

APPELLATE CASE LAW UPDATE

Summaries of Oregon Appellate Court Decisions in
Juvenile Court Cases

July 2013 to July 2014

Oregon Judicial Department
Juvenile Court Improvement Project

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Juvenile Delinquency

1. *State v. J.N.S.*, [258 Or App 310 \(2013\)](#).

Facts:

Youth and a companion entered a vacant house after throwing a rock through a back door window and unlocking the door. Once inside, they took a key. Upon being detained by police, youth said he thought the house “would be a cool place to hang out” and that “it was okay since no one lived there and no one owned it.” Officers searched youth’s bag and found a modified tennis ball filled with smokeless gunpowder with an improvised fuse and a magnesium fire starter. Youth told police he was going to set it off later outside.

After the delinquency hearing, the juvenile court found the youth within the jurisdiction of the court for committing acts that, if committed by an adult, would constitute burglary in the second degree, ORS 164.215, unlawful possession of a destructive device, ORS 166.382, unlawful manufacture of a destructive device, ORS 166.384, criminal mischief in the third degree, ORS 164.345, and theft in the third degree, ORS 164.043.

Youth appealed, arguing (1) the juvenile court erred in concluding that youth’s intent to steal the key, formed after youth unlawfully entered the vacant house, was sufficient to establish the specific intent element of burglary; (2) the court erred in failing to hold that the tennis ball device fell within the exclusion for “pyrotechnic” device in ORS 166.382(2)(a); and (3) the court erred in adjudicating youth delinquent for theft in the third degree because the state failed to prove that the key had any value (the Court of Appeals rejected this without discussion).

Held:

Second-degree burglary may be committed in two alternative ways: (1) entering a building unlawfully with the intent to commit a crime therein; or (2) entering a building lawfully, but then remaining unlawfully — *viz.*, failing to leave after authorization to be present expires or is revoked — with the intent to commit a crime therein. The focus of the question is on youth’s intent at the initiation of the trespass. In this case, the only evidence of the youth’s intent to commit a crime when he entered the premises unlawfully was youth’s possession of the key. The Court of Appeals found the juvenile court erred in adjudicating the youth delinquent for burglary in the second degree, but found the court’s factual findings were sufficient to support an adjudication for criminal trespass in the second degree, ORS 164.245. With respect to jurisdiction on unlawful possession of a destructive device and unlawful manufacture of a destructive device, the juvenile court’s judgment was reversed and remanded for consideration of whether the tennis ball device fell under the statutory exclusion for “pyrotechnic” devices.

2. *State v. S.N.R.*, [260 Or App 728 \(2014\)](#).

Facts:

Youth was traveling south on Highway 101 when her vehicle crossed into the northbound lane and struck a motorcyclist. The crash threw the rider from his motorcycle and into a signpost, killing him. Following the crash, youth told witnesses that she had fallen asleep before veering into the northbound lane. The youth was interviewed by a state trooper and disclosed that she started getting tired while she was driving and knew she needed to pull over. Specifically, she stated, “I knew *I shouldn’t put it off*, so I - I was looking for somewhere to - to sleep. But I couldn’t find a turnoff.” However, the statement was transcribed and admitted into evidence at trial to state, “I knew *I should have pulled off*.” This latter statement was relied on by the juvenile court to find the youth acted with a conscious disregard of a substantial and unjustifiable risk. The juvenile court took jurisdiction based on its conclusion that youth committed acts that would have constituted criminally negligent homicide and assault in the third degree if, they had been committed by an adult.

Held:

Reversed. The Court of Appeals exercised discretion to review the case *de novo*, concluding the case was exceptional because a crucial finding supporting the juvenile court’s decision did not comport with the evidence on the record. The court held that to find a defendant guilty of criminally negligent homicide (or other crime) based up on falling asleep requires some evidence that the defendant had, or should have been aware of, a sufficient prior warning of the likelihood of sleep so that the defendant had the opportunity to reduce the substantial risk of injury.

In this case, the court found youth had some prior warning of the likelihood that she could fall asleep, however, that it was not sufficient to give her time to find a safe place to pull over so as to constitute a greater culpable mental state than ordinary negligence. In addition, based on the evidence as correctly transcribed, the court found youth’s conduct did not constitute a gross deviation from the standard of care, and therefore, the youth did not act recklessly. Consequently, the juvenile court erred in taking jurisdiction of youth based on its conclusion that youth’s acts, if committed by an adult, would have constituted criminally negligent homicide and assault in the first degree.

Conditions of Probation

1. *State v. C.M.C.*, [259 Or App 789 \(2013\)](#).

Facts:

The juvenile court found the youth to be within the court’s jurisdiction and ordered him to pay for his psychological evaluation as a condition of probation. Youth appealed.

Held:

Ordering the youth to pay for his own psychological evaluation was outside the court's dispositional authority under ORS 419C.446(2). The statute provides that "[t]he court may specify particular requirements to be observed during the probation consistent with recognized juvenile court practice," followed by a nonexclusive list of such requirements. The court's authority under this section is limited in that any additional requirement not listed in the statute must be of the same kind as those specifically provided in the statute. In this case, the Court of Appeals held ordering the youth to pay for the evaluation is not of the same kind as the requirements specifically set forth in ORS 419C.446(2). Reversed.

Motion to Suppress

1. *State v. D.P.*, [259 Or App 252 \(2013\)](#).

Facts:

Youth, 12 years old, was charged with acts, which if done by an adult, would constitute rape in the first degree and sodomy in the first degree. In the course of investigating a report that the youth allegedly had sexual intercourse and oral sex with a 10 year-old girl, two detectives went to his school to interview him. Youth was escorted to the school's office by the principal and led to a room in the administrative area of the school. During the course of the interview, he admitted to the allegations. Youth argued that the circumstances of the interview were custodial or compelling, thus requiring that the evidence be suppressed. The trial court denied youth's motion to suppress these statements, and youth appealed.

Held:

The Oregon Constitution requires that police give a defendant *Miranda* warnings if the defendant is in full custody or in settings that are compelling. The court considers all of the circumstances to determine whether the officers created the sort of police dominated atmosphere that *Miranda* warnings were intended to counteract, including: the location of the encounter, the length of the encounter, the amount of pressure exerted on the defendant, the defendant's ability to terminate the encounter, and the nature of the questions. When a youth is involved, the determination that circumstances are compelling depends on whether a reasonable person in the child's position (considering age, knowledge, experience and similar environment) would have felt required to stay and answer all of the detective's questions. In this case, the court found the setting compelling based on: the length of the interview, the location, the youth's age, maturity level, the repetitive and escalating nature of the questions throughout the interview, and the increasingly coercive tactics used by the detectives. Reversed.

2. *State v. J.C.L.*, [261 Or App 692 \(2014\)](#).

Facts:

Youth appeals from a judgment determining he is within the jurisdiction of the juvenile court for conduct that, if committed by an adult, would constitute the criminal offenses of first-degree encouraging child sexual abuse, ORS 163.684(1)(a)(A) (2007), and second-degree encouraging child sexual abuse, ORS 163.686 (2007).

Youth's uncle, Conahan, was arrested for possession of child pornography. Conahan made statements to police that led them to investigate youth. Youth's computer was in the possession of a computer repairman, Dutton. Dutton told the detective that when youth had given Dutton the computer for repair, youth had told Dutton to back up everything. However the day after Conahan's arrest, youth called and requested that Dutton delete the contents of the computer, including the back-ups. Given youth's request and the fact that youth's hard drive was connected to Dutton's computer, the detective believed the destruction of evidence was imminent, and he seized youth's computer and hard drive. Eight days later, police obtained a warrant to search youth's computer. On a shared folder on the computer, police found images and videos of child pornography identical to the images and videos found on Conahan's thumb drive.

The juvenile court denied youth's motion to suppress the evidence found on youth's computer. At the close of trial, the court denied youth's motion for a judgment of acquittal.

Held:

Affirmed. Police may search or seize property without a warrant without violating the Oregon or federal constitutions when they have probable cause to believe that the property is evidence of a crime, upon a showing of exigent circumstances. It's the state's burden to show exigency, by establishing both that the destruction of evidence was imminent and that a warrant could not have otherwise been expeditiously obtained. The Court of Appeals found the record supported the juvenile court's conclusion that the police detective reasonably believed Dutton was about to erase youth's hard drive and that, if he left youth's computer within Dutton's control to obtain a warrant, the destruction of evidence was imminent.

The Court of Appeals also considered whether the trial court erred in denying the youth's motions for judgment of acquittal, based on youth's argument that the state failed to prove that he knowingly possessed or controlled photographs involving sexually explicit conduct involving a child, as required by ORS 163.686. There was evidence in the record establishing that material was downloaded to youth's computer from one of Conahan's thumb drives, and the files were located in a shared folder, and organized in subfolders. There was evidence that the subfolders are not system folders or default folders that would be automatically created, indicating they

were downloaded and saved intentionally and with an awareness of their contents. That evidence, along with evidence that the computer belonged to youth, had been kept in his bedroom, and that he had instructed Dutton to delete everything on it, was sufficient to allow a rational trier of fact to find that youth knowingly possessed images of child pornography.

Finally, the Court of Appeals considered whether the court erred in denying youth's motion for a judgment of acquittal of charges of first-degree encouraging child sexual abuse in violation of ORS 163.684(1)(a)(A), and whether the evidence was sufficient to establish youth's intent to "duplicate or display" the images. Youth argued that the supreme court's decision in *State v. Bray*, 342 Or 711 (2007) requires that the images be possessed with an intent to either be shown publicly or to others, and the evidence was not sufficient to establish youth had an intent to "display" if it shows only that the youth had the intent to view the images himself. There was evidence that youth was using the software Limewire, which is designed to facilitate the sharing of files among connected users, and that he downloaded the material to a shared folder. Although there were competing inferences that could be made based on the evidence, viewing the evidence in the light most favorable to the state, the court concluded it was sufficient to allow the juvenile court to find that youth had an intention to share the files.

3. *State v. A.J.C.*, [355 Or 552 \(2014\)](#).

Facts:

Youth called V and told her that he was going to bring a gun to school to shoot her and other students. The next day, V informed a school counselor about the threat, who in turn notified the school principal, Smith. Smith conducted an independent search of youth's locker and found no evidence corroborating the threat. Smith then went to youth's classroom, picked up youth's backpack, and asked youth to accompany him to the office. In the office, Smith placed the backpack at his feet, away from youth, who was sitting by his mother. A deputy sheriff was also present and explained she was just an observer, and the situation was not a criminal matter. After interviewing the youth, Smith informed youth that he was going to search the backpack. Youth did not object or consent. During the search, Smith found several bullets and a handgun. Youth was arrested.

Before trial, youth moved to suppress evidence of the handgun and bullets arguing that the warrantless search of the backpack violated his rights under Article I, section 9, of the Oregon Constitution. The juvenile court denied youth's motion and youth appealed. The Court of Appeals affirmed the trial court decision in *State v. A.J.C.*, 254 Or App 717 (2013). The Oregon Supreme Court granted youth's petition for review.

On appeal, youth contends: (1) the warrantless search was not justified under the school-safety exception to the Article I, section 9, warrant requirement; and (2) under the circumstances at the

time of the search, the search was not justified because youth no longer posed an immediate safety risk.

Held:

Affirmed. The court acknowledged the protections of Article I, section 9, extend to students attending public schools. However, the court has recognized an exception to the warrant requirement (“school-safety exception”) permitting school officials to undertake reasonable protective measures in response to a credible safety threat as announced in *State ex rel Juv. Dept. v. M.A.D.*, 348 Or 381 (2010):

“[W]hen a school official develops a reasonable suspicion, based on *specific and articulable facts*, that a particular individual on school property either personally poses or is in the possession of some item that poses an *immediate threat* to the safety of the student, the official, or others at the school, the school official must be allowed considerable latitude to take safety precautions.”

(Internal quotations omitted; emphasis added.)

Protective actions, such as a limited search, do not violate Article I, section 9, if they are based on *specific and articulable facts* and are *reasonable*. The court rejected youth’s argument that once Smith was in possession of the backpack, a warrantless search was no longer justified. The court distinguished the school-safety exception from the officer-safety exception to the warrant requirement, reasoning that schools have a heightened standard of care due to the large number of students (and adult staff) who are compelled to be in school, and in considering whether the school official’s action is reasonable, the unique features of the official’s responsibilities and the school setting must factor into the assessment.

In this case, the court found the information known to Smith at the time of the search was sufficient for him to reasonably suspect the youth possessed a firearm for the purpose of shooting students. In addition, the court found the scope of the search was reasonable as it was limited to parts of the backpack that could contain the gun. Finally, the court found the threat of harm remained imminent at the time of the search because Smith did not know where the gun was.

Restitution

1. *State v. N.R.L.*, [354 Or 222 \(2013\)](#).

Facts:

Youth was adjudicated delinquent after admitting that he unlawfully entered a warehouse and damaged property – acts that, if committed by an adult, would constitute second-degree burglary and first-degree criminal mischief. Before the dispositional hearing, youth moved for a jury trial

arguing that under Article I, section 17, he was entitled to have a jury determine the amount of restitution he should be required to pay. The juvenile court denied youth's motion and entered a judgment ordering youth to pay \$114,071.13 in restitution.

Youth appealed arguing that he was entitled to a jury trial on the issue of the amount of restitution that he should be required to pay. Holding that a juvenile offender's obligation to pay restitution is penal, not civil, in nature, the Court of Appeals affirmed the trial court's determination. The Oregon Supreme Court allowed review on the question of whether Article I, section 17, applies to a juvenile restitution determination under ORS 419C.450.

Held:

A restitution determination pursuant to ORS 419C.450 is not civil in nature. Article 1, section 17, did not grant a right to jury trial in this case.

Juvenile Dependency

Disposition

1. ***Dept. of Human Services v. A.E.F., [261 Or App 384 \(2014\)](#).***

Facts:

The court took jurisdiction over mother based on mother's admissions that: (1) the child had presented with bruising and/or injuries consistent with inflicted injury; (2) mother has used inappropriate and excessive discipline on child; and (3) mother has an anger management/control problem that impairs her ability to parent. At the dispositional hearing, DHS requested that the court order mother to undergo a psychological evaluation, arguing it would help determine whether other than "typical" counseling would be beneficial, given mother's history of physically abusing her children and because she had already been given training and information about the appropriate use of discipline. The trial court declined to order the evaluation, concluding its authority to do so was limited to the following circumstances: (1) where there is proof/admission at jurisdiction of a psychological condition, and an evaluation would assist in determining appropriate services; and (2) where a parent has been offered and has not appeared to benefit from services, and nobody can explain why. The child appealed.

Held:

The juvenile statutes authorize a court to order a parent to participate in a psychological evaluation if the evaluation "bears a rational relationship to the bases the court found for taking jurisdiction." See ORS 419B.337(2) and 419B.343(1)(a). In *State ex rel Juv. Dept. v. G.L.*, 220 Or App 216 (2008), the court found that a rational relationship existed when mother had failed to

benefit from past services, and the evaluation would assist DHS in determining whether there was a mental health diagnosis that could be the cause of that failure. However, *G.L.* does not limit the court's authority to order a psychological evaluation of a parent to those circumstances. The juvenile court in this case construed its authority too narrowly. Vacated and remanded for the juvenile court to make a determination of whether to order mother to undergo a psychological evaluation.

Guardianship

1. *Dept. of Human Services v. K.H.*, [256 Or App 242 \(2013\)](#), *adh'd to as modified*, [258 Or App 532 \(2013\)](#).

Facts:

In the initial Court of Appeals opinion, the court found the trial court had conducted a sufficient hearing under ORS 419B.366 (establishment of durable guardianship) where mother was allowed to submit an offer of proof, and the trial court denied her request for a further evidentiary hearing based on a finding that the evidence would not affect its conclusion as to the findings required by ORS 419B.366. The Court of Appeals found it permissible for the trial court to limit mother's submission to an offer of proof regarding the "reasonable time" determination where the permanency hearing and guardianship hearing were held within a four-month span, and the trial court made a finding regarding "reasonable time" in the permanency judgment. On petition for reconsideration, mother challenges the Court of Appeals' "factual findings" that: (1) the juvenile court took judicial notice of the record of the permanency hearing in denying mother's request for a hearing; and (2) the juvenile court relied upon the record of the prior permanency hearing in ruling that DHS had met its evidentiary burden under ORS 419B.366. Mother also requested reconsideration that the hearing satisfied the hearing requirement in ORS 419B.366 and that DHS had met its evidentiary burden to prove all four elements of guardianship.

Held:

The second Court of Appeals decision disavowed its previous statement that the juvenile court took judicial notice of the permanency hearing record and instead clarified that the trial court "considered" the court record of the contested permanency proceedings. The court further clarified that the trial court's determination that the child could not be returned to mother in a reasonable time was not just based on the affidavit of DHS counsel, but also on mother's offer of proof and the trial court file, which included the determinations incorporated in the permanency judgment as to reasonable time. The former opinion was adhered to as modified.

2. *Dept. of Human Services. v. J.G.*, [260 Or App 500 \(2014\)](#).

Facts:

Mother, a member of the Klamath Tribe, appealed the granting of a durable guardianship under ORS 419B.366, arguing that the juvenile court's failure to make an "active efforts" finding in the proceeding establishing the guardianship was reversible error. The court made such a finding at the permanency hearing but not at the proceeding in which the guardianship was established.

Held:

(1) Allegation of ICWA violation may be raised for the first time on appeal even though Oregon rule requires preservation of error. 25 USC section 1914 of ICWA preempts Oregon's preservation rule as "obstacle preemption." Section 1914 allows parties to challenge, "in any court of competent jurisdiction," any action for foster care placement or TPR that violate certain sections of ICWA. The effect of Oregon's preservation rule would be an obstacle to the execution of the full purposes and objectives of Congress because mother would be precluded, by her failure to preserve, from enforcing her right to invoke section 1914 as a means of enforcing ICWA in a challenge in appellate court.

(2) The court was not required under ICWA to make an "active efforts" finding in the guardianship judgment where it had made the finding in the permanency judgment. A guardianship is a "foster care placement" under ICWA, but the court is not required to make an active efforts finding in the guardianship judgment because the court satisfied that requirement by making an active efforts finding at the permanency hearing. The court is not required to make that finding again at a later hearing when it actually orders that placement.

3. *Dept. of Human Services v. R.S.*, [261 Or App 815 \(2014\)](#).

Facts:

The juvenile court established a guardianship under ORS 419B.366 for F. Mother appealed the judgment arguing the juvenile court erred in denying her motion to terminate the wardship.

Held:

Affirmed. A review of the record shows that mother did not move to terminate the wardship or otherwise properly place the continuing jurisdiction of the court at issue. Instead, mother used the guardianship hearing to attack the court's initial jurisdictional determination. Once the initial jurisdiction of the court is established, the issue in later proceedings is only whether jurisdiction continues.

Immunizations

1. *Dept. of Human Services v. S.M.*, [355 Or 241 \(2014\)](#).

Facts:

The juvenile court took jurisdiction over parents' children and appointed the Department of Human Services (DHS) as the children's legal guardian and custodian. Four months later, DHS requested a review hearing and notified the court that the children needed to be immunized against common childhood diseases both for their own safety and also for the safety of other children at their school. Parents objected and argued: (1) the juvenile court had never determined they were unfit to make medical decisions for their children; and (2) immunization was against mother's religious beliefs. The juvenile court entered a review judgment for each child providing for immunization over the parents' objection. Parents appealed.

The trial court's decision was affirmed by the Oregon Court of Appeals in *Dept. of Human Services v. S.M.*, 256 Or App 15 (2013). Parents appealed to the Oregon Supreme Court, arguing: (1) DHS lacked statutory authority to make medical decisions because medical neglect was not one of the factual allegations on which the juvenile court had jurisdiction; and (2) ORS 419B.372 (guardianship as incident of custody) and ORS 419B.376 (duties and authorities of guardian) should be interpreted consistently with due process.

Held:

Affirmed. Under ORS 419B.372 and ORS 419B.376, DHS had statutory authority as the children's legal guardian to approve their immunization. The power of DHS as guardian to "make other decisions concerning the ward of substantial legal significance" under ORS 419B.376(5) includes the power to immunize the wards in its care against common childhood diseases.

The court noted DHS has promulgated administrative rules to guide the exercise of its authority as guardian and legal custodian that require DHS to: (1) consider the impact of the proposed action upon the welfare of the child, the child's family, and the community, prior to deciding whether to consent to or authorize the proposed action; and (2) make reasonable efforts to consult the child's legal parent(s) or guardian(s) about the proposed action when the child is not in the permanent custody of DHS. OAR 413-020-0170. In addition, DHS may notify the juvenile court, and/or seek the court's concurrence concerning a proposed course of action authorized by ORS 419B.376. The court found these procedural protections provide assurance that DHS's decisions as a ward's legal guardian will take into account the parents' concerns and that there is a process for a parent to raise a statutory or constitutional challenge to DHS's proposed action if the parent believes DHS has exceeded its authority.

Jurisdiction

1. *Dept. of Human Services v. N.P.*, [257 Or App 633 \(2013\)](#).

Facts:

The circuit court established jurisdiction over father in August 2011 based on the allegation that “father’s use of controlled substances made him incompetent to parent.” Father successfully completed drug and alcohol counseling in December 2011. DHS filed an amended petition in February 2012 alleging the child was within the jurisdiction of the court because “[t]he father has ongoing mental health and/or anger and frustration problems that impair his ability to competently parent the child.” At a hearing on the petition in April 2012, the court found father no longer had a substance abuse problem and that his mental health did not impair his ability to parent, but that jurisdiction was justified because, “[v]iewed in light of the risk that is represented by his use of controlled substances, father’s anger and frustration represent a condition that, without treatment, impairs his ability to parent.” Father appealed, arguing the court erred in denying his motion to terminate wardship and to dismiss jurisdiction.

Held:

The 2011 judgment establishing wardship is no longer sustained because father’s substance abuse was no longer an issue. The trial court could not rely on father’s past substance abuse and his risk of relapse to support jurisdiction based on the second petition because those facts ceased to exist and there was no evidence. Due to the fact that the court did not base jurisdiction on father’s anger and frustration issues, the Court of Appeals reversed the trial court’s determination.

In addition, the Court of Appeals clarified its standard of review as follows. The Court of Appeals may decline to review the juvenile court’s determination of jurisdiction predicated on ORS 419B.100(1)(c) *de novo*. The court has discretion to review “non-*de novo*”, allowing the court to view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court’s disposition and assess whether the record was legally sufficient to permit that outcome. The opinion sets forth a three part analysis for reviewing the trial court’s determination.

2. *Dept. of Human Services v. C.J.T.*, [258 Or App 57 \(2013\)](#).

Facts:

Three children were taken into protective custody and DHS filed a petition with four circumstances and conditions that endangered the child’s welfare under ORS 419B.100(1)(c). Following a jurisdictional hearing on July 30, 2012, the juvenile court found sufficient evidence to establish jurisdiction based on one allegation concerning mother’s use of alcohol and/or

controlled substances. The following testimony was presented at the hearing: (1) the children smelled marijuana in the house and believed they had seen mother using it; and (2) the children's father smelled marijuana in mother's house in March or April of 2012. Mother took three drug tests in July 2012, two of which came back negative, and one she failed because the specimen was too dilute. On appeal, mother argued the trial court erred in determining the children were within the court's jurisdiction under ORS 419B.100(1)(c) when DHS failed to prove the children's welfare was at risk of serious loss or injury or to present any evidence that mother was using marijuana at the time of the hearing.

Held:

Juvenile court jurisdiction is appropriate under ORS 419B.100(1)(c) when a child's condition or circumstances endanger the welfare of the child. To "endanger" the welfare of a child means to expose the child to conditions or circumstances that present a current threat of serious loss or injury. The key inquiry in determining whether conditions or circumstances warrant jurisdiction is whether, under the totality of circumstances, there is a reasonable likelihood of harm to the welfare of the child, and DHS has the burden to demonstrate a nexus between the allegedly risk-causing conduct and the harm to the child. DHS must also show the risk of harm is present at the time of the hearing.

In this case, the record lacked legally sufficient evidence to establish that mother used marijuana after April 2012. There is no evidence in the record establishing a nexus between mother's marijuana use and any current threat of harm to the children. There is no evidence in the record establishing that mother abused alcohol. The trial court's decision was reversed.

3. *Dept. of Human Services v. T.A.H.*, [257 Or App 526 \(2013\)](#).

Opinion:

"Mother appeals judgments establishing jurisdiction and disposition as to her four children. DHS alleged that the youngest, infant T, suffered severe injuries; mother left T with unsafe caregivers and failed to protect her from abuse; mother does not adequately supervise children; mother was unable to protect them from domestic violence by father of the youngest three; and mother does not understand basic needs of children and lacks parenting skills. The juvenile court ruled that DHS had proved the allegations and placed children in substitute care. In two of her assignments of error, mother contends that the court erred by taking jurisdiction over children, and, in a third assignment, contends that the court's disposition, out-of-home placement of children, was error.

After briefing was complete, children were placed with mother. Accordingly, mother's assignment of error to the court's out-of-home placement of children is

now moot. *See Brumnett v. PSRB*, 351 Or 402, 405, 848 P2d 1194 (1993) (A case is moot when the ‘court’s decision no longer will have a practical effect on or concerning’ the parties’ rights.). As for mother’s other assignments of error challenging jurisdiction, we affirm.

Mother left T and her two boys, ages 5 and 6, in the care of a friend, Adams, who was living with her, while she went out and while D, her teenage daughter, 19, went to a school dance. Mother did not come home that night, and in the morning, D discovered that T had a bump on her head and did not appear normal. D, who often babysat her siblings, called mother, crying, but mother thought D was overreacting. When mother got home, it was evident that T needed emergency care. T had a skull fracture, a broken arm and ribs, and a liver laceration. Mother argues that children were not at risk and did not need the court’s protection at the time of the hearing because the abuse of T was unforeseeable; Adams was no longer in her life and she cooperated with authorities in his criminal prosecution; and, after moving in with her brother, mother had more assistance with children. Mother also notes that she sought a restraining order against the father of the three younger children. Without further discussion, we agree with DHS that the record supports the juvenile court’s jurisdiction over children under ORS 419B.100(1)(c) (the court has jurisdiction if the child’s ‘condition or circumstances are such as to endanger the welfare’ of the child) given the injuries to T, mother’s conduct in response, and evidence that mother failed to provide adequate supervision for children. Affirmed.”

COMMENTS:

The rather sparse discussion of the sufficiency of the evidence to support jurisdiction in this case could make this decision hard to reconcile with other recent “current-risk-of-harm” decisions. *See generally, e.g., State v. S.T.S.*, 236 Or App 646, 654, 238 P3d 53 (2010) (In order to establish jurisdiction under ORS 419B.100(1), the petitioner must prove “that there is a current risk of harm and not simply that the child’s welfare was endangered at some point in the past.”).

4. *Dept. of Human Services v. R.L.F., Jr.*, [260 Or App 166 \(2013\)](#).

Facts:

The juvenile court took jurisdiction over the child pursuant to ORS 419B.100(1)(c) on the following bases relating to father: (1) the father was subjected to domestic violence by the mother and the father is unable to protect the child from exposure to mother’s violence; (2) the father of the child does not have sole legal custody of the child and is unable to protect the child from the mother’s abusive and neglectful behavior; (3) the father’s substance abuse interferes

with his ability to safely parent the child; and (4) [the father] is said child's legal father as he is listed on said child's birth certificate.

After the child was taken into protective custody and prior to the jurisdictional hearing, father ended his relationship with mother and obtained a restraining order against her. After he obtained the restraining order, father called police to enforce it during a confrontation with mother. He also initiated proceedings to obtain sole legal custody of the child, but his petition had not yet been granted by the time of the jurisdictional hearing. In addition, he moved from mother's residence to a friend's house. When DHS determined the residence was unsuitable due to the presence of marijuana, he arranged to move to a sober housing facility where he could live with the child. Finally, he participated in drug and alcohol assessments, weekly outpatient treatment meetings, and random urinalysis.

At the jurisdictional hearing, DHS presented evidence of prior instances of domestic violence, the child's exposure to domestic violence, the status of the restraining order against mother, and whether father had acted to enforce the restraining order. Father presented evidence of his petition for sole legal custody, mentioning the terms of the petition would require mother to have supervised parenting time with the child if she could demonstrate she was receiving treatment for her mental health conditions. DHS presented no evidence of current drug or alcohol use. Urinalysis tests were negative for alcohol and showed declining levels of THC. Finally, evidence showed father was not yet living in the sober-housing facility because a unit was not available at the time of the jurisdictional hearing. However, father was willing to check into a hotel until a unit became available if the child was returned to his care. On appeal, father argues the trial court erred in taking jurisdiction over the child because DHS failed to prove the child was exposed to a current threat of serious loss or injury due to father's conditions or circumstances.

Held:

Juvenile dependency jurisdiction is appropriate when a child's condition or circumstances are such as to endanger the welfare of the child. To determine if the child is endangered the court looks to whether the child is exposed to conditions or circumstances that present a *current* threat of serious loss or injury. DHS must prove there is a nexus between the allegedly risk-causing conduct and harm to the child. Without evidence that father is unable to protect the child or that the child will suffer some actual harm because father lacks sole legal custody, lack of a custody order alone is not sufficient for jurisdiction pursuant to ORS 419B.100. In this case, the state failed to establish there was a current, non-speculative threat of serious loss or injury to the child at the time of the jurisdictional hearing.

5. *Dept. of Human Services v. J.G.*, [258 Or App 118 \(2013\)](#).

Facts:

Mother and father have one child together, A, who was three years old at the time of trial. Mother had four children (“stepchildren”) from a previous relationship. DHS took custody of all of the children on the basis of abuse and alleged (pursuant to ORS 419B.100(1)(c)) the children were under threat of harm from father based on father’s physical and emotional abuse of the stepchildren. At the jurisdictional hearing, DHS presented testimony about the abuse from a DHS caseworker, who had interviewed the children. Father’s attorney objected to this on hearsay grounds. DHS relied on OEC 801(4)(b)(A), admission by a party-opponent, for admissibility of the evidence. The children’s attorney presented evidence from a medical examiner from Child Abuse Response and Evaluation Services (CARES), who conducted a physical examination of stepchildren. As part of the examination, the medical examiner observed a CARES forensic examiner interview each child. The medical examiner testified to statements made by the stepchildren to her and the forensic examiner during the trial. Father’s attorney objected based on hearsay, and DHS and the children’s attorney argued the medical exception to the hearsay rule in OEC 803(4), allowed the stepchildren’s statements to be admitted. The juvenile court ruled the statements were admissions of a party-opponent and were also admissible under the medical care hearsay exception. Father appealed.

Held:

The stepchildren’s statements were not admissions of a party opponent in this case. DHS must show the child who is the subject of the juvenile dependency proceeding has declared a position on the issues before the court that is adverse to the allegations in the dependency petition, and then DHS, as the proponent of these allegations, may offer the child’s out-of-court statements against the child under OEC 801(4)(b)(A). DHS did not make the required showing in this case.

With respect to the medical care hearsay exception, a declarant’s out-of-court statement is admissible under OEC 803(4) if it: (a) is made for purposes of medical diagnosis or treatment; (b) describes or relates medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof; and (c) is reasonably pertinent to diagnosis or treatment. In this case, the record supported the juvenile court’s conclusion that the statements were made for the purpose of medical diagnosis or treatment where the medical examiner testified that she explained to each child the examination and interview is for purposes of the medical diagnosis and treatment of any medical problems that are found and the physical examination and interviews took place at the same time in the same medical facility.

In sum, the Court of Appeals affirmed the juvenile court’s jurisdictional judgment based on allegations that father’s emotional and physical abuse toward his stepchildren presented a danger

to his biological son, holding the stepchildren's out of court statements were admissible under the medical hearsay exception in OEC 803(4).

6. *Dept. of Human Services v. C.F.*, [258 Or App 50 \(2013\)](#).

Facts:

DHS filed a petition alleging that mother and father engaged in incidents of domestic violence, some of which occurred in the presence of the children, placing the children under a threat of harm for physical abuse and mental injury, and that mother did not believe that father presents a safety risk to the children and failed to protect them. Mother admitted the allegations. The court heard testimony from a number of witnesses concerning past acts of domestic violence by father. Father didn't deny the acts, but testified it had been at least a year and a half since the last physical altercation between the parents. Based on mother's admission, the court entered a "Jurisdiction and Disposition Judgment" on May 9, 2012, stating that jurisdiction was established on the date of her admission in court on May 3, 2012, and continuing the jurisdictional hearing as to father. On May 21, 2012, the court found jurisdiction based on the domestic violence issue, stating orally, "[D]omestic violence is something that can-people can learn to give in to the other party over and over again in order to avoid a confrontation once there's-it's escalated to that point it affects the relationship negatively always in the future until there's been an adjustment so that that person never has to be afraid again. There's always the threat there to control the other person." On July 11, 2012, the court entered a "Jurisdiction and Disposition Judgment" with regard to father, finding the children within the jurisdiction of the court.

Father appealed, arguing DHS failed to prove the history of domestic violence between father and mother created a current threat of serious loss or injury to the children, since there was no evidence of domestic violence within 18 months before the hearing. DHS argued that because father did not appeal from the judgment establishing jurisdiction as to mother, but only appealed the judgment as to father, his appeal is not justiciable. DHS also argued father's claim failed on the merits.

Held:

(1) As to DHS's argument, the Court of Appeals found the appeal justiciable. It was clear from the language of the earlier judgment concerning the mother, "that the juvenile court did not intend for that judgment to conclusively resolve all matters concerning jurisdictional allegations as to father" because it "expressly contemplated a further hearing as to whether father created a threat of injury to the children" and set a date for future review of those allegations.

(2) With regard to father's claim, the court considered the following evidence in the record: (1) mother expressed fear of father; (2) in December 2011 (six months prior to jurisdiction), mother

obtained a protective order against father based on the allegations of domestic violence and sought help from the Women's Crisis Center; (3) mother told a DHS investigator that she was not able to leave the house on a frequent basis and was not able to go to the library, her parenting classes, or WIC appointments; and (4) mother's behavior demonstrated a pattern that is common in domestic violence, which presents a risk to the children; the court found the evidence was legally sufficient to permit the trial court's ruling there was a current threat of serious injury to the children.

7. *Dept. of Human Services v. S.D.I.*, [259 Or App 116 \(2013\)](#).

Facts:

Mother gave birth to A in Washington State in 1999. Mother and father divorced a few years later, and father assumed legal custody of A due to mother's methamphetamine addiction. Mother participated in some supervised visits with A but stopped visiting her in 2003 or 2004. Some time thereafter, father moved to Oregon. In 2006, mother gave birth to J. J was removed from mother's care in 2009 due to her methamphetamine use. After completing drug treatment, parenting and counseling services, and obtaining stable housing, J was returned to mother's care in June 2012. In February 2012, the state removed A from father's care and placed her with local paternal relatives whom she has known her entire life. On November 9, 2012, the state filed a second amended dependency petition requesting that the juvenile court take jurisdiction over A with respect to mother, alleging a history of substance abuse and lack of a relationship with A. At the hearing, mother testified that if allowed to do so, she would immediately assume physical custody of A and move her to mother's home in Washington. She also testified she would research counselors to help A with the transition and would use her huge family support system for help with A's care. The caseworker testified that the transition would likely be damaging to A psychologically.

The juvenile court took jurisdiction over mother's daughter A, pursuant to ORS 419B.100(1)(c), on the ground that, because mother had been absent from A's life for several years, there was a risk that A would be psychologically damaged if she were immediately transferred to mother's custody without a transition process. The court declined to take jurisdiction on the substance abuse issue.

Held:

On appeal, the issue was whether the state presented sufficient evidence to establish that A's condition and circumstances were such as to endanger her welfare. ORS 419B.100(1)(c). Specifically, the question was whether A's immediate transfer to mother's custody created a risk of "serious loss or injury" to A that was reasonably likely to be realized. The Court of Appeals found the state failed to establish the severity of the potential harm was such that juvenile court jurisdiction was justified. The caseworker did not testify as to what she meant by "psychological

damage”, or explain how, to what extent, or for how long A would be “psychologically damaged” by immediately moving into mother’s home.

8. *Dept. of Human Services v. N.B.*, [261 Or App 466 \(2014\)](#).

Facts:

The juvenile court took jurisdiction over mother’s five children in October 2012, pursuant to ORS 419B.100 based on: (1) mother, having participated in services, has been unable to ameliorate the issues that had interfered with her ability to parent her children; and (2) L has been diagnosed as a victim of medical child abuse by mother, placing B, M and J at risk of harm. The court previously established jurisdiction over B, M and J in October 2010 based on mother’s mental health, and M and J were subsequently returned to mother in July 2012. Mother challenged jurisdiction, asserting there was insufficient evidence to prove her current actions and conditions endanger the children.

Held:

The evidence in the record was legally sufficient to support the juvenile court’s findings and those findings support the bases for jurisdiction. The evidence included a history of mother medically abusing her older children, mother continuing to see a convicted sex offender who had physically abused two of her children, a recent incident of medical child abuse, and expert medical testimony that mother’s progress in dealing with her mental health was fragile and the children remain at risk of significant harm and potentially death in her care.

9. *Dept. of Human Services v. I.S.*, [261 Or App 731 \(2014\)](#).

Facts:

In May 2013, DHS removed the children from mother’s custody and placed them in substitute care based on her substance abuse, parenting issues and involvement in criminal activity. Mother and father had not lived together for a number of years, and father was living out of state when the children came into care. Mother and father had no formal agreement or judgment governing custody of the children. The court established jurisdiction as to mother in July 2013. In September 2013, the court took jurisdiction as to father based on: father was aware that mother cannot safely parent the children due to issues of substance abuse and neglect and has done nothing to assert custody of his children and this condition places the children under a threat of harm. At the hearing, the children’s caseworker testified that father had allowed mother to have the children with her in the past and had failed to protect the children. Father testified that he had taken the children from mother’s physical custody twice, without “much of a fight.” He also testified that because mother’s substance abuse problems were getting worse, he did not

intend to relinquish custody to her in the future and couldn't see leaving the children with her for more than a few hours at a time.

On appeal, father argued that a parent's lack of a custody order cannot support jurisdiction under ORS 419B.100(1)(c), and that DHS was required to prove that father's lack of a custody order presented a current risk of harm to the children.

Held:

Reversed. Under ORS 419B.100(1)(c), jurisdiction is proper when a child's conditions 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.

In cases in which the allegation of harm involves the lack of a custody order, jurisdiction is not proper if the lack a custody order would not expose the child to a reasonable likelihood of harm.

In this case, mother did not have legal custody of the children, and there was no evidence that mother had ever tried to physically prevent father from taking physical custody of the children or attempted to remove the children from father's care.

10. *Dept. of Human Services v. W.A.C.*, [263 Or App 382 \(2014\)](#).

Facts:

Mother admitted to allegations that were phrased in terms of her conduct. Father did not admit to any of the allegations, and the court set a contested hearing to consider those allegations for a future date. However, the court asserted jurisdiction and made the children wards of the court before adjudicating the allegations against father.

Held:

A finding of jurisdiction interferes with a parent's right to direct the custody and control of the child. In order to determine whether jurisdiction is warranted, the court must "consider all the facts in the case before it and consider whether, under the totality of circumstances, the child's welfare is endangered."

"Accordingly, we hold that a juvenile court cannot assert jurisdiction over a child based on the admissions of one parent when the other parent has been served and summoned, appears, and contests the allegations in the petition. In such a case, the juvenile court can only assume jurisdiction over the child after a contested hearing on the allegations denied by the other parent. If it were otherwise, a juvenile court could assert jurisdiction over a child and make the child a ward of

the court, depriving one parent of legal and physical custody of the child, without a determination that that parent cannot safely parent the child.”

COMMENTS:

The opinion will impact courts that have been taking jurisdiction over a child based only on the conduct of one parent. Under *Dept. of Human Services v. W.A.C.*, 263 Or App 382 (2014), the child will not become a ward until the petition allegations are resolved as to both parents, if both have been served, summoned and appeared.

Impact on other parent:

The court cannot order the parent who has admitted to begin services. Neither ORS 419B.385 (parent or guardian as party) nor ORS 419B.387 (parent participation in treatment or training) provide authority to order parents into services pre-jurisdiction. ORS 419B.385 applies to parents of a “ward” which is defined as a person within the jurisdiction of the juvenile court under ORS 419B.100. ORS 419A.004; 419B.328(1). *Dept. of Human Services v. S.P.*, 249 Or App 76 (2012), supports the conclusion that personal jurisdiction over a parent arises out of taking subject matter jurisdiction over the child. In that case, the court stated:

“The statutes contemplate that ORS 419B.100(1)(c) brings *the child* whose condition or circumstances are as described in the statute within the jurisdiction of the court, *see, e.g.*, ORS 419B.809(1) (any person may file a petition alleging that a child is within the jurisdiction of the juvenile court under ORS 419B.100); ORS 419B.310(3) (facts alleging that a child is within the jurisdiction of the juvenile court under ORS 419B.100(1) must, unless admitted, be proved by a preponderance of competent evidence); ORS 419B.328(1) (court shall make child found to be within the jurisdiction of the juvenile court under ORS 419B.100 a ward of the court); ORS 419A.010(33) (defining ‘ward’ to mean ‘a person within the jurisdiction of the juvenile court under ORS 419B.100’), and the courts also frame it in those terms, *see, e.g., Smith*, 316 Or at 650, 853 P2d 282. (‘This court has not previously considered what conditions or circumstances are such as to endanger the welfare of a child *over whom juvenile court jurisdiction is sought.*’ (Internal quotation marks and brackets omitted; emphasis added.)). However, under ORS 419B.803(1), a juvenile court having subject matter jurisdiction under ORS 419B.100 generally also has personal jurisdiction over the *parents* of the child or ward. Moreover, the court may order a parent to participate in treatment or training if the court finds ‘that treatment or training is needed by a parent to correct the circumstances that resulted in wardship or to prepare the parent to resume the care of the ward’ and if ‘the participation is in the ward’s best interests.’ ORS 419B.387.”

11. *Dept. of Human Services v. S.R.C.*, [263 Or App 506 \(2014\)](#).

Facts:

The juvenile court established jurisdiction over H on the basis of five allegations. One year later, DHS filed an amended petition concerning H with eight additional allegations. After a series of contested hearings, the juvenile court asserted jurisdiction over H based on all eight allegations in the amended petition. The court did not make any specific findings, but stated generally that mother posed an ongoing threat.

On appeal, mother argued the evidence was insufficient to show a *current* risk of serious loss or injury to H as of the time of the hearings on the amended petition. She argued that she was incarcerated at the time of the hearings and will not be released until 2015, when H will be almost 18 years old, and therefore it is unlikely she will ever parent H again. In addition, she argued that most of the allegations in the amended petition concerned historical circumstances that no longer exist, *e.g.*, H living in the same house with mother and stepfather, and a lack of court and DHS involvement in their lives.

Held:

Reversed and remanded with instructions to enter a jurisdictional judgment omitting allegation G as a basis for jurisdiction; otherwise affirmed.

The fact that the child is currently receiving protection because of the court's jurisdiction cannot be used by mother to argue that the asserted additional jurisdictional bases do not present a current risk of harm to H. When reviewing a challenge to jurisdiction based on an additional allegations in an amended petition, the court examines whether there is sufficient evidence from which a reasonable factfinder could conclude by a preponderance of the evidence that a current risk of harm exists from the additional allegation standing alone, or that the additional allegation contributes to or enhances the risk associated with the existing bases of jurisdiction.

In this case, the court found sufficient evidence in the record to establish the facts alleged on all of the jurisdictional bases except one. Regarding mother's failure to protect H from stepfather's inappropriate physical discipline, there was no evidence in the record that stepfather had physically disciplined H, only her siblings.

12. *Dept. of Human Services v. E. M.*, [264 Or App _____ \(2014\)](#)

Facts:

On August 19, 2013, the juvenile court asserted jurisdiction over E, after finding that DHS had proved by a preponderance of the evidence that father's and mother's substance abuse interfered

with their ability to safely parent E, and made E a ward of the court. Mother appealed. The facts regarding mother's drug use were as follows. She tested positive for amphetamine and THC in February 2013, and tested positive for THC two months later, four days prior to E's birth. E was born prematurely but did not test positive for any illicit substances. Mother completed two subsequent voluntary urinalysis in April, both of which were negative for illegal drug use. On May 13, mother failed to show up at a voluntary UA requested by DHS. Mother denied any current drug use at the time of the jurisdictional hearing. She admitted to past heroin use four years prior to the hearing, and denied methamphetamine use.

Held:

Reversed.

The court found the record lacked evidence that mother had a substance abuse problem at the time of the hearing. The court found that mother's lack of credibility could not be used as affirmative evidence that she was still using drugs at the time of the jurisdictional hearing. In addition, her failure to show for the April UA did not constitute a pattern of missed court ordered UAs, from which it could be inferred that mother was attempting to hide her drug use. Finally, DHS did not present any evidence that any drug use by mother put E at a non speculative threat of serious loss or injury. A parent's substance abuse alone does not create a risk of harm to the child.

Based on the holding in *Dept. of Human Services v. W.A.C.*, 263 Or App 382 (2014) that jurisdiction over the child is only appropriate when the petition allegations have been admitted or proven as to both parents (who have appeared in the case), the court reversed the juvenile court judgment, finding no evidence in the record that mother was unable or unwilling to protect E from risk of harm relating to father's substance abuse.

13. *Dept. of Human Services v. A.B.* [264 Or. App. \(2014\)](#).

Facts:

Three of mother's five children were taken into care in May 2013. This was not the first time. The court had asserted jurisdiction over all the children in March, 2011, after which things improved and jurisdiction was dismissed in July 2012. The court asserted jurisdiction after three day hearing in August and September of 2013 on grounds that mother had a substance abuse problem which impaired her judgment and had failed to meet the children's medical, educational, dental needs and to provide preventative dental care. Mother appealed from the judgment of jurisdiction asserting that the evidence did not support the court's assumption of jurisdiction. Subsequent to the appeal, at a permanency hearing in March 2014, the court terminated wardship. The state sought to dismiss the appeal on the grounds that it was moot. Mother contended that the appeal should not be dismissed because there were collateral consequences to the underlying judgment, specifically the probability that the grounds for jurisdiction would influence a pending custody matter in the same court.

Held:

The court denied the state's motion to dismiss because, in light of a probable adverse consequence on a pending custody matter, the fact that the underlying jurisdictional judgment had been dismissed did not render mother's appeal moot. *See Dept. of Human Services v. G.D.W.* 353 Or 25, 32 (2012)(appeal of jurisdictional judgment was not moot after dismissal of juvenile court's jurisdiction, because findings in judgment could affect court's custody order and parenting time decision).

On the merits, the Court of Appeals agreed with mother that the allegation of substance abuse was not established but that there was legally sufficient evidence in the record to support the court's assumption of jurisdiction based on the other grounds alleged in the petition. As to the substance abuse, the court noted that only mother's first UA in May 2013 was dirty and that all of the rest were clean up to the time of the jurisdictional hearing in September. In addition she had been evaluated and was not ordered to do treatment. *See Dept. of Human Services v. E. M.*, 264 Or App 76, ___ (July 2, 2014) (DHS failed to prove that "mother had a substance abuse problem at the time of the [jurisdictional] hearing") (slip op at 7).

Motion to dismiss denied; jurisdictional judgment remanded for dismissal of jurisdictional ground of substance abuse; otherwise affirmed.

Comment: The fact that this was a return-to-care case troubled the trial court. The court reasoned that because mother had not shown the insight of even a minimally adequate parent into the amount of time, energy and effort it takes to keep children safe, there was a risk that when DHS was no longer involved, there would once again be a return to unsafe circumstances. On appeal mother characterized the court's "lack of insight" rationale as equal to the "failure to internalize" rationale the Court of Appeals disapproved of in *Dept. of Human Services v. J.M.* 260 Or App 261, 267-8 (2013)(fact that father had not internalized social norms against corporal punishment did not mean he was unlikely to conform to them). The Court of Appeals upheld the trial court because the court's rationale was based on evidence in the record. Mother's permanency caseworker testified that mother continued to minimize the severity of the circumstances that led to DHS involvement, giving rise to a risk it could occur in the future. *Ah the beauty of legally sufficient evidence and findings thereon.*

Permanency Hearings

Motion to Dismiss

1. *Dept. of Human Services v. D.A.S.*, [261 Or App 538 \(2014\)](#).

Facts:

A was removed from mother's care in Oregon in February 2012. Father was a resident of the state of Washington living with his wife (not the mother of A). Jurisdiction was established

pursuant to ORS 419B.100(1)(c) based on: father's wife's children are not in her care due to DHS intervention in Douglas County and were removed from her care in 2009 due to the condition of the home, domestic violence, and wife's drug use; since 2010, father has not had much contact with A and needs the assistance of DHS to re-establish the relationship; and father does not have custody of A and would be unable to protect her from mother's drug use and neglect.

In July and September 2012, DHS requested that WDSHS complete a home study regarding father through ICPC. On both occasions, WDSHS summarily denied approval without completing a home study. Meanwhile, father participated in a parent-child interaction, and the evaluator recommended DHS place A with father. Father also successfully maintained ongoing telephone contact with A and had face-to-face visits with A once per month.

At a permanency hearing in May 2013, father's attorney filed a motion to dismiss jurisdiction and terminate the wardship. A guardianship was in the process of being established for wife's children in Douglas County, so the case was still open, but DHS presented no evidence at the permanency hearing regarding current safety concerns. The trial court denied the motion finding that the jurisdictional bases on all issues remained with the exception that father had re-established his relationship with A. Father appealed, arguing that although some of the facts on which jurisdiction was based persisted, DHS did not prove those facts would expose A to a current threat of serious loss or injury.

Held:

Reversed and remanded with instructions to terminate the wardship. DHS has the burden to prove that the facts on which jurisdiction is based persist to the degree that they pose a current threat of serious loss or injury that is reasonably likely to be realized. DHS did not present any evidence that the safety concerns regarding wife still existed. In addition, without evidence that one parent is unable to protect the child from the other parent, or that the child will suffer some risk of actual harm because one parent lacks sole legal custody, lack of a custody order alone is insufficient to support continued jurisdiction.

2. *Dept. of Human Services v. J.B.V.*, [262 Or App 745 \(2014\)](#).

Facts:

The juvenile court asserted jurisdiction over father's two children on four bases that generally pertained to his inability to safely parent them. Subsequently, father filed a motion to dismiss jurisdiction and DHS sought to change the permanency hearing from reunification to adoption. The motion and the change in permanency plan were considered together at a permanency hearing. At the hearing, DHS sought to introduce a psychological evaluation of the father, a police report describing an incident involving father and the children, counseling records, and

certain medical records of the children. Father objected based on hearsay, and DHS argued the exhibits were admissible under ORS 419B.325(2), which provides: “*For the purpose of determining disposition of the ward*, testimony, reports or other material relating to the ward’s mental, physical and social history and prognosis may be received by the court without regard to their competency or relevancy under the rules of evidence” (emphasis added).

Relying on ORS 419B.325(2), the juvenile court received the challenged exhibits, denied father’s motion to dismiss, and changed the permanency plan from reunification to adoption. Father appealed.

Held:

Vacated and remanded for reconsideration of father’s motion to dismiss; otherwise affirmed.

The court held ORS 419B.325(2) does not serve as an exception to the requirement of competent evidence for purposes of making a jurisdictional determination. Therefore, the court held the exhibits were not admissible under ORS 419B.325(2) for purposes of considering father’s motion to dismiss jurisdiction. However, the ORS 419B.325(2) exception to competent evidence applies to permanency hearings pursuant to ORS 419B.476(1), allowing the court to receive the exhibits at issue for purposes of considering reasonable efforts to effect reunification, and whether the parent made sufficient progress to allow the child’s safe return home. The court rejected father’s argument that the reference to ORS 419B.310 in ORS 419B.476(1) requires competent evidence for purposes of evaluating reasonable efforts and parental progress, instead interpreting ORS 419B.310(3) to require competent evidence only when making a jurisdictional determination at a permanency hearing.

Reasonable Efforts

1. *Dept. of Human Services v. M.K.*, [257 Or App 409 \(2013\)](#).

Facts:

Father was incarcerated and had not had regular contact with child. Jurisdiction was established based on father’s incarceration and his status as a convicted, untreated sex offender. While in prison, father had completed courses on parenting and anger management and had enrolled in a “cognitive thinking errors” group. He had also written letters to the child. DHS wanted the father to visit with child, but required him to complete a psychosexual evaluation prior to engaging in visits. The results of the evaluation would determine whether father could safely have visitation with the child – either in prison or after his release. The caseworker testified that undergoing the psychosexual evaluation was the “key element” in father progressing towards reunification with child. DHS found an evaluator who would conduct the evaluation in prison for \$5,000. According to the caseworker, DHS typically pays less than \$1,000 for an evaluation. Due to the high cost of the evaluation, the caseworker was still looking for another doctor who

could conduct it at a more reasonable price. Father argued that a clean evaluation was likely, and that he would be a resource shortly after his release in a year. In finding DHS had made reasonable efforts, the court found DHS was not required to pay \$5,000 to have father evaluated in prison.

Held:

When a parent contends that DHS's efforts have not been reasonable because the agency has declined to provide a particular service, the court's "reasonable efforts" determination should include something resembling a cost-benefit analysis, at least when the agency itself has deemed that service to be "key" to the reunification plan. In this case, the juvenile court should have considered the extent to which the family might benefit if father received a psychosexual evaluation promptly, instead of waiting a year to be evaluated after his release. The court should have considered the totality of the circumstances related to the reasonableness of DHS's reunification efforts, including both the potential benefits of providing services, and the burden of associated costs. The record did not reflect this analysis, so the juvenile court's decision was reversed.

2. *Dept. of Human Services v. R.D.*, [257 Or App 427 \(2013\)](#).

Facts:

Child appeals from a permanency judgment, asserting that the juvenile court erred in continuing a plan to return child to mother and father instead of changing the plan to adoption. Child argues that based on the evidence at the hearing, even if the Department of Human Services (DHS) provided reasonable services to mother with regard to sex offender treatment, mother will never be able to adequately parent child, and child will not be able to safely return home.

Held:

The court will not change a plan from reunification to adoption if DHS fails to prove at the permanency hearing that it made reasonable efforts to make it possible for the child to return home safely. Because DHS failed to secure a sex offender treatment provider to mother for 16 months after jurisdiction was established, DHS failed to make reasonable efforts to provide services to mother. Affirmed.

COMMENTS:

(1) Having determined that DHS's reunification efforts with respect to the mother were not "reasonable" and that the parents had not made "sufficient progress" to permit the safe return of the child to their care, the juvenile court found that "further efforts can and will make it possible for the child to safely return home *within a reasonable period of time*," "ordered the parents to participate in services and make progress," continued the reunification plan in effect, and

“scheduled another permanency hearing for *one year later*.” But, the Court of Appeals (and apparently the juvenile court) effectively ignored the “reasonable time” requirements of ORS 419B.476(4)(c) and (5)(c), and there is no reference in the opinion to what evidence, if any, supported the juvenile court’s finding that one year is a “reasonable time” for this child. A juvenile court simply cannot make a finding that further efforts will permit the safe return home of a child “within a reasonable time” without knowing/considering what the “reasonable time” is for the specific child. *See generally, e.g.*, ORS 419A.004(20) (defining “reasonable time”); *see State ex rel SOSCF v. Stillman*, 333 Or 135, 146, 35 P3d 490 (2001) (explaining that the “reasonable time...inquiry is child-specific” and “calls for testimony in psychological and developmental terms regarding the specific child’s requirements”).

(2) For reasons that are not explained in the Court of Appeals’ decision, the jurisdiction judgment in *R.D.* was not entered until *11 months* after the child (then one day old) was taken into protective custody and placed in substitute care, and the permanency hearing was not held until *18 months* after jurisdiction was established. ORS 419B.305(1) requires that, absent a judicial finding of “good cause,” the juvenile court must hold a hearing on the petition and enter a dispositional order “no later than 60 days” after the filing of the petition, and ORS 419B.470(2) requires that, “when a child or ward is in substitute care, the court shall conduct a permanency hearing no later than 12 months after the ward was found within the jurisdiction of the court under ORS 419B.100 or 14 months after the child or ward was placed in substitute care.”

(3) The record in this case also showed that, as a result of DHS’s “delay in obtaining the services of a provider for mother’s sex offender treatment[,] * * * the mother’s treatment did not begin until April 2012” — *i.e.*, 16 months after the dispositional order was entered and one month before the permanency hearing. ORS 419B.343 requires that a DHS case plan for reunification be rationally related to the bases for jurisdiction *and* provide “[a]ppropriate services to allow the parent the opportunity to adjust the parent’s circumstances or condition to make it possible for the ward to safely return home *within a reasonable time*.” (Emphasis added.)

3. *Dept. of Human Services v. M.H.*, [258 Or App 83 \(2013\)](#).

Facts:

Mother and father had child A, who was placed in DHS custody shortly after birth in May 2010. The court established jurisdiction in September 2010, and the parents subsequently stopped attending visits in April 2011. In July 2011, the court held a permanency hearing and changed the permanency plan to adoption. In August 2012, the court held another permanency hearing and continued the plan of adoption. On appeal, the parents argued the juvenile court failed to comply with the requirement in ORS 419B.476(5)(d) to include in the August 2012 permanency judgment its determination of whether there were any compelling reasons under ORS 419B.498(2) to defer the filing of petitions to terminate parental rights. In particular, the parents

argued that the order was required to include a determination that parents were not participating in services that would enable reunification within a reasonable time. ORS 419B.498(2)(b)(A).

Mother and father had another child V, who was born in June 2011 and a few days later, placed into DHS care. The court held jurisdictional hearings in November 2011 and April and May of 2012 involving testimony from multiple expert witnesses and entered a jurisdictional judgment in July 2012. In August 2012, the juvenile court held a permanency hearing and found DHS had made reasonable efforts. In the court's findings, the court found that DHS had assisted the parents to: (1) determine ICWA eligibility; (2) engage in services; (3) fully participate in the case plan; (4) identify relatives as possible placement resources; (5) maintain a connection with their daughter; and (6) attend visitation, services, meetings and court hearings related to the case. The parents argued these efforts weren't reasonable, as visits had been reduced when the child was moved to a relative placement in a different city, and parents had to travel to attend visits, and because father was not timely referred to a required psychosexual evaluation or parenting classes.

Held:

With respect to the reasonable efforts determination, the juvenile court's determination was supported by the evidence in the record, and the court did not err.

With respect to continuing the plan of adoption for A, the court must enter an order within 20 days of the permanency hearing and must include, *if the plan is continued or changed to adoption*, "the court's determination of whether one of the circumstances in ORS 419B.498(2) is applicable." ORS 419B.476(5)(d) (emphasis added). One of the circumstances in ORS 419B.498(2) is whether "there is a compelling reason" not to file a petition to terminate parental rights, ORS 419B.498(2)(b), and one of the "compelling reasons" is that the parent is "successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time." ORS 419B.498(2)(b)(A) (emphasis added). Failure to include the "no compelling reason" determination was reversible error.

COMMENTS:

The required findings by ORS 419B.476(5)(d) and ORS 419B.498(2) are included in JCIP's model forms for local court use. This reversal could have been avoided by checking the appropriate boxes:

5. FINDINGS AND ORDERS SUPPORTING THE COURT'S DETERMINATION OF A PERMANENT PLAN OTHER THAN REUNIFICATION:

ADOPTION

None of the circumstances described in ORS 419B.498(2) applies because: the child is **not** currently being cared for by relative in a placement that is intended to be permanent, as provided in ORS 419B.498(2)(a), there is **not** a “compelling reason” within the meaning of that term in ORS 419B.498(2)(b) for determining that filing a petition to terminate the parent’s/parents’ parental rights would not be in the child’s best interests, **and** the circumstances described in ORS 419B.498(2)(c) are **not** present.
Additional findings: _____

This judgment **continues** the current plan of **ADOPTION**. The termination-of-parental-rights petition was/will be filed on/by _____, 20____, and the child was/will be placed for adoption on/by _____, 20____.

This judgment **changes** the current plan to **ADOPTION**, and, **THEREFORE**, the court orders that the termination-of-parental-rights petition be filed not later than _____, 20____, and the child placed for adoption not later than _____, 20____.

4. *Dept. of Human Services v. G.N.*, [263 Or App 287 \(2014\)](#).

Facts:

DHS took the children into protective custody in July 2011, and the juvenile court took jurisdiction in September 2011. The court changed the permanency plan from reunification to APPLA at a permanency hearing on August 30, 2013, finding that DHS had made reasonable efforts, father had made insufficient progress, and that a compelling reason existed not to. Father appealed, challenging the court’s “reasonable efforts” and “sufficient progress” determinations.

Held:

Affirmed. Regarding reasonable efforts, the record contained evidence that: (1) visits were reduced to one hour a week because the child indicated they weren’t going well; (2) the child and parents started attending individual counseling sessions in preparation for family therapy starting in December 2012 (family therapy was court ordered in September 2012) and were provided with one family therapy session in April 2013, but family counseling was subsequently discontinued due to father’s behavior; and (3) once DHS learned that father had stopped taking his ADHD medication because of its cost, it made efforts to help him pay for the medication.

Regarding sufficient progress, the record contained evidence that despite having completed therapy for domestic violence, father continued to be emotionally abusive during visits and

blamed the children for DHS involvement. Father's counselor also testified father did not express empathy for the children.

In sum, the court found the record contained legally sufficient evidence to support the juvenile court's determination that DHS's efforts were reasonable and that father had not made sufficient progress to allow the child to safely return home.

Right to Participate

1. *Dept. of Human Services v. D.J.*, [259 Or App 638 \(2013\)](#).

Facts:

The child was placed in protective custody in December 2011, and the juvenile court established jurisdiction in February 2012. In June 2012, father was arrested, his probation was revoked, and he was incarcerated with an expected release date of early August 2013. The juvenile court held a permanency hearing in March 2013. The two issues under consideration were whether to change to the permanency plan from reunification, and if so, whether to change it to adoption or guardianship. The court attempted to call the prison so father could participate in the hearing telephonically, but the prison telephone was busy. After the second attempt, the court announced the hearing would proceed. Father's counsel objected to proceeding in father's absence, but the objection was overruled. Father's counsel told the court in general terms about father's participation in services and his plans following his release. At the end of the hearing, the juvenile court found that it was not possible for the child to be returned to either parent within a reasonable time and changed the plan to adoption. Father argued on appeal the juvenile court erred in holding the permanency hearing in his absence.

Held:

Reversed. The Court of Appeals found the right to "participate in hearings" in ORS 419B.875(2)(c) includes the right to testify in the party's own behalf. In finding the juvenile court's error was prejudicial, the court considered the following factors: (1) father's counsel's statement was not evidence and nothing in the record suggests the juvenile court gave it any weight; (2) if father had been given an opportunity to testify, he might have been able to persuade the court he could be united with M within a reasonable time and whether a compelling reason existed under ORS 419B.498(2)(b)(A); and (3) in the context of a permanency hearing, especially when a parent hopes to convince a court to adopt guardianship as the plan, rather than adoption, it is critical for the court to hear the parent's personal account of his or her participation in services, plans for the future, and reasons for wanting to maintain contact with the child.

Sufficient Progress

1. *Dept. of Human Services v. D.W.C.*, [258 Or App 163 \(2013\)](#).

Facts:

Child entered foster care in May 2010 at age seven. Father had never met her and was living in Oklahoma. Jurisdiction was established based on mother's infliction of injuries on the child, mother's use of controlled substances and alcohol, mother's chaotic and unstable lifestyle, and father's failure to protect the child as well as his limited contact with the child for an extended period of time. In November 2010, DHS requested an ICPC evaluation. Father was approved as a placement contingent on establishment of a relationship with the child. In April 2011, DHS communicated this to him. Father visited the child in Oregon in June 2011 and occasionally called her on the telephone between June and October 2011. For the following eight months, he had no contact with the child. He was court ordered to complete a psychological evaluation based on a previous head injury and resulting disability but failed to attend the two evaluations that were scheduled. The juvenile court held a permanency hearing in July 2012, and DHS sought to change the permanency plan from reunification to guardianship. The hearing was continued to September 2012. In the interim, father again traveled to Oregon to visit the child. At the permanency hearing in September 2012, the juvenile court found the child could not be returned to father based on his lack of connection with his daughter and changed the permanency plan to guardianship. The court's findings were based on lack of contact (two visits over two years and limited phone contact) and resulting lack of connection and understanding of the child's needs. Father challenges the juvenile court's determination that he had not made sufficient progress in ameliorating the barrier to reunification identified in the jurisdictional judgment to make it possible for the child to return home.

Held:

The record was legally sufficient to support the juvenile court's determination that father had made insufficient progress in ameliorating the jurisdictional basis of limited contact.

2. *Dept. of Human Services v. D.A.N.*, [258 Or App 64 \(2013\)](#).

Facts:

Child was born on August 12, 2011, and placed in foster care in November 2011. The court established jurisdiction in January 2012 based on mother's substance abuse. Father was incarcerated just prior to the child's birth. In May 2012, the court changed the permanency plan to adoption. Father had not yet been identified as the child's father, but he notified DHS that he believed he was the father. In August 2012, his paternity was established. In September and November 2012, he stipulated to allegations of a jurisdictional petition that he was incarcerated

and unable to be a custodial resource for the child, and that his substance abuse impairs his judgment and interferes with his ability to safely parent the child.

Following father's incarceration and prior to the establishment of paternity, father was disciplined six times in prison. After paternity was established, he entered into an action agreement and agreed to engage in any remedial services available in prison, to comply with prison conduct requirements, and to maintain contact with DHS. He participated in Narcotics Anonymous meetings and took a certification course to become a flagger, but he was not able to enroll in parenting or drug treatment programs due to the brevity of his remaining prison term. Father's release date was scheduled for March 16, 2013.

On November 27, 2012, the juvenile court held a hearing on DHS's motion to change the child's permanency plan to adoption (the court determined that since father had not yet been identified at the May permanency hearing, the permanency plan at the time of the November hearing was reunification). In addressing whether father had made sufficient progress under ORS 419B.476(2), the court noted father was not able to access parenting classes and substance abuse treatment due to the brevity of his remaining prison term, and that those services would be necessary to his ability to parent the child. Therefore, father would have to wait until his release to undergo an evaluation, address his parenting skills and substance issues, and to complete the action agreement, in addition to finding housing and employment. The juvenile court determined the delay was partially attributable to father's disciplinary record in prison. At the earliest, the juvenile court found, reunification would be at least nine months from the November 2012 permanency hearing, leaving the child in care for at least 21 months. The juvenile court found that was too long for the child to wait. Father argued the trial court erred in ruling that he failed to make sufficient progress, and the trial court erred in failing to find the child could not be returned to him within a reasonable time.

Held:

The juvenile court's finding that father had not made sufficient progress was supported by evidence in the record. The juvenile court's findings implicitly include a determination that a minimum of an additional nine months from the date of the permanency hearing was not a "reasonable time". The Court of Appeals did not decide if the juvenile court is required to make a "reasonable time" determination pursuant to ORS 419B.476 and ORS 419B.498(2)(b)(A) as a prerequisite to changing the plan from reunification to adoption.

COMMENTS:

The court's opinion provides a summary of the findings required at a permanency hearing. The findings are integrated into [JCIP's Model Court Forms](#) to provide juvenile courts a vehicle for ensuring appropriate findings are made.

See also, *Dept. of Human Services v. D.L.H.*, 251 Or App 787, 284 P3d 1233, *adh'd to on recons*, 253 Or App 600, 292 P3d 565, *rev den*, 351 Or 649 (2012), for a discussion on whether the court is required to make a “reasonable time” determination before changing a permanency plan from reunification to adoption.

3. *Dept. of Human Services and J.H., a Child v. G.L.H.*, [260 Or App 72 \(2013\)](#).

Facts:

The Circuit Court established jurisdiction over mother in March 2012 based on mother’s mental health problems and borderline intellectual functioning, use of methamphetamine, and impulsive and angry behavior. At the first permanency hearing in March 2013, the court made extensive written findings on a form attached to the judgment, concluding that DHS had made reasonable efforts, and mother had not made sufficient progress to enable the child to go home. The court ordered DHS to staff the case with the AG within 45 days. At the second permanency hearing in May 2013, the court heard no testimony but allowed those present to make statements. The only evidence submitted was the caseworker’s report, which documented that mother’s mental health problems and borderline intellectual functioning continued to interfere with her ability to care for the child. No party advocated for a dismissal. Nonetheless, the court dismissed the case, stating that mother had made “some progress.” The court made an express finding that mother had made sufficient progress with respect to the service agreement and also attached to the judgment the March findings to support a finding of reasonable efforts. DHS and the child appealed, asserting that the court’s return of the child home was not supported by sufficient evidence.

Held:

The Court of Appeals used the three part analysis for assessing whether the record was legally sufficient to support the outcome recently discussed in *Dept. of Human Services v. N.P.*, 257 Or App 633 (2013). The court determined that while the trial court did not expressly find that mother had made sufficient progress to make it possible for the child to go home, that finding was implicit in the court’s decision to terminate wardship. However, the implicit finding was not supported by legally sufficient evidence given that the only evidence was the caseworker report, which came to a contrary conclusion. The judgment to dismiss was inconsistent with the March findings, which were attached as a whole to the May judgment and addressed not just reasonable efforts but also included why DHS custody was in the child’s best interests.

4. *Dept. of Human Services v. J.M.*, [260 Or App 261 \(2013\)](#).

Facts:

Father disciplined his child several times by hitting him on the legs with one-quarter-inch diameter rubber tubing. At the time of his arrest, he told police that physical discipline is

supported by scripture. His two children were placed into protective custody and the juvenile court assumed jurisdiction based in part on: (1) father uses inappropriate discipline to respond to the child's misbehavior, which places the child at risk of harm; and (2) father needs the assistance of a child welfare agency to learn safe and appropriate parenting techniques, without which, the child is at risk of harm.

After jurisdiction was established, father completed a parent education course with a grade of 105.3 percent. Although he regularly attended visits with the children, DHS noted father did not discipline his child, instead allowing DHS or the foster parent to intervene. Father participated in a psychological evaluation by Dr. Miller, who provided an opinion that father would likely regress to former patterns of behavior once DHS was no longer involved. He recommended father participate in Dialectic Behavior Therapy (DBT), although he was not optimistic about father's ability to change. Father participated in DBT for approximately three months until he was terminated from the service because "there was a lack of insight and appeared to be an inability to take the material and to use it in his life." At the permanency hearing, father testified that his views on discipline had changed, and although he believed that some physical discipline is allowed under scripture, he would not use it. He further testified his discipline strategy would include patience, talking and redirection. The juvenile court rejected father's motion to dismiss, found that DHS had made reasonable efforts, the evidence did not support a determination under ORS 419B.476(4)(c), and (5)(c) that further efforts would make it possible for the children to safely return home within a reasonable time, and changed the permanency plan to adoption, finding that none of the circumstances in ORS 419B.498(2) applied. The juvenile court's findings appeared on a check-the-box form and did not include any oral or written explanations of its reasoning. Father appealed the denial of his motion to dismiss, as well as the determinations relevant to the change of the permanency plan to adoption.

Held:

Reviewing the evidence according to the standard set forth in *Dept. of Human Services v. N.P.*, 257 Or App 633, 639, 307 P3d 444 (2013), the Court of Appeals found the evidence did not support the inference that father, despite his assertions, would resume the infliction of inappropriate corporal punishment on the child, and for that reason posed a risk of harm. The court found the important inquiry in the case was not what father believes, but what he is likely to do at the time of the hearing. The court found DHS did not satisfy its burden of establishing that father posed a current threat of serious loss or injury that is reasonably likely to be realized, and that the evidence was legally insufficient to support the juvenile court's finding that father had not made sufficient progress to allow the children to be returned home safely.

5. *Dept. of Human Services v. L.A.S.*, [259 Or App 125 \(2013\)](#).

Facts:

The juvenile court took jurisdiction over the children in February 2012, primarily because of mother's "use of alcohol and/or controlled substances." At the time of the permanency hearing a year later, W was seven and had been in foster care for nearly half his life and A, who was 14 months old, had been in foster care all of his life. The juvenile court found mother had not made sufficient progress, and the case plan should be changed from reunification to a different plan. The court also found the evidence did not support a determination under ORS 419B.476(4)(c), and (5)(c) that further efforts by the agency would make it possible for the child to safely return home within a reasonable time.

On appeal, mother argued the state failed to prove she had not made sufficient progress for the children to safely return home and failed to prove she had not made sufficient progress for the children to return home within a reasonable time.

Held:

The Court of Appeals rejected mother's challenge to the court's finding regarding her progress because it was not preserved. Rather, she asked for a "90-day extension" to show that she could continue to make progress.

Regarding mother's "reasonable time" argument, previously in *Dept. of Human Services v. D.L.H.*, 251 Or App 787, 284 P3d 1233, *adh'd to on recons*, 253 Or App 600, 292 P3d 565, *rev den*, 351 Or 649 (2012), the court held there is no statutory requirement under ORS 419B.476 or any other authority that requires the juvenile court to find that parent cannot be reunited with the child within a "reasonable time" before the court changes the plan from reunification to adoption. The court did not revisit *D.L.H.* because the trial court's determination that children could not be returned home within a reasonable time was supported by the record, including evidence of mother's history of substance abuse combined with her belated and incomplete progress through treatment.

6. *Dept. of Human Services v. J.M.*, [262 Or App 133 \(2014\)](#).

Facts:

Two month old child, C, came into care after C's pediatrician suspected abuse and ordered a skeletal survey revealing a possible fracture of C's tibia. Doctors opined that the fracture was due to non-accidental trauma. Each parent admitted to the following facts for purposes of establishing jurisdiction: (1) his/her lack of parenting skills impaired his/her ability to provide minimally adequate care for C; and (2) C sustained an unexplained physical injury to include distal tibial metaphyseal fracture in the child's tibia while in the care of mother and father.

Parents participated fully in services and classes and attended visits regularly with C. However, DHS determined the parents were not making sufficient progress and requested the juvenile court change the permanency plan from reunification to adoption. In discovery for the permanency hearing, DHS provided C's x-rays to the parents for the first time. Father promptly had the images examined by a medical expert, Gabaeff, who opined that the injury resulted from infantile rickets and not from abusive fractures.

Before the permanency hearing, DHS moved *in limine* to exclude Gabaeff's testimony and any reports based on the theory that parents were attempting to relitigate the jurisdictional basis and were attempting to introduce evidence that wasn't relevant to the permanency hearing. The juvenile court granted the motion to exclude the evidence. At the permanency hearing, DHS's primary theory as to why the parents had not made sufficient progress was that the parents had not provided an explanation for C's fracture, and therefore, there is no way to have a meaningful conversation about how it won't happen again. The juvenile court found DHS made reasonable efforts, and the parents were not making sufficient progress, and changed the plan to adoption. Parents appealed and asserted that the juvenile court erred when it excluded Gabaeff's testimony and report.

Held:

Reversed. The assessment of a parent's progress toward addressing an unexplained injury ordinarily requires a determination of the cause of the injury. This allows DHS and the parent to identify what actions are needed to ameliorate the conditions that led to the child's unexplained injury. Therefore, the cause of C's tibia injury is relevant to the determination of whether the parents have made sufficient progress to make it possible for C to return home. Because there was never any admission, stipulation, or finding as to the cause of the injury, parents' attempt to introduce evidence that the injury resulted from rickets does not represent a collateral attack on any prior admission, stipulation, or finding as to the cause of the injury.

In a footnote, the Court of Appeals contrasted another case involving unexplained injury, *Dept. of Human Services v. T.R.*, 251 Or App 6, *rev den*, 352 Or 564 (2012). In that case, the juvenile court found as fact that the injuries to the child either had resulted from the parents themselves or that, at a minimum, the parents knew or should have known of the injuries. The juvenile court also found that the parents' denial of awareness was not credible. In light of those unchallenged factual findings about the nature and the cause of the child's injury, and the parents' knowledge of it, the juvenile court correctly concluded the parents had not made sufficient progress to permit the child to return home where the parents continued to deny knowledge of the child's injuries.

7. *Dept. of Human Services v. G.N.*, [263 Or App 287 \(2014\)](#).

Please see case summary under "Permanency Hearings/Reasonable Efforts."

8. *Dept. of Human Services v. R.B.*, [263 Or App \(2014\)](#).

Facts:

In September 2011, the juvenile court took jurisdiction over A and C pursuant to ORS 419B.100(1)(c) based on admitted allegations that: (1) “[mother’s] behavior is impulsive or she cannot or will not control her behavior thereby making the... children unsafe”; and (2) mother’s behavior “exemplif[ies] her lack of parenting knowledge, skills, and motivation necessary to ensure her children’s safety thereby making the... children unsafe.” In July 2013, DHS filed a second dependency petition alleging mother suffered from mental illness, emotional illness, or mental impairment that interferes with her ability to safely parent. After the children had been in foster care for two years (with the exception of a four month trial reunification), the court held a permanency hearing and changed the plan from reunification to adoption. The court also entered judgments assuming jurisdiction over the children based on the new mental health allegation. In support of the decision to change the permanency plan, the court found: (1) mother had a pattern of seeking out and engaging in services but not following through with them, consistent with the allegations in the first petition; (2) mother had three romantic relationships over the course of the court’s involvement and during that time had not been able to follow through with her intention to find stable employment, continued to rely on foster parents for respite, and had not yet learned to function independently; and (3) the children had been in foster care for two years, and evidence established that further delay would have an adverse impact on them.

Mother appealed arguing the juvenile court erred in finding jurisdiction based on the new allegation and in finding that mother had not made sufficient progress.

Held:

Affirmed. The evidence in the record is legally sufficient to support the juvenile court’s findings.

Mother argued on appeal that the juvenile court could not use mother’s mental health problems as a basis for finding she hadn’t made sufficient progress because that allegation was not established as part of jurisdiction until just prior to the permanency hearing. In considering that argument, the Court of Appeals stated, “The key question is whether the jurisdictional judgment would put a reasonable parent on notice that [the bases for that judgment] would be used to continue jurisdiction over the child and to change the permanency plan for the child.” Based on the circumstances of this case, the court found that mother’s mental health problems can be implied from the allegations in the original petition and judgment, and that those documents put mother on notice that she needed to address her mental health problems in order to regain custody of her children. In addition, evidence in the record supported the juvenile court’s finding that mother’s depression was not a new issue. To the extent the juvenile court took into account mother’s progress on mental health issues at the permanency hearing, the court found it

permissible even though the particulars of those issues were not detailed in the original jurisdictional judgment. Nothing in the record indicated that mother would have been provided with any different services (or would have participated more successfully in services) had the judgment more particularly identified her mental health problems as a basis for jurisdiction.

Review Hearings

Motion to Dismiss

1. *Dept. of Human Services v. A.R.S.*, [258 Or App 624 \(2013\)](#) (*ARS III*).

Facts:

This is the third appeal involving this juvenile dependency case. The child came into care in 2009 and was placed with maternal grandmother. Jurisdiction as to mother was established in 2010, and included among other bases, residential instability and choosing unsafe partners. The first permanency judgment was reversed because the trial court incorrectly determined that mother's ability to parent independently was a legal requirement for parental fitness. In the second appeal, the Court of Appeals reversed and remanded another permanency judgment because the trial court had relied on a circumstance that was not alleged or established as a basis for jurisdiction in assessing mother's progress towards reunification. While the second appeal was pending, the trial court held a review hearing, in which both mother and child moved to dismiss jurisdiction. In her motion, mother stated she was living in a home with a room mate, however, she would like to live in the "family home" but for the court's order prohibiting her from living with grandmother and child. A month prior to the hearing, mother was living with a boyfriend, however, subsequently moved out because of his threats of self-harm and concerns about his parenting style. She told DHS she did not want to expose her child to an unstable person and she would no longer be around her boyfriend. She moved and rented a room, which DHS inspected. The caseworker indicated the home was safe and appropriate and allowed unsupervised daytime visits. Overnight visits were not allowed until mother obtained a bed for her and her child. Mother indicated the grandmother would help her provide a bed for the child.

The trial court denied the motions to dismiss, finding mother made insufficient progress based on lack of confirmation she was participating in counseling, residential instability, and inability to assess safety risks. Mother and child appealed trial court's refusal to dismiss the wardship arguing the facts that gave rise to jurisdiction have been ameliorated.

Held:

DHS has the burden to prove, by a preponderance of the evidence, that the factual bases for jurisdiction persist to a degree that they pose a current threat of serious loss or injury that is reasonably likely to be realized. Residential instability is not a sufficient basis for jurisdiction

without a showing that it creates a risk of harm to the child. No evidence was presented in this case as to why mother's home posed a risk of harm to the child. There was also no evidence that mother's ex-boyfriend had a history of violence or that mother should have foreseen that he presented a safety risk. To the contrary, mother ended the relationship and immediately left the home. Reviewing the evidence according to the standard provided in *Dept. of Human Services v. N.P.*, 257 Or App 633 (2013), the Court of Appeals found the record contained insufficient evidence from which a reasonable factfinder could conclude, by a preponderance of the evidence, that those circumstances exposed the child to a current risk of serious loss or injury that was reasonably likely to occur.

Reviewability

1. *Dept. of Human Services v. C.W.J.*, [260 Or App 180 \(2013\)](#).

Facts:

The juvenile court denied father's motion to dismiss a petition alleging jurisdiction over the child on the ground that father did not have a custody order, and, therefore, could not protect the child from the child's mother. The court assumed jurisdiction and father appealed, asserting that lack of a custody order is not a basis for jurisdiction. After oral argument on appeal, the juvenile court entered a judgment terminating the wardship.

Held:

The appeal is moot. The court distinguished this case with past cases in which the court found sufficient collateral, practical effects on the parents' rights to withstand a motion to dismiss on the ground of mootness. In *State v. S.T.S.*, 236 Or App 646, 238 P3d 53 (2010), and in *State ex rel Juv. Dept. v. L.B.*, 233 Or App 360, 226 P3d 66 (2010), the Court of Appeals considered: (1) the adverse effect of the original judgment on the parent's employment opportunities; (2) the negative effect of the original judgment on the parent's record with DHS in the event further abuse reports were received; and (3) the social stigma that results from a determination based on abuse or neglect, in determining whether sufficient collateral practical effects gave rise to a live controversy.

2. *Dept. of Human Services v. B.A.*, [263 Or App 675 \(2014\)](#).

Facts:

Juvenile court took jurisdiction over the child under ORS 419B.100(1)(c) based on allegations that: (1) mother has unresolved substance abuse that presents a danger to the child; and (2) father lacks an order granting him sole legal custody of the child and is therefore unable to protect the child from mother. Parents appealed. Pending the appeal, father obtained an order granting him sole legal custody, and on the state's motion, the juvenile court dismissed jurisdiction and

terminated wardship. The state sought to dismiss the appeal, asserting that the juvenile court's dismissal of jurisdiction and termination of wardship renders moot any claim raised on appeal.

Held:

Oregon courts do not have authority to decide moot cases. Because the juvenile court dismissed jurisdiction and terminated wardship, the parties no longer have adverse interests. The court found there were not collateral consequences in this case, distinguishing it from other cases involving unexplained physical injury and domestic violence. The possibility that the underlying jurisdictional judgment could affect future employment or possible action by DHS was speculative and did not prevent the case from being moot.

Termination of Parental Rights

1. *Dept. of Human Services v. J.L.H.*, [258 Or App 92 \(2013\)](#).

Facts:

At ages 16 and 17, mother gave birth to her two daughters, both of whom were taken into DHS custody in 2008 due to domestic violence and drug use. Mother voluntarily relinquished her parental rights to them in 2009. In October 2010, she had a third child who was placed in DHS custody at birth. The child is a member of the Alaska Native Village of St. Michael, and the case is therefore subject to ICWA. The court established jurisdiction based on mother's chemical abuse problem and mental health issues. She had a history of relationships with unsafe men and lying to DHS about her involvement with them. In December 2011, she was diagnosed with PTSD, a depressive disorder, cannabis and opiate abuse, and a narcissistic personality disorder. Mother's attendance and follow through at drug treatment services and Fostering Attachment Treatment Court (FATC) were inconsistent. Mother was terminated from FATC due to her deception regarding her ongoing relationship with father and her lack of consistency and follow through. The state filed a petition to terminate her parental rights in June 2012 based on unfitness, ORS 419B.504. After a two-day trial, the trial court terminated mother's rights, citing mother's untrustworthiness and lack of participation in services. Mother appealed, arguing she had ameliorated all of the circumstances that formed the bases of the termination petition, that termination was not in the child's best interests, and that the juvenile court erred to the extent it relied on factual circumstances not alleged in the termination petition.

Held:

On *de novo* review, the Court of Appeals affirmed the trial court's decision, finding beyond a reasonable doubt, that mother's long time emotional and mental condition and her continued inability to engage in healthy relationships or disassociate herself from father and unsafe men made it improbable she would be able to adjust her life circumstances to make her able to safely parent the child within a reasonable time. The court also found termination of mother's parental

rights was in the child's best interests, relying largely on a tribal expert's testimony that the child would suffer serious emotional and physical harm if placed with mother.

2. *Dept. of Human Services v. K.M.M.*, [260 Or App 34 \(2013\)](#).

Facts:

In May 2011, the child was taken into protective custody based on mother's mental health issues. In February 2013, DHS petitioned for termination of parental rights based on the allegation that "mother is unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into mother's home is improbable within a reasonable time due to conduct or conditions not likely to change, including, but not limited to the following: an emotional illness, mental illness or mental deficiency of such nature and duration as to render the parent incapable of providing care for extended periods of time." At the time of trial, the child was 10 years old, had been in foster care for 21 months, and her grandparents had been selected as the adoptive placement.

At trial, expert evidence was presented that mother was diagnosed with schizophrenia and that she would need to take antipsychotic medication for a period of four to six months before the child could be returned to her care. Expert testimony also established mother's refusal to take medication was not going to change. Also, if her schizophrenia remained untreated, her mental health issues would have a huge impact on her parenting and would be detrimental to the child. The child would have anxiety issues that would be detrimental to her and would be at risk of emotional neglect if placed in her mother's care. Mother testified that she disputed her diagnosis and stated she would not take her medication. A psychologist who evaluated the child testified that if the child remained in foster care, there would be a risk she would continue to have anxiety issues, and it would be beneficial for the child to have permanency established as soon as possible. Session notes from the child's counselor also opined that delaying permanency would be detrimental because it would affect the child's ability to form age-appropriate relationships with others.

The juvenile court terminated mother's parental rights. Mother appealed, arguing the court erred in finding mother was unfit at the time of the proceeding by reason of conduct or condition that was seriously detrimental to the child, in determining that integration of the child into mother's home was improbable within a reasonable time, and in determining that termination of parental rights was in the best interests of the child.

Held:

ORS 419B.504 provides a two part test regarding unfitness: (1) whether mother has engaged in some conduct or is characterized by some condition that is seriously detrimental to the child; and (2) whether it is improbable that the child can be integrated into mother's home within a

reasonable time because the conduct or condition is unlikely to change. A “reasonable time” is defined as period of time that is reasonable given a child or ward’s emotional and developmental needs and ability to form and maintain lasting attachments. If the test is satisfied, the court must decide whether termination is in the child’s best interest.

The parties did not dispute that mother is “characterized by some condition,” *i.e.*, schizophrenia. In looking at whether mother’s condition was seriously detrimental to the child, the court examined the child’s needs (citing *State ex rel Juv. Dept. v. F.W.*, 218 Or App 436, 456, 180 P3d 69 *rev den*, 344 Or 670 (2008) (“The inquiry of whether a parent’s conduct or condition has had a seriously detrimental effect on the child is meant to be child-specific and calls for testimony in psychological and developmental terms regarding the particular child’s requirements.”) and concluded there was clear and convincing evidence mother’s untreated schizophrenia has a detrimental impact on the child.

On *de novo* review, the Court of Appeals found the record demonstrated by clear and convincing evidence that mother’s untreated schizophrenia is harmful to the child, and mother is unable to provide the child with proper care, and that because she continues to refuse to take medication her condition is unlikely to change so as to allow the child to be integrated into her home within a reasonable time. The court further concluded termination was in the child’s best interest due to her need for permanency and stability and her preference to live permanently with her adoptive parents.

3. *Dept. of Human Services v. F.J.S.*, [259 Or App 565 \(2013\)](#).

Facts:

The children had two entries into foster care, from October 2009 through April 2010, and from September 2010 forward. By the time of the termination trial in July and August of 2012, father had completed drug and alcohol treatment, parenting classes, and DBT, but failed to complete anger management treatment. The juvenile court terminated father’s parental rights based on unfitness pursuant to ORS 419B.504. Father challenged the trial court’s determination that he was unfit at the time of trial and that F could not be returned to him within a reasonable time.

Held:

On *de novo* review, the Court of Appeals considered father’s failure to meaningfully participate in his anger management course in 2010, his assault of one of the children after they were returned home in 2010, and his failure to complete a second anger management class after the children’s re-entry into foster care. The court noted his failures to complete the classes were not enough to demonstrate he continued to have anger management issues. However, the failures when considered in light of his history of anger and violence issues, the psychological evaluation that recommended intensive anger management treatment, and his continued aggressive conduct

toward others up to the time of trial, demonstrated father continued to suffer from that condition that was seriously detrimental to F. Further, in concluding that there was clear and convincing evidence that F could not be integrated into father's home within a reasonable time, the court considered father's failure to complete treatment within almost three years, as well as F's psychological evaluation indicating F had multiple placements over the first year of his life and although he is doing well now, he was at risk for attachment issues and needed permanency.

4. *Dept. of Human Services v A.D.G.*, [260 Or App 525 \(2014\)](#).

Facts:

DHS initiated TPR proceedings for mother's two children in two cases on two different schedules. In each case, the mother failed to appear after being issued a summons requiring her appearance. Based on her nonappearance, the court entered default orders in both cases and set one date for a *prima facie* hearing as to both cases for December 18. Mother appeared on that date and requested to be heard. Based on the prior default orders, the court treated her as a nonparty, and after the *prima facie* hearing, the court terminated mother's parental rights. Mother moved to set aside the default judgment under ORS 419B.923.

Held:

(1) ORS 419B.923(1) grants the juvenile court broad discretion to set aside any order or judgment made by the court.

(2) The trial court abused its discretion when it denied mother's motion to set aside the default judgment. ORS 419B.819(7) does not allow a default when the parent is not "absent" at the hearing in which the default judgment is entered. The court expressly found that the words "on a future date" in ORS 419B.819(7) apply only to the granting of a guardianship petition and not to the termination of parental rights. The court rejected DHS's contention that the statute allows the juvenile court to terminate a parent's rights without further notice and without the parent's participation once the parent fails to appear, regardless of when the hearing occurs and whether the parent appears at a later date. The court found that construction inconsistent with the language and history of the statute and with due process. Under ORS 419B.090(4), a parent's due process rights are always implicated in the construction and application of ORS chapter 419B.

COMMENT:

JUDGES, TAKE HEED. IN A TPR, IF A PARENT SHOWS UP FOR THE FINAL *PRIMA FACIE* HEARING, EVEN AFTER PRIOR FTA'S, THE COURT IS NOT ALLOWED TO ENTER A DEFAULT.