights is in the child's best interest.

**Held:** On de novo review, the Court of Appeals concluded that, while mother is not currently fit to parent the child herself, the child is placed long-term with extended family members with whom he is bonded, and the state did not prove, beyond a reasonable doubt, facts that would support the conclusion that terminating mother's parental rights is in the child's best interest. Reversed.

**Case note:** In this case subject to ICWA, judgment terminating mother's parental rights reversed when on de novo review, Court of Appeals found DHS failed to prove beyond a reasonable doubt that termination was in J's best interests. The juvenile code requires that the court decide whether termination is in the child's best interests based on the particular needs and circumstances of the

child. While evidence was presented that J needed permanency, there was no evidence that mother had sought, or threatened to, interfere with J's or T's (J's sibling) living arrangement (and in T's case, guardianship) with grandmother, nor could mother move to vacate a permanent guardianship under the juvenile code. Since J's older sibling T was already living with grandmother under a guardianship, an adoption would alter J's legal relationship with T, in a way that may not be beneficial to J in the event of unexpected death or disability of mother or grandmother in the future.

## Failure to Appear

➤ ***Dept. of Human Services v. M.C.D.B.*, [301 Or App 52 \(2019\)](#)**

Mother appeals from a judgment terminating her parental rights with respect to her son, which the juvenile court entered after mother failed to appear at the termination hearing. She contends that the juvenile court erred in not granting a continuance, and then erred by proceeding to termination in her absence under ORS 419B.819 without first issuing an order in compliance with ORS 419B.820.

**Held:** In light of the circumstances identified in the juvenile court's order, along with evidence that mother ignored attempts by the Department of Human Services (DHS) to assist her with transportation to the termination hearing, the juvenile court acted well within the bounds of its discretion in denying her motions for a continuance. With regard to mother's arguments that the court erred by proceeding to termination in her absence under ORS 419B.819 without first issuing an order in compliance with ORS 419B.820, the Court of Appeals declined to exercise its discretion to correct those unpreserved claims of error. Mother previously had a colloquy with the juvenile court about the consequences of her failure to appear at the termination hearing, and mother demonstrated that she understood the gravity of such a failure to appear. Moreover, many of the same reasons justifying the court's denial of mother's motions for a continuance also militated against the exercise of discretion in this case: Her son had been in the state's care for more than three and a half years; she chose to move a month before the termination hearing, knowing both that she was required to appear personally and the consequences if she did not; and she thereafter ignored DHS's efforts to arrange for travel to the termination hearing. Affirmed.

➤ ***Department of Human Services v. C. M. W.*, [300 Or App 561 \(2019\)](#)**

Appellant in this juvenile dependency case appeals two judgments terminating her parental rights. Appellant asserts first that the juvenile court plainly erred in terminating her parental rights in her absence when she had not received statutorily required notice of the time and place of trial. Second, appellant asserts that she received inadequate assistance of counsel because her lawyer did not object to the juvenile court proceeding without her when the required notice had not been given.

**Held:** First, the record does not establish that the juvenile court plainly erred because it does not reflect whether or not appellant received the required notice. Second, appellant presents a colorable argument that she might have received ineffective assistance of counsel because of a lack of notice, and a hearing on that claim is therefore required. Vacated and remanded.

**Commentary:** When a parent responds to a TPR summons by denying the allegations under ORS 419B.819(2)(b) or (c), the court is required to provide the oral or written order under ORS 419B.820. An Order to Appear form that is compliant with the statutory requirements is

available on the JCIP

website: <https://www.courts.oregon.gov/programs/jcip/ModelCourtForms/Pages/default.aspx>

In this case, the court didn't make a record of whether the order was provided to the parent in person at the status conference, or whether it was subsequently mailed to the parent. Making a record of how the order was provided, or alternatively, reading the specific requirements of ORS 419B.820 orally into the record, may have prevented the remand in this case.

## Delinquency

### Assault

- *State v. D.C.F.*, [299 Or App 210 \(2019\)](#)

Youth was found under the juvenile court's delinquency jurisdiction for conduct that, if committed by an adult, would constitute fourth-degree assault, ORS 163.160, and harassment, ORS 166.065. On appeal, the court reversed the judgment for fourth-degree assault, accepting the state's concession that there was insufficient evidence to support a finding that youth's act of biting his sister caused "physical injury" to her within the meaning of ORS 163.160 and ORS 161.015(7).

### Motion to Suppress DNA Evidence

- *State of Oregon v. H. K. D. S.*, [305 Or App 86 \(2020\)](#)

In this delinquency proceeding, youth, age 12, was found to be within the juvenile court's delinquency jurisdiction for acts that, if committed by an adult, would constitute first-degree sexual abuse, ORS 163.427. That finding was based, in part, on evidence that seminal fluid containing DNA matching youth's was found on underwear belonging to youth's four-year-old stepsister. Officers made the DNA match after obtaining--without a warrant but with signed parental consent forms--a buccal swab from youth. Before the hearing, youth moved to suppress the DNA evidence obtained through the buccal swab. He argued that the collection of the DNA was both an unconstitutional search and seizure under Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution because officers did not obtain a warrant and, in youth's view, no exception to the warrant requirement applied. In particular, youth contended that he did not consent to the search and, further, that the consent of third parties--in this case, his parents--cannot authorize officers to search a child's person in the context of a criminal investigation. The juvenile court denied youth's motion to suppress. On appeal, youth assigns error to that denial, renewing his arguments below.

Held: The juvenile court erred in denying youth's motion to suppress the DNA evidence obtained by the buccal swab, and that error was not harmless. Youth merely acquiesced in the search and did not consent to it for purposes of Article I, section 9. Furthermore, under Article I, section 9, parental consent alone does not permit law enforcement to search the person of a child suspected of a crime for DNA. Reversed and remanded.

## Obligation to Report as Sex Offender

➤ *State v. A. L. M.*, [305 Or App 389 \(2020\)](#)

Youth was adjudicated delinquent in relation to two counts of attempted first-degree sodomy, and the juvenile court ordered him to serve probation. Near the end of his probationary term, youth requested to be relieved of the obligation to report as a sex offender, in accordance with ORS 163A.030. Under that statute, youth had 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 juvenile court denied youth's request after an evidentiary hearing. On appeal, youth argues that the record does not support the juvenile court's decision.

Held: A reasonable juvenile court could conclude, on this record, that the evidence did not demonstrate clearly and convincingly that youth was rehabilitated and did not pose a public-safety threat. Accordingly, the court did not err when it ordered youth to report as a sex offender. Affirmed.

Additional relevant details:

In this case, the juvenile court acknowledged youth's successful completion of probation and sex-offender treatment, but found that youth had repeatedly sodomized his very young and vulnerable victims, that youth had taken advantage of his age and their ages, and that youth had taken advantage of the position of authority or trust he had been given over the children. The court also found that youth uses drugs "in connection with things that aren't necessarily healthy," noting the evidence that he offered marijuana to his victims in conjunction with abusing them. Based on that, the court was concerned by youth's repeated use of marijuana while on probation. Finally, the court observed that it could have "no idea" how youth would do once he was "off supervision" given that – up to the point of the hearing – youth had "been monitored fairly closely" since the abuse occurred.

## Restitution

➤ *State v. J.M.E.*, [299 Or App 483 \(2019\)](#)

Youth appeals a supplemental judgment ordering him to pay restitution after causing physical injury to the victim. Youth argues that the juvenile court erred in ordering restitution for a hospital bill in the absence of evidence that the bill was reasonable. The state disagrees, arguing that the Crime Victim Compensation Program (CVCP) payment of the medical bill in question is proof that the bill was reasonable because the CVCP is under a statutory duty to pay only reasonable expenses.

Held: The juvenile court erred. Payment of medical bills in accordance with the statutory and regulatory scheme governing the CVCP does not, in the absence of other evidence, support the determination that those bills are reasonable. Because, in this case, the state produced no other evidence as to the reasonableness of the medical bill in question, the trial court erred in including that portion of the victim's medical expenses in the supplemental judgment. Supplemental judgment vacated and remanded.

➤ ***State v. M.A.S.*, [302 Or App 687 \(2020\)](#)**

In this delinquency proceeding, youth seeks reversal of the juvenile court's determination that youth is within the court's jurisdiction for one count of second-degree sexual abuse if committed by an adult. Youth argues that the court lacked authority to amend the petition to include the allegation of second-degree sexual abuse because it failed to make written findings stating the reason for directing the finding, as required by ORS 419C.261(1). Youth also contends that the juvenile court's direction to amend the delinquency petition on the morning of the jurisdictional hearing violated his due process right to notice under the Fourteenth Amendment to the United States Constitution. The juvenile court awarded restitution, and youth argues that, because the state presented its restitution evidence after the court had determined that youth was within its jurisdiction, the state failed to meet the requirement under ORS 419C.450 that restitution evidence be presented "prior to or at the time of adjudication."

**Held:** Youth's challenges that the juvenile court lacked the legal authority to amend the petition without making written findings and that his procedural due process rights were violated are rejected. The state's presentation of restitution evidence at the dispositional hearing occurred after the adjudication of youth and was therefore untimely. Restitution award reversed; remanded for new dispositional judgment; otherwise affirmed.

**Additional notes:** The court makes clear in this case that the district attorney is required to present, prior to or at the time of adjudication, evidence of the nature and amount of the injury, loss or damage for purposes of establishing restitution. ORS 419C.450(1)(a). The juvenile court must include the amount of restitution in the judgment or include in the judgment a requirement that the youth offender pay the victim restitution, and that the specific amount will be established by a supplemental judgment within 90 days. ORS 419C.450(1)(A)&(B).