

APPELLATE CASE LAW UPDATE

*Summaries of Oregon Appellate Court Decisions in
Juvenile Court Cases*

July 2015 to July 2016

Oregon Judicial Department

Juvenile Court Improvement Program

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Juvenile Delinquency

► *State v. K.A.M, 279 Or App 191 (2016)*

Facts:

An officer was conducting a sweep of a house when he encountered youth in a bedroom. The person renting the house gave police permission to walk through the house to look for a person of interest. The officer asked youth his name and if he had anything illegal in his possession. Youth gave the officer his name, admitted he had a meth pipe and handed the officer a pipe that contained methamphetamine residue. The state filed a delinquency petition alleging that the juvenile court had jurisdiction over youth on the ground that he had unlawfully possessed methamphetamine, in violation of ORS 475.894.

Youth filed a pretrial motion to suppress the pipe and his statements under Article I, section 9 (unreasonable search and seizure). He argued the officer stopped him unlawfully, because the officer had no reasonable suspicion that youth was involved in criminal activity. The juvenile court denied the motion, finding that the officer's conduct did not constitute a stop. Youth then entered a conditional guilty plea, reserving the right to appeal the denial of the suppression motion.

Held:

Affirmed.

A person is stopped for purposes of Article 1, section 9, if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of liberty or freedom of movement, or if a reasonable person would believe the restriction occurred. A show of authority occurs when an officer conveys that the person is not free to terminate the encounter. This is determined under an objective standard - whether a reasonable person would feel free to terminate the encounter.

The court rejected youth's contention that his status as a 17 year old homeless youth bears on whether the officer's conduct constituted a show of authority. In determining whether an officer has stopped a person, the inquiry focuses on the officer's actions and how a reasonable person would have perceived them. In this case, the court held the youth was not stopped. Absent some other show of authority, the court held a person is not seized when an officer asks to see a person's identification and asks whether the person has anything illegal in his or her possession.

► *State v. J.C.N.-V, 268 Or App 505 (2015), reversed and remanded, 359 Or 559 (2016)*

Facts:

A petition was filed alleging youth, age 13 years and eight months old, participated in a violent murder and robbery. The state petitioned the juvenile court to waive youth to circuit court so he

could be tried as an adult on multiple charges, including aggravated murder. After a hearing, the court granted the state's petition to waive youth to adult court and issued written findings in support of the required determinations under ORS 419C.349(3) and (4) (These determinations include: (3) the youth at the time of the alleged offense was of *sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved*; and (4) the juvenile court, after considering certain criteria listed in the statute, determines that retaining jurisdiction will not serve the best interests of the youth and of society and therefore is not justified.) The juvenile court concluded the youth's conduct demonstrated a degree of maturity consistent with youth's biological age at the time of the event, and in several respects, reflected a degree of maturity consistent with an older youth.

Youth appealed, arguing the juvenile court had misunderstood what the "sophistication and maturity" requirement of ORS 419C.349(3) entailed and had incorrectly determined that requirement had been satisfied. Specifically, youth argued the legislature intended to impose a requirement that a youth have a "more adult-like" understanding of the conduct and its consequences than an average 13 year old would possess. The Court of Appeals affirmed the juvenile court's judgment.

Held:

Reversed and remanded.

The Oregon Supreme Court held that ORS 419C.349(3) requires a juvenile court to find that the youth possesses sufficient adult-like intellectual, social and emotional capabilities to have an adult-like understanding of the significance of his or her conduct, including its wrongfulness and its consequences for the youth, victim and others in order for a juvenile court to authorize waiver of a youth who is otherwise eligible for waiver under ORS 419C.349 or ORS 419C.352. The court found the legislature did not intend to impose a requirement that a youth have every one of the capabilities of a typical adult. Instead, the legislature intended that the juvenile court take measure of a youth, and reach an overall determination as to whether the youth's capacities are sufficiently adult-like to justify a conclusion that the youth was capable of appreciating, on an intellectual and emotional level, the significance and consequences of his conduct.

In this case, the juvenile court made findings that the youth understood and acknowledged his own role in the murder and knew it constituted a crime that would carry criminal consequences. The court also relied on a finding that the youth possessed a degree of maturity that was consistent with his biological age at the time of the murder, and in some respects, possessed a degree of maturity consistent with an older youth. The Oregon Supreme Court found these findings were insufficient to show the youth possessed sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved, as the court has interpreted that requirement.

► *State v. J.G.G.*, [278 Or App 184 \(2016\)](#)

Facts:

Youth was adjudicated and placed on probation after shooting another teen with a BB gun and damaging property. A condition in the judgment set forth a curfew for youth of 4 p.m. to 5 a.m. At a subsequent probation violation proceeding, a neighbor testified youth was riding his scooter after 4 p.m. in violation of his probation. The court found youth in violation of his probation. Youth appealed, arguing the court erred by not interpreting "curfew" within the context of the juvenile code (ORS 419C.680), or alternatively by subjecting youth to an unconstitutionally vague order. The state argued the order was not appealable because the probation violation did not adversely affect youth, and that youth failed to preserve his claims of error.

Held:

Affirmed.

A party to a juvenile proceeding whose rights or duties are adversely affected by a juvenile court judgment may file an appeal. ORS 419A.200(1). An appealable judgment includes a final order *adversely affecting* the rights or duties of a party and made in a proceeding after judgment. ORS 419A.205(1)(d). The court rejected the state's argument that the juvenile court's order did not adversely affect youth because it did not impose any sanction or extend the term of youth's probation. Instead, the court found that having a probation violation on youth's record could adversely affect any future dispositions by the juvenile court, because the court is required to consider the youth offender's juvenile court record and respond to the requirements and conditions imposed by previous juvenile court orders when determining a disposition in a juvenile case. ORS 419C.411(3)(e). Since the order in this case was made in a proceeding after judgment and a determination that the youth was in violation could result in more stringent requirements or liberty restrictions in the future, the court found the disposition was appealable.

The court found youth's arguments regarding the terms of probation were unpreserved.

► *State v. B.B.S.*, [276 Or App 602 \(2016\)](#)

Facts:

The juvenile court found youth within the court's jurisdiction for conduct that, if committed by an adult, would constitute the crimes of unauthorized use of a vehicle and possession of a stolen vehicle and denied youth's motion for judgment of acquittal. On appeal, youth argued there was insufficient evidence to support a reasonable inference that he knew the vehicle was stolen.

Held:

Reversed.

The Court of Appeals held that nothing in the stipulated facts permitted the finder of fact to conclude the vehicle was stolen. The Oregon Supreme Court recently held in *State v. Simonov*, 358 Or 531 (2016) that the state is required to prove that a defendant knew that the use of the vehicle was without the owner's consent in a prosecution for the crime of unauthorized use of a vehicle under ORS 164.135(1)(a). Nothing in the stipulated facts explained how youth obtained the car, whether youth was present at the time, whether the driver told youth anything about the vehicle, or whether the youth would have noticed anything unusual about the vehicle.

► *State v. T.Q.N.*, [275 Or App 969 \(2015\)](#)

Facts:

A petition was filed alleging youth had committed one count of sexual abuse in the first degree and one count of attempted sexual abuse in the first degree. Youth filed a motion for conditional postponement, and argued that the court had authority to grant his motion under ORS 419C.261. The state opposed the motion, arguing that Washington County's conditional postponement program is unlawful. After a contested jurisdictional hearing, the court issued an order finding the youth within the jurisdiction of the juvenile court. Youth renewed his motion for conditional postponement at the dispositional hearing. The court denied the motion, finding there was no legal basis for the conditional postponement. Youth appealed.

Held:

Reversed.

ORS 419C.261(2)(a) provides: "The court may set aside or dismiss a petition filed under ORS 419C.005 in furtherance of justice after considering the circumstances of the youth and the interests of the state in the adjudication of the petition." In Washington County, a conditional postponement is an agreement between the court and a youth, in which the youth admits to certain facts sufficient for the court to make findings for purposes of establishing jurisdiction. In addition, the youth agrees to participate in treatment and other conditions, which, if completed, result in a dismissal of the case.

Oregon appellate courts have interpreted ORS 419C.261 to grant broad discretion to juvenile courts to dismiss petitions. The court held the legislature's grant of authority to juvenile courts to dismiss petitions "in furtherance of justice after considering the circumstances of the youth and the interests of the state in the adjudication of the petition" is broad enough to encompass the Washington County conditional release program.

► *State v. L.M.W.*, [275 Or App 731 \(2015\)](#)

Facts:

The state filed a delinquency petition alleging youth was within the jurisdiction of the juvenile court for acts that, if committed by an adult, would constitute attempted sodomy in the first degree and attempted sexual abuse in the first degree. Prior to the adjudication hearing, youth filed a motion to amend or dismiss the delinquency petition under ORS 419C.261; Article I, section 16 of the Oregon Constitution; and the Eighth and Fourteenth Amendments of the United States Constitution. Youth requested the petition be dismissed or amended to allege misdemeanor sexual offenses that would not require mandatory sex-offender registration or enhance youth's adult criminal history score.

The juvenile court denied youth's motion, concluding that ORS 419C.261 does not give the court authority to dismiss or direct amendment of the petition pre-adjudication, or for the purpose of granting relief from sex-offender registration requirements.

Held:

Reversed.

ORS 419C.261 provides, in part: "(1) The court...may at any time direct that the petition be amended....When the court directs the amendment of a petition alleging that a youth has committed an act that would constitute a sex crime, as defined in ORS 181.805, if committed by an adult, the court shall make written findings stating the reason for directing the amendment. (2)(a) The court may set aside or dismiss a petition filed under ORS 419C.005 in furtherance of justice after considering the circumstances of the youth and interests of the state in the adjudication of the petition....(c) When the court sets aside or dismisses a petition alleging that a youth has committed an act that would constitute a sex crime, as defined in ORS 181.805, if committed by an adult, the court shall make written findings stating the reason for setting aside or dismissing the petition."

The court held subsection (1) explicitly allows the court to amend the petition before adjudicating it. In addition, subsection (2) allows the court to grant pre- and post-adjudication dismissals. Finally, the juvenile court may amend or dismiss a petition alleging an offense subject to sex-offender registration requirements as long as the court makes written findings stating its reasons for amending or dismissing the petition. The court further explained that the legislature contemplated the juvenile court may dismiss a petition for conduct that would otherwise subject a youth to sex-offender registration requirements, thus effectively granting the youth relief from those requirements.

NOTE: Legislative changes during the 2015 session may impact this analysis. Youth found under the juvenile court's jurisdiction for felony sex crimes on or after August 12, 2105 are no

longer subject to automatic sex offender registration requirements. Instead, HB 2320 requires the juvenile court to hold a hearing prior to termination of juvenile court jurisdiction or prior to discharge from PSRB jurisdiction, to determine if youth is rehabilitated and does not pose a safety threat to the public. If the youth meets the burden of proof, no registration is required. Although the potential consequences of adjudication for sex crimes has changed, HB 2320 did not amend the language in ORS 419C.261(2)(c).

► *State v. C.S.*, [275 Or App 126 \(2015\)](#)

Facts:

Youth, age 12, repeatedly told three of his classmates that they were going to die in various ways and that he would kill them. This behavior continued over a period of three weeks during social studies class and in school hallways. A petition was filed, alleging youth had committed acts, that if committed by an adult, would constitute three counts of menacing under ORS 163.190. At trial, JH testified that youth told her she was going to burn to death when she was 18. Then he brought it down to when she was 16, then to 13 and then to three days. He said if she didn't die, he was going to stab her with a pencil until she died. All three classmates testified youth would draw his finger across his throat as he walked past them and would say "die" as he did so.

The juvenile court found the youth within the court's jurisdiction. Youth appealed, arguing the evidence was legally insufficient to show that his words and conduct would have caused fear of "imminent serious physical injury" in an objectively reasonable person.

Held:

Reversed.

In *State ex rel Juv. Dept. v. Dompeling*, the court determined that, as used in ORS 163.190, an imminent injury is one that is "near at hand," "impending," or "menacingly near." In this case, the threats to JH were the only instances that made any reference to time, none of which were "near at hand," "impending," or "menacingly near." However, a threat can be silent as to time frame while nonetheless implying that the harm is moments away. The nature of the threats made in this case did not permit such an inference, because youth's body language, actions, and verbal threats did not imply he was threatening to carry out the violence at that time. Contrasting the facts in this case with other decisions, the court noted the threats were not made in the context of a close relationship, or in response to a specific disagreement or escalating conflict. Also, there was no history of violence or aggression by youth toward any of the three classmates.

The court found the state's evidence was legally insufficient to demonstrate that an objectively reasonable person would have feared a threat of serious injury or death that was "imminent".

Juvenile Dependency

Appealability

- *Dept. of Human Services v. A.D.D.B.*, 278 Or App 503 (2016).

For a full recitation of the facts, please click on the link above to view the opinion. The Court of Appeals found the review judgments were not appealable when the juvenile court continued the child's placement and reasonable efforts finding from the hearing held a month earlier. To be appealable, among other requirements, a judgment must affect the rights or duties of a party. In this case, mother did not cite any new information or changed circumstances since the last hearing, and consequently, the court did not deny any request for affirmative relief that mother raised for the first time or renewed with support of new information.

Disposition

- *Dept. of Human Services v. R. W.*, 277 Or App 37 (2016)

Facts:

A 15 year old child, N, was removed from her father's home on December 31, 2014 and placed in substitute care. The caseworker met with father on January 2, 2015 to explain the reunification services available, including anger management courses, parenting support and mental health evaluation and treatment services. Father refused services and did not sign the requested releases of information. On April 1, 2015, the juvenile court asserted jurisdiction over N, and postponed the dispositional hearing until mid-May 2015. Meanwhile, N was receiving counseling services and refused to have contact with father. Two days prior to the dispositional hearing, father contacted DHS to request a referral for anger management and signed a release of information. DHS made the referral to services the same day as the dispositional hearing. Father objected to DHS's claim at the hearing that it had made reasonable efforts. The court expressed concern that DHS had not provided reasonable efforts between the shelter and dispositional hearings. The caseworker responded that DHS needs to have releases of information signed before submitting any referrals.

The court entered the dispositional judgment finding that reasonable efforts had been made since the date of the last court review, indicating that DHS had issued father referrals for the same services identified in the DHS court report (DHS did not dispute these had not been offered prior to the hearing): anger management; mental health services; parent training; counseling; safety planning; and intensive family services.

On appeal, father challenged the court's finding that DHS had made reasonable efforts.

Held:

Reversed.

The court will consider the particular circumstances of a case, including a parent's participation or lack of cooperation, in determining whether DHS's reunification efforts were reasonable. However, the inquiry is primarily directed at DHS's conduct and not the parent's. A parent's failure to sign releases is not one of the circumstances that legally excuses DHS from making reasonable efforts as to that parent.

In this case, DHS did not demonstrate it had made any subsequent attempts to provide, or even to offer, father services after the initial offering on January 2nd. There was no explanation as to why DHS made no additional attempts to obtain a release from father, especially after jurisdiction was asserted. The fact that N was in counseling and did not want visits does not impact the reasonable efforts analysis as to father. The court found DHS's lack of action over a five and a half month period of time between the removal date and the dispositional hearing to be significant.

ICWA

- *Dept. of Human Services v. S.R.H.*, 278 Or App 427 (2016)

Facts:

In 2004, mother had contact with DHS in connection with a child welfare assessment involving her children, and indicated she had an affiliation with the Karuk Indian tribe. DHS subsequently learned from the tribe that mother did not meet the requirements for tribal membership. In 2011, mother's children were removed from the home, DHS renewed its ICWA inquiry, and mother indicated orally she did not know if she was enrolled, and refused to fill out DHS ICWA related forms. The court's order for the shelter hearing indicated DHS had not yet made a full inquiry about ICWA. The court subsequently entered jurisdictional and dispositional judgments, with no mention of ICWA. A month later (June, 2011) the parents filled out a Verification of ICWA Eligibility form, and indicated no American Indian or Alaskan Native Ancestry. Almost a year later (May, 2012), mother received an enrollment card from the Karuk Tribe, but did not notify DHS. In June, 2012, the court changed the permanency plan from reunification to APPLA, ruling out adoption for both children based on sibling and parent attachment, and the older child's ambivalence about adoption.

In October, 2013, the Karuk Tribe notified DHS that the children qualified as Enrolled Descendent Tribal Members. From that point on, DHS considered the case subject to ICWA. In June, 2014, mother filed motions to dismiss based on purported noncompliance with ICWA. On the same day at a permanency hearing, the court: (1) found ICWA applied to the proceedings; (2) deferred consideration of mother's motions pending more complete development of the record as to when DHS knew or should have known the children were Indian children; and (3) continued the permanency plans of APPLA, over the objections of DHS and the children who argued adoption was appropriate. At the next permanency hearing in August, 2014, the court found the case was not subject to ICWA prior to late 2013, and that a reasonable efforts standard was appropriately applied in prior hearings. The court denied parent's motion to dismiss, and continued the plan of APPLA, finding: the children have been in the foster care placement for 39 months in a stable placement; the tribe prefers a relative placement but had not stated a position regarding adoption; the tribal expert witness was credible and testified the child would

likely suffer serious physical or emotional damage if returned to the parent's care; the foster parent was willing to facilitate tribal connections and education for the children. The court declined to change the plan to adoption without input from the tribe.

Parents appealed the trial court's denial of the motion to dismiss; children and DHS challenged the juvenile court's refusal to change the plan to adoption.

Held:

Affirmed.

ORS 419B.878 requires the court to inquire whether a child is an Indian child subject to ICWA when a court conducts a hearing relating to involuntary child custody. If the court knows or has reason to know the child is an Indian child, the court is to enter an order requiring DHS to notify the tribe of the pending proceeding and of the tribe's right to intervene. The case is to be treated as an ICWA case until such time as the court determines the case is not subject to ICWA. In addition, under the 1979 version of the Bureau of Indian Affairs Guidelines for State Courts (in effect at the time of this proceeding), if a public child-protective agency has discovered information which suggests that a child is an Indian child, *that knowledge is constructively imputed to the juvenile court*. If the case is subject to ICWA, a child, parent or tribe may petition the court to invalidate an action taken in violation of ICWA.

In this case, the juvenile court did not err in denying parents' motions to dismiss, since there was no evidence that DHS knew the children were Indian children under ICWA in May, 2011, when the jurisdictional judgments were entered. The juvenile court's subsequent determination that the children were Indian children under ICWA as of late 2013, did not render ICWA retroactively applicable to the court's earlier decisions, requiring the court to make an active efforts finding when changing the permanency plan from reunification to APPLA. Finally, the juvenile court's findings continuing the plan of APPLA pending input from the tribe regarding the plan of adoption was not erroneous under the totality of the circumstances.

Commentary:

The [new version](#) of the BIA Guidelines contains similar language imputing agency knowledge of information that the child may be an Indian child to the juvenile court. *See* subsection B.2(c). As the facts of this case demonstrate, a child's ICWA status may change over the life of the case. Recommended practice in the BIA Guidelines is to inquire about the child's ICWA status at every hearing.

Inadequate Assistance of Counsel

- ***Dept. of Human Services v. T.L., [358 Or 679 \(2016\)](#)***

Facts:

This case involved three children who were first placed in foster care in April, 2011 based on parents' drug use, and returned home five months later over the objection of DHS. They re-entered care in early 2013, after both parents relapsed. After jurisdiction was established and the parents failed to appear at a subsequent review hearing, the court scheduled a permanency hearing for August 29, 2013. Father and mother failed to appear at the start of the hearing, as did father's counsel. The court tried unsuccessfully to reach father's attorney, and waited 12 minutes before starting the hearing. After taking evidence and hearing argument, the court decided to change the permanency plans from reunification to APPLA for R, and to guardianship for M and T. Mother and father arrived, and the court informed them of his decision to change the plans. In an unsworn statement, father explained to the court that he thought he was doing everything DHS had requested of him, including participation in detox and behavioral health programs, and that he had submitted clean urinalyses. He did not say anything about the absence of his attorney, nor did he oppose the change in plans. On September 6, 2013, the court entered permanency judgments, which father appealed. He argued that he had received inadequate assistance of counsel, and although he had not raised that issue at the trial level, *Geist* entitled him to raise it the first time on appeal. The Court of Appeals affirmed, holding that the enactment of ORS 419B.923 (modifying or setting aside order or judgment) required father's claims to be raised first at the trial court level.

On appeal to the Supreme Court, father argued that the rationale of *Geist* applies equally to the judgments that changed the children's permanent plans from reunification to guardianship and APPLA.

Held:

Reversed and remanded.

The court considered whether the holding in *Geist* - that unpreserved challenges to the adequacy of counsel in termination proceedings could be raised on direct appeal - should be extended to appeals from judgments changing a permanent plan from reunification to guardianship or APPLA. After considering the factors set out in ORS 419B.205 for appointment of counsel for a parent, the court concluded that the complex nature of the legal and factual issues, and the gravity of the interests at stake, require that counsel be adequate in permanency proceedings when the court changes the permanency plan from reunification to a plan of guardianship or APPLA. In addition, concerns expressed by the court in *Geist* regarding finality for children in care apply equally to permanency judgments that order a change in plan from reunification to guardianship or APPLA. Based on these considerations, the court found that providing a remedy for unpreserved claims of inadequate assistance of counsel on direct appeal is justified.

The court outlined the following procedures for asserting and processing claims for inadequate assistance of counsel:

No preservation required. In cases in which counsel has been appointed, and the court orders a change of plan from return to parent to a permanent plan of guardianship or APPLA, a claim for inadequate assistance of counsel may be raised for the first time on appeal.

To be entitled to relief, a parent has the burden to show: (1) trial counsel was inadequate; and (2) the inadequacy prejudiced the parent's rights to the extent that the merits of the juvenile court's decision are called into serious question. In many instances, it will be necessary to develop a more thorough evidentiary record than exists on direct appeal to determine whether the parent is entitled to relief.

Assertion of claim in juvenile court. ORS 419B.923(7) allows assertion of inadequate assistance of counsel claims in the juvenile court while an appeal is pending. If further development of an evidentiary record would be necessary to determine whether inadequate assistance was provided or whether the party suffered prejudice, a claim may be filed in juvenile court. A moving party is required to serve a copy of the motion filed in the trial court with the appellate court. In addition, the moving party is required to file a copy of the trial court's order or judgment with the appellate court within seven days of the trial court's order or judgment.

When record insufficient on appeal. If a party fails to utilize the procedure in ORS 419B.923(7) to adequately develop the evidentiary record and the Court of Appeals determines the record is insufficient to warrant relief, the Court of Appeals may affirm without prejudice to the parent's ability to renew the claim before the juvenile court, or remand for an evidentiary hearing.

In this case, the court held a more complete evidentiary record was necessary to review father's claim. Neither party had an opportunity to make a record as to why counsel failed to appear, or whether father was prejudiced by counsel's absence. The case was remanded to juvenile court for the purpose of determining whether father is entitled to relief from the permanency judgments under ORS 419B.923. The court directed that trial counsel be appointed to represent father in juvenile court, and directed father to file a copy of the juvenile court's judgment with the Court of Appeals within seven days of the juvenile court's judgment.

Judicial Notice

- *Dept of Human Services v. A.A., 276 Or App 223 (2016)*

Facts:

Father appealed from a permanency judgment changing the permanency plan for the child from reunification to guardianship. According to father, no party offered evidence during the hearing regarding DHS's efforts at reunification. After the hearing, with no notice to the parties, the court took judicial notice of DHS and CASA reports, and statements made at the hearing by the parties' attorneys.

Held:

Reversed.

The court did not comply with ORS 419A.253 because it failed to take judicial notice of the documents and statements made on the record at the permanency hearing, and failed to give the parties an opportunity to object. The court could not permissibly rely on the information in the reports and the statements in determining whether DHS made active efforts or whether father made sufficient progress.

Commentary: The Court of Appeals discussed the issue of notice and timing in this case, but did not address the appropriateness of taking judicial notice of the reports. One could argue the facts provided in DHS reports may be subject to reasonable dispute, precluding the court from taking judicial notice of them. *See* ORS 419A.253(1)(b)(A); ORS 40.065. An alternative way for the court to rely on the DHS and CASA reports is to identify the reports on the record, allow the parties an opportunity to object, and then cause the reports to be marked and received as an exhibit. ORS 419A.253(1)(b)(B).

Jurisdiction

► *Dept. of Human Services v. S.M.S., 279 Or App 364 (2016)*

Facts:

Mother had a history of schizophrenia and related conditions since she was 17 years old, resulting in multiple hospitalizations in several states over a period of 7 years. When she was 24, she traveled to Portland intending to deliver her baby. She was unable to secure a physician to help her and ended up traveling to a hospital in Corvallis. The baby was delivered, and hospital staff began to have concerns about mother's sudden arrival and other behaviors. Mother was moved to the psychiatric unit and the child was placed in DHS care. After her discharge, mother engaged in outpatient mental health treatment. At the jurisdictional hearing, her psychiatrist testified that she kept all of her four appointments and took her medications as prescribed. He also testified if mother were to interrupt her treatment, it was likely her symptoms would return. At the time of the hearing, mother had obtained an apartment and a car, was attending parenting classes, had purchased appropriate baby supplies and had successfully participated in 14 supervised visits of L.

The juvenile court asserted jurisdiction over L, finding a current threat of serious loss or injury. The court reasoned that mother had been stabilized for a very short period of time, and had a demonstrated history of interrupting her treatment followed by lengthy psychiatric hospitalizations. The court also found that mother had no friends or family in Oregon who could monitor her treatment and detect any symptoms, should they return.

Mother appealed, arguing there was insufficient evidence to establish a "current threat" of harm.

Held:

Affirmed.

The court held there was legally sufficient evidence from which the juvenile court could conclude that L was at risk of serious loss or injury at the time of the hearing. Mother had an extensive history of mental illness with a demonstrated pattern of interrupted treatment and decompensation including: (1) multiple and lengthy hospitalizations over the past seven years; (2) delusions, hallucinations, paranoia and disorganized thinking, and (3) alienation of all of her family and friends. Although mother's mental health was being managed at the time of jurisdiction, considering the totality of the circumstances, the evidence permitted an inference that mother was likely to interrupt her treatment once more causing her symptoms to return. Finally, L's age (3 months) and mother's history of a prior involuntary termination supported an inference that mother's condition would pose a threat of harm that likely would be realized without the court's intervention.

► ***Dept. of Human Services v. T.E.B., 279 Or App 126 (2016)***

Facts:

Child was removed from mother's care. At the jurisdictional hearing, father's counsel advised the court that father was prepared to admit to allegation E, that he is unavailable to be a custodial resource and the state is willing to dismiss allegation F, that father has a pattern of criminal behavior and incarceration. Father had previously filed a *pro se* petition in which he requested the child be placed with grandmother or father's fiancee. Father told the court he did not wish to withdraw his petition, and father's counsel indicated that the court could proceed with father's admission and address the petition later. Father's counsel also suggested that the *pro se* petition primarily reflected father's concern that a criminal history did not prevent him from being an adequate parent.

The court explained to father he had the right to a trial, at which DHS would have the burden to put on evidence to prove the allegations in the petition and at which father would have the chance to present his own evidence. The court further explained father could waive the trial right and admit to part of the petition. The court then asked:

"[P]aragraph 2E of the petition says, 'The conditions and circumstances of the child are such as to endanger the welfare of the child by reason of the following facts: The child's father is incarcerated and _____ unavailable to be a custodial resource at this time.' Is that true?"

Father responded, "That's true, ma'am."

The court found this to be a knowing and voluntary admission. After some further discussions with the attorney, father asked to add something for the record. He emphasized that his mother and fiancee were available to take care of the child.

Father later moved to withdraw his admission. After reviewing the recording of the admission, the court found father expressed a full understanding of what he was admitting, was clear about what he understood that he was admitting and was not coerced or misled about the nature and consequences of his admission.

Father appealed, and argued his admission wasn't sufficient to establish jurisdiction, given his proposal to place the child in the temporary custody of grandmother.

Held:

Affirmed.

The court distinguished this case from previous cases finding no risk of harm because the child was placed with a grandparent. In this case, father admitted that his circumstances presented a danger to the welfare of his child. Since father also waived his right to require DHS to present evidence and to present his own evidence, there was no evidence in the record to the contrary of father's admission that his incarceration presents a danger to the child.

The court rejected father's argument that the juvenile court erred when it refused to allow father to withdraw his admission. The court held the juvenile court's finding that father made a knowing and voluntary admission was supported by the evidence. The court found father's remarks about not withdrawing his *pro se* petition, and his emphasis that he was not completely incapable of providing care because grandmother and his fiancee remained custody resources, were not inconsistent with his admission. Finally, the court held the record on appeal was insufficient to determine that father was entitled to relief on his claim for inadequate assistance of counsel.

► ***Dept. of Human Services v. K.A.H., [278 Or App 284 \(2016\)](#)***

Facts:

In March, 2015, A, who was six months old, was taken to the emergency room in Pendleton. Mother reported she had been injured when her six year old sister, who was carrying her, tripped and fell. A was treated and released. Her parents brought her back the following day for concerns about dehydration. She was transferred to Doernbecher Children's Hospital in Portland and examined by Dr. Valvano, the medical director of the hospital's suspected child abuse program. During this and subsequent exams, he found A's injuries were not consistent with the circumstances the parents' described, and were instead characteristic of physical abuse. Based on this assessment, DHS took A into care. A dependency petition was filed, indicating A suffered injuries while in mother's custody that were at variance with the explanation given.

Before the jurisdictional hearing, mother moved to exclude any evidence based on the theory of shaken baby syndrome or abusive head trauma (SBS/AHT). At an evidentiary hearing, Dr. Valvano testified he had previously testified as an expert on SBS/AHT theory, and that it is generally accepted among child abuse pediatricians and considered a medical diagnosis. The juvenile court denied mother's motion to exclude the evidence.

DHS moved to allow Dr. Valvano to testify at the jurisdictional trial by telephone under ORS 45.400. In support of the motion, DHS argued that traveling would require Dr. Valvano to miss a full day of work, that he was the hospital's only pediatrician specializing in child abuse, and that it would be difficult to obtain replacement coverage. Mother objected, arguing she couldn't

conduct an effective cross examination over the telephone, and that under ORS 45.400(3)(b), telephonic testimony should not be allowed because Valvano's testimony would be determinative of the outcome of the case.

The juvenile court granted the motion, however, the record did not include a copy of the court's ruling or the grounds for its decision. Valvano was allowed to testify telephonically at the jurisdictional hearing, and the juvenile court entered a judgment asserting jurisdiction over A based on the unexplained injuries and the credible testimony of Dr. Valvano concerning the head and rib injuries. Mother appealed.

Held:

Reversed and remanded.

The court examined the provisions of ORS 45.400 relevant to this case: the court (except as provided in subsection (4) for jury trials) shall allow telephone testimony for good cause shown (subsection 3), but may not allow the use of telephone testimony if: (a) the ability to evaluate the credibility and demeanor of a witness or party in person is critical to the outcome of the proceeding; (b) the issues to which a witness will testify are outcome determinative; or (f) if failure of a witness or party to appear personally will result in substantial prejudice to a party in the proceeding.

Reviewing the trial court's decision for legal error, the court found that Dr. Valvano's testimony was the only evidence that definitively linked A's injuries to a theory of abuse, and that any significant hindrance in effectively cross-examining him amounted to a substantial prejudice under these circumstances. In addition, his testimony was outcome determinative, and as such, the court held ORS 45.400(3)(b) requires that the parent have the opportunity to cross examine the witness in person.

► *Dept of Human Services v. K.V., [276 Or App 782 \(2016\)](#)*

Facts:

A was two years old at the time of the jurisdictional hearing. Mother was primary caregiver, and father worked long hours as a restaurant manager. He would often come home intoxicated and would get angry. Eight months prior to the hearing, during an argument while both parents were intoxicated, father threw a heavy wallet at mother's back while she was holding A, knocking the wind out of mother. Father tried to wrestle the car keys away from mother when she threatened to leave, so mother fled to the bathroom with A and called 9-1-1. Father was arrested, charged with Assault IV, and ordered to have no contact with mother. However, father violated the no contact order and was living with mother a month after the incident. Later that month, the parents agreed to care for S, a seven month old niece. While father was at work and S was in the care of mother, S sustained a severe brain injury that resulted in permanent and severe intellectual disability. Medical personnel determined she suffered from abusive head trauma, which was inconsistent with the explanation that mother had provided that the child fell from a bed. Medical personnel also found unexplained bruising on S.

DHS petitioned for jurisdiction over A due to concern there was a risk of harm as a result of the serious unexplained injury to S. During the seven months before trial, mother and father separated and were living apart. The petition allegations (paraphrased) at trial included : (1) due to unexplained serious injury to S while in the parents care, A is at risk of harm; (2) the father's use of alcohol/controlled substances interferes with his ability to parent, and if left untreated, presents a threat of harm to the child - father has engaged in domestic violence while intoxicated, and (3) father presents a threat of harm to A (physical abuse or mental injury) in that he engaged in domestic violence in the presence of the child.

At trial, DHS and mother presented expert witnesses, and a DHS caseworker testified. The court found: (1) father's past violation of a no contact order demonstrated he was likely to allow A to have contact with mother; (2) father's past domestic violence was directed at both mother and A and was caused by father's alcohol abuse; the court noted that, during the domestic violence incident, mother had protected A from father, and she would not be able to protect her in the future because of her abuse of S; in addition, mother had minimized the level of conflict but A's aggression with a doll (during visitation) demonstrated she had been affected by the domestic violence between mother and father; (3) there was no proof father had undergone a substance abuse assessment and he needed one in order to safely parent; anger management alone was not sufficient to address the threat of harm to A posed by father.

On appeal, parents argued: (1) any risk of harm to A due to the potential that father would harm A was speculative (parents had not had any contact for 7 months); (2) the substance abuse assessment showed that father didn't require treatment and that DHS failed to prove a nexus between father's alcohol use and a current risk of harm to A; and (3) DHS presented no evidence that father engaged in violent behavior beyond one incident and DHS failed to prove a nexus between domestic violence by father and a current risk of harm to A.

Held:

Affirmed.

Under ORS 419B.100(1)(c) jurisdiction is appropriate where a child's condition or circumstances endanger the welfare of the child. A child's welfare is endangered if the child's condition and circumstances give rise to a current threat of serious loss or injury to the child. The key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child. DHS has the burden to prove there is a nexus between the parent's conduct and the harm to the child, and that the risk of harm is present at the time of the hearing.

In this case, there was evidence in the record that father had failed to protect S from mother while S was in parent's care. He took no action to protect S from mother after seeing bruises, which supports the court's finding that there was a risk that father would fail to protect A. There was also evidence that father did not believe there were any issues with mother's parenting that would have led to the injury to S. Despite the fact that the parents had separated, there was evidence in the record that father's failure to protect S indicated he would fail to protect A, and there was nothing to prove that father was prepared to take action to prevent mother from harming A.

There was also sufficient evidence from which the court could conclude that father's substance abuse and domestic violence in the presence of A would create a current risk of harm to A if she were to be placed in father's care since father had not taken the necessary steps in order to address the underlying causes of that behavior. There was minimal evidence in the record that father had completed a substance abuse assessment, and there was uncontroverted testimony from a caseworker that she had received "community reports" that father still had problems with alcohol.

The court implicitly found that father's alcohol abuse was likely to lead him to engage in future domestic violence. Father's failure to complete batterer's education support the court's finding that father would likely behave violently in the future if he did not receive additional treatment. Finally, the juvenile courts finding there was a nexus between father's alcohol use and domestic violence and a current risk of harm to A was supported by expert testimony that domestic violence between spouses is a risk factor for child abuse. In this case, the domestic violence was directed toward mother and A, and mother would not be able to protect A from father's violence.

► ***Dept. of Human Services v. M.M., [277 Or App 120 \(2016\)](#)***

Facts:

After a 10-day jurisdictional trial that took place over the course of five months, between December, 2014 and April 2015, the juvenile court took jurisdiction over B on the grounds that mother had a substance abuse problem that impairs her ability to safely parent and father has a substance abuse problem and mental health issues that impair his ability to safely parent the child. The court found that father was willing to give mother his prescription drugs as a way to deal with her illicit drug use. However, the court also found that father never actually gave mother his prescription drugs to use. The juvenile court found that father's willingness to share drugs with mother was drug abuse that presented a risk to B because it made mother unavailable to parent. The court also found that father abused drugs when he attempted suicide in February, 2014 by overdosing on his pain medication. In addition, the court found father's PTSD was untreated, and is a serious illness, posing a risk to B. The court found the substance abuse and mental health grounds for jurisdiction were intertwined, and that father's codependency contributed to his risk of suicide.

On appeal, father argued the evidence in the record was insufficient to allow the juvenile court to determine that his substance abuse and mental health issues existed and posed a present risk of serious loss or injury to B.

Held:

Reversed.

A juvenile court has jurisdiction under ORS 419B.100(1)(c) when the child's conditions and circumstances give rise to a current threat of serious loss or injury to the child. DHS has the burden to prove there is a current risk of harm and not simply that the child's welfare was endangered in the past.

In this case, the appeals court found the circumstances on which the juvenile court relied had existed approximately a year before the trial and entry of judgment, and had changed

substantially. By the time the jurisdictional judgment was entered, parents had been separated for almost a year, and mother was in a relationship with someone else. No evidence regarding father's mental health was presented for the period between June 2014 and February 2015. Since father's circumstances had changed substantially since his suicide attempt in February, 2014, the court found the suicide attempt did not allow for an inference that father's mental health presented a current threat of serious loss or injury. The risks involving drug sharing and co-dependency identified by the juvenile court were no longer current by the time of trial.

In addition, father's mental health issue - post-traumatic stress disorder - was not tied to any risk of harm to B. There was evidence in the record that three months after father's suicide attempt, father's PTSD was being treated. There was no evidence presented as to how the PTSD posed a risk of harm to the child. Father's symptoms of nightmares, thrashing in his sleep and verbal aggressiveness over the phone with a caseworker in February, 2014 were insufficient to show a risk of harm to the child.

► ***Dept. of Human Services v. A.W.,* [276 Or App 276 \(2016\)](#)**

Facts:

Mother, father and A moved in with grandfather. Grandfather had helped raise A since A was six months old. After they moved in with grandfather, mother and father had verbal arguments in the basement of grandfather's house. Grandfather asked father to leave the house after father responded aggressively to grandfather's requests for father to calm down. Grandfather filed a petition for a stalking protective order against father, stating that he feared for the physical safety of his home, and all in it, including A. After the court issued a stalking protective order against father, father yelled at the judge, who then said DHS should be involved. The following week, DHS removed A from grandfather's house and placed him in non-relative foster care. DHS filed a petition under ORS 419B.100(1)(c) alleging that A's safety was endangered based on mother's substance abuse, domestic violence in the home, exposure to chaotic living environment and chaotic situations, father's lack of emotional and behavioral regulation and father's residential instability. The juvenile court found DHS had proved all allegations, with the exception of father's residential instability.

Mother appealed, arguing there was insufficient evidence to support the allegations.

Held:

Reversed.

To establish jurisdiction pursuant to ORS 419B.100(1)(c), DHS must present evidence sufficient to support a conclusion that the child's condition or circumstances expose the child to a current threat of serious loss or injury that is likely to be realized. When the petition is based on a parent's conduct, DHS must prove a nexus between the conduct and a current threat of serious loss or injury to the child.

In this case, mother testified she had used methamphetamine twice in the months leading up to the hearing. However, DHS did not present any evidence that mother used drugs while caring for A or that her drug use had an effect on her parenting. With respect to the allegation of domestic violence, there was no evidence that A had ever been exposed to that conduct or that

the verbal abuse had ever escalated to physical abuse. Nor was there any evidence the parents' behavior put A at risk of suffering a harm that would justify juvenile court jurisdiction. The court also found the evidence regarding the "chaotic living environment and violent situations" and father's lack of "emotional and behavioral regulation" was insufficient because there was no evidence that A had seen or heard disagreements, or that such exposure put A at risk of serious harm or injury.

► ***Dept. of Human Services v. A.H.,*** [275 Or App 788 \(2015\)](#).

Facts:

The juvenile court took jurisdiction over A based on allegations that: (1) mother's behaviors interfere with her ability to safely parent and place A at risk of harm; (2) A's parents could not meet her specialized needs; and (3) A had disclosed that a family member sexually abused her, and parents failed to take steps to protect her from the family member, who lived on the same property. The juvenile court subsequently entered a judgment dismissing jurisdiction and terminating the wardship of A.

Parents appealed the jurisdictional judgment. After the juvenile court terminated wardship, DHS moved to dismiss the appeal as moot.

Held:

Motion to dismiss denied; jurisdictional judgment reversed.

An appeal is moot when a decision will no longer have a practical effect on the rights of the parties. However, even when the main issue has been resolved, collateral consequences may prevent the controversy from being moot. In this case, the court found the potential collateral consequences were significant enough to have a practical effect and not render the case moot. Those consequences included: (1) the lack of ability of parents to seek review of a founded disposition if a legal proceeding results in a finding consistent with the founded disposition, putting the parents at a disadvantage in any future investigation by DHS; (2) negative effects on mother's employment as a teacher; and (3) in the small community where parents live, the negative social stigma associated with the court's finding that the parents failed to protect A from a sexual abuser after she disclosed abuse to them.

On the merits, the court found the record contained insufficient evidence of a current threat of harm to A. At the time of the jurisdictional judgment, A was living with her grandparents and no evidence was presented that grandparents were unsafe. Although DHS effected A's placement with grandparents, the placement would continue without juvenile court jurisdiction or continued involvement of DHS.

► ***Dept. of Human Services v. J.R.,*** [274 Or App 601 \(2015\)](#)

Facts:

DHS filed petitions alleging father's substance abuse impaired his judgment and ability to safely parent his children, age two and six. At the jurisdictional hearing, the court heard testimony from the DHS caseworker, an investigator who had conducted father's ICPC home study, and

father. Father testified he had incurred four DUII convictions between 2002 and 2009, resulting in his repeated incarceration and participation in treatment for alcohol use. He testified that he stopped drinking and enrolled in substance abuse classes after DHS received the results from the ICPC study recommending a substance abuse assessment and any recommended treatment. However, he resumed drinking after a week because he kept waking up at night with back pain. He testified his consumption was limited to every three or five days after the children were in bed, and added that his consumption "varies". He also testified that his girlfriend is with him "24 hours a day". He explained that he was starting a relationship with his girlfriend over the course of the previous six months and they were trying to move in together.

The juvenile court found father was not credible and that he was an alcoholic who minimized his drinking problem. The court found that even though father only admitted to drinking a beer or two at a time, this presented a problem for father since he was an admitted alcoholic, served time in prison because of his drinking and depended on beer to fall asleep. The court was not persuaded that father's girlfriend would care for the children, given they lived in separate homes and had only been dating for six months.

The juvenile court found that father's substance abuse was sufficient to support the assertion of jurisdiction over the children. Father appealed, arguing: (1) DHS failed to establish a nexus between his alcohol use and a risk of harm to the children at the time of the hearing, (2) DHS did not produce any evidence that he drank to the point of intoxication at the time of the hearing, and (3) DHS presented no evidence he had ever harmed his children or that his drinking posed an actual, nonspeculative risk of future harm.

Held:

Affirmed. Under the totality of the circumstances, there was sufficient evidence in the record to support the juvenile court's finding that father's alcohol use posed a current risk of serious loss or injury to the children.

The Court of Appeals found father's extensive history of alcoholism, combined with his failure to participate in treatment, his admission that he drinks to self-medicate, and his failure to articulate how much alcohol he consumes or how often, permitted the juvenile court to infer that father was likely drinking to the point of intoxication. Further, the court found it permissible for the juvenile court to find that father's substance abuse subjected the children to a current, nonspeculative risk of harm when there wasn't anyone else in the home to look after the children when father was intoxicated.

► *Dept. of Human Services v. R.N., 274 Or App 182 (2015).*

Facts:

Mother appeared by telephone at a jurisdictional hearing. Mother moved to continue the hearing to a later date on the basis that DHS had recently amended the petition, adding new allegations for which she required discovery. DHS requested to be allowed to present its *prima facie* case without mother's participation. The juvenile court denied mother's motion and allowed DHS to proceed. Although mother continued to listen on the telephone, the court did not allow her to testify to oppose DHS's case against her.

The court entered a jurisdictional judgment over the children. Mother appealed.

Held:

Reversed.

Although ORS 419B.815(7) allows the court to establish jurisdiction after a parent has been summoned and fails to appear personally, ORS 419B.918(1) permits the court to allow a parent to appear by telephone upon timely written motion and for good cause. In this case, DHS asserted on appeal, and the Court of Appeals agreed, that once the court permitted mother to appear by telephone, the court erred by not allowing her to testify and then establishing jurisdiction in mother's "absence".

► *Dept. of Human Services v. J.R., 274 Or App 107 (2015)*

Facts:

Mother was granted a restraining order against father which prohibited him from having parenting time. Subsequently, the children were placed in foster care. In September, 2014, the juvenile court took jurisdiction over the children based on allegations related to mother and that father had failed to protect the children from mother's neglectful behavior. In October 2014, mother signed a limited power of attorney under ORS 109.056(1) that gave father the authority to make all parenting decisions for the children. In November 2014, father filed a motion to dismiss. Mother was incarcerated at the time of the hearing and the restraining order was no longer in effect. At the hearing, mother testified she wanted to give full custody of the children to father and that she preferred to have no physical contact with the children than to participate in services. A DHS worker testified that a month prior to the hearing, mother said if the children were back in Nevada, she could just go see them whenever she wanted. Father testified he would go back to Nevada if jurisdiction were dismissed. He also testified he planned to file for divorce and seek full custody of the children. If mother attempted to see the children, he said he would call the police and move to another residence unknown to mother.

The juvenile court denied father's motion to dismiss. Father appealed.

Held:

Reversed.

DHS has the burden to prove, by a preponderance of the evidence, 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. 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 an insufficient basis for jurisdiction.

In this case, there was insufficient evidence in the record to support a finding that father would be unable to protect the children from mother.

Motion to Dismiss

- [**L.D. v. T.J.T., 274 Or App 430 \(2015\)**](#)

Facts:

Jurisdiction was established over the ward in 2001, when he was six years old. In 2002, the court changed the permanency plan to guardianship. In 2003, the court granted the guardians legal custody and guardianship, and placed the child under protective supervision of the court under ORS 419B.331. The court also ordered the guardians to provide annual written reports to the court and to DHS. In 2014, after the ward had turned 18, guardians filed an annual report detailing a number of problems with the ward (safety, mental health, finances, stealing), and requested a guardianship review hearing. Ward's counsel filed a motion to dismiss jurisdiction, terminate the wardship and vacate the guardianship.

At the hearing, testimony was presented that the 19 year old ward had moved out of his guardians' home and sometimes lived on the streets. He had also lived with his mother for three months, and stayed with MC for two months, until MC had become verbally aggressive. He testified he didn't feel he was in any danger when he was with his mother. At the time of the hearing, he was staying at a transitional living program. He testified to being high functioning autistic and having been diagnosed with bipolar disorder when he was 17 or 18. He stated he planned to attend a state-promoted job corps orientation and that he was seeking Social Security disability payments.

Relying on testimony presented and the guardian's report, the juvenile court found the guardians had met their burden and concluded that the following jurisdictional bases had not been ameliorated: mother's failure to protect ward from abuse by MC and ward's special educational, medical and counseling needs. The court noted the ward was living on the street, doing drugs, committing crimes and stealing. The court determined it was in the ward's best interest to continue the guardianship and denied ward's motion to dismiss jurisdiction, terminate wardship, and vacate the guardianship.

Held:

Reversed and remanded.

Guardians had to show, by a preponderance of the evidence, that the factual bases for jurisdiction persisted to the degree that they posed a current - not speculative - threat of serious loss or injury that was reasonably likely to be realized. The key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child, and the proponent has the burden to demonstrate a nexus between the allegedly risk-causing conduct and the harm to the child. The focus is on whether the conditions that were originally found to endanger the child persist.

In this case, the juvenile court found the following jurisdictional bases persisted: (1) mother failed to protect the child from contact with MC (mother's then partner); and (2) ward has special educational, medical and counseling needs. On appeal, the court found there was insufficient evidence in the record that mother or MC physically abused the ward or that it was reasonably likely that ward would suffer any harm from MC in the future. At the time of the hearing, ward

was not living with MC and had other plans for housing. Likewise, the court found there was insufficient evidence in the record as to when the ward was diagnosed with autism and what special needs he had when the court took jurisdiction in 2001, or as they developed over the course of the court's jurisdiction over the ward. The only information about the timing of the existence or recognition of the disabilities relates to his bipolar diagnosis, which occurred when he was 17 or 18.

Motion to Set Aside Judgment

- ***Dept. of Human Services v. K.W., 273 Or App 611 (2015)***

Facts:

The juvenile court entered a termination of parental rights judgment against mother after a three day trial. The trial court's decision was affirmed on appeal. Sixteen months after entry of the juvenile court judgment, mother moved to set aside the judgment under ORS 419B.923(1), on the basis that the judgment would cause harm to the child. Her motion was supported by affidavits from the designated adoptive placement, describing the bond that had developed between mother and child. Mother also submitted affidavits from others documenting her progress since the time of the TPR judgment.

The juvenile court denied mother's motion, concluding the court lacked authority to set aside the judgment under ORS 419B.923(1). Mother appealed.

Held:

Affirmed.

ORS 419B.923(1) allows the juvenile court to set aside any order or judgment made by it. The statute sets forth reasons for modifying or setting aside an order or judgment, and they include, but aren't limited to, clerical mistakes, excusable neglect, and newly discovered evidence. The court found inclusion of the examples in the statute limited the scope of the court's authority to set aside the judgment to circumstances that share a common characteristic with those examples listed in the statute. Although the court did not "identify with precision the characteristic common to clerical mistake, excusable neglect, and newly discovered evidence," it did state that allegations that the order is defective or the proceeding was unfair are "close to the mark." The court examined whether mother's allegations contain a similar characteristic to the examples provided in the statute and concluded a change in circumstance like that alleged by mother is not a reason that would allow a court to set aside a TPR judgment under ORS 419B.923(1).

Permanency Hearings

- ***Dept. of Human Services v. M.J.H., 278 Or App 607 (2016)***

Facts:

In November, 2014, DHS removed M, T and A from parents' care and filed a dependency petition for each child (hereinafter "2014 case"). In January, 2015, the court took jurisdiction over the children, and determined the plan for each child would be return to parent, with a

concurrent plan of adoption. In June, 2015, DHS filed new dependency petitions for each child, creating a new case for each child (hereinafter "2015 case"). In August, the court took jurisdiction over the children based on the new allegations. The following week, the court held a permanency hearing in the 2014 dependency case. DHS sought to change the plan in the 2014 case from reunification to adoption, and advocated that the 2014 and 2015 cases should be treated separately. DHS told the court it was not seeking a change in the plans in the 2015 case, and that it could proceed in that case based on a plan of return to parent. The juvenile court concluded that since the 2014 and 2015 cases were separate, there could be a different plan as to each. The cases were not consolidated. The court changed the permanency plan for each child in the 2014 case to adoption, and did not issue a judgment with respect to the 2015 case.

Parents appealed, arguing the court could not change the plan to adoption in the 2014 case, while the plan remained return to parent in the 2015 case.

Held:

The court has emphasized that the juvenile dependency code contemplates that a juvenile court takes jurisdiction over a child. Once jurisdiction is established, the child becomes a ward and the court must decide who will have legal custody based on its determination of what is in the best interest and welfare of the child. The juvenile dependency code does not contemplate that a child, and decisions about the child's welfare, will be split into separate cases. Instead, the code contemplates that the court will take jurisdiction of the child and make decisions about the child based on the totality of all the circumstances of that child. When the court is required to determine the child's plan, which is referred to in the singular, the code continues to contemplate that there will only be one plan in place at a time per child. To the extent there are separate, concurrent dependency cases involving the same child, it is error for the juvenile court to set a permanency plan for a child that results in the existence of different plans for the same child at the same time.

Vacated and remanded.

Commentary:

The court did not decide whether maintaining two separate, but concurrent, dependency cases involving the same child is permitted under the juvenile code. As you know, this is now common practice in courts using Odyssey. However, the court stated that the code does not appear to contemplate separate cases for one child, citing the consolidation statute (ORS 419B.806) and the provision in ORS 419B.809(6) that allows petitions to be amended "at any time." When more than one petition is filed per child, our office has provided the following guidance:

- The court is required to hold 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 was placed in substitute care, whichever is earlier. ORS 419B.470 (2). The date of entry into substitute care or the first jurisdictional judgment triggers the timeline.

- Subsequent amendments to a jurisdictional judgment or entry of subsequent jurisdictional judgments within that care episode do not generally impact the timing of the hearing, but may impact the court's ability to change the plan from reunification if doing so would deprive a parent of adequate notice and an opportunity to address the conditions identified in the judgment prior to the permanency hearing. *See e.g., Dept. of Human Services v. A.R.S., 256 Or App 654 (2013).*
- *Most importantly*, once the plan has been changed from reunification at a permanency hearing, entry of a subsequent jurisdictional judgment does not start a new timeline, or afford the court an opportunity to designate a plan of reunification in the subsequent jurisdictional judgment/case.
- The court can only change a court ordered permanency plan for a child at a permanency hearing under the authority of ORS 419B.476. For additional information, the [Juvenile Court Dependency Benchbook](#) outlines the legal framework and analysis of the findings that must be made (Go to "Hearings and Forms" and then to "Permanency Hearings") at a permanency hearing, including changing a plan from reunification to a different plan.

► ***Dept. of Human Services v. A.E.R., 278 Or App 399 (2016).***

Facts:

The juvenile court held a permanency hearing at which DHS sought to change the permanency plans for the children from reunification to adoption. Father, who had been incarcerated since jurisdiction, was in opposition, and argued that DHS could not demonstrate that it had made reasonable efforts to reunify the family. During the first two days of the permanency hearing, he testified that he had sent seven letters to his children but the DHS caseworker did not deliver them because she deemed them to be inappropriate. Father testified he believed the letters were good, and did not contain anything inappropriate. Father's counsel sought a continuance because she had just learned the day prior to the hearing that the caseworker had been terminated and would not be testifying. DHS had not included copies of father's letters to the children in discovery and the DHS lawyer did not have the case file or letters at the hearing. The juvenile court allowed parents time to obtain the desired additional evidence by scheduling the final day of the hearing a few weeks out, with the understanding that parents would subpoena DHS to produce the former caseworker's records, and locate and subpoena the former caseworker to testify. Subsequently, the court granted a DHS motion to quash father's subpoena.

Father obtained a court order directing the sheriff to transport him to the court on the day of the hearing. However, on the day of the hearing, father was not transported. Father's counsel was present and stated that father had not rested and that she was anticipating probably introducing some evidence through him. She requested that he be there personally. After the court attempted to connect father by telephone, the court directed the parties to proceed with closing

argument. Following closing argument, father's counsel attempted to make an offer of proof regarding the letters, which the court refused, ruling the offer should have been made when father was in court.

On appeal, father argued the juvenile court erred in conducting the final day of the hearing in father's absence, in violation of his statutory right to participate in hearings provided in ORS 419B.875(2)(c).

Held:

Reversed.

The court reviewed the meaning of the right of a party to participate as provided in ORS 419B.875(2). In *Dept. of Human Services v. D.J.*, 259 Or App 638 (2013) the court held a party's statutory right to participate includes the right to testify, and appearance through counsel is not a substitute when a party wishes to offer his or her own testimony. In this case, father was denied the opportunity to participate in a day of the hearing at which his testimony was critical to the presentation of evidence that the court would have considered in making its determination regarding the change in permanency plan. The letters formed a key part of father's argument that DHS failed to make reasonable efforts toward reunification.

► ***Dept. of Human Services v. J.M.*, [275 Or App 429 \(2015\)](#)**

Facts:

The juvenile court assumed jurisdiction over C based on each parent's admission that his or her lack of parenting skills impaired his or her ability to provide minimally adequate care for C. Each parent also admitted that C sustained an unexplained physical injury while in the care of parents. In mother's psychological evaluation, Dr. Deitch indicated she minimized or denied problem areas and likely had a dependent personality. That, coupled with her defensiveness and lack of an explanation of C's injury that conformed to the medical evidence, were concerning. Parenting classes were recommended. Father was given a rule out diagnosis of intermittent explosive disorder, and testing indicated a high degree of defensiveness and denial. Anger management counseling and parent training were recommended. A year after jurisdiction was established, the court changed the permanency plan from reunification to adoption. That decision was appealed and reversed.

Shortly after the first permanency hearing, C was found eligible for services for cognitive and speech delays. Initially, DHS shared this information with the foster parents, but not the parents. Parents continued to receive trauma based parenting services and did not learn about the delays until the court held a hearing on their motion to dismiss six months later. Two months prior to the second permanency hearing, C was diagnosed with autism spectrum disorder and global developmental delays. Parents began working with a provider for the first time about C's delays, and began to show improvement in their interactions with C. Father, however, did not participate in discussions about C's autism. Parents were also encouraged to complete 12 online modules on autism between sessions to help them learn and apply new skills. Parents did not

begin the online classes until a week prior to the second permanency hearing, and completed only 5 modules.

During a parent-child relationship assessment in the two months prior to the second permanency hearing, Dr. Laubacher concluded C had a primary attachment bond with foster parents, and a tertiary attachment bond with her parents. He concluded that any disruption to her primary attachment would create an intense amount of stress and possibly longer-term emotional disturbances.

The court held a second permanency hearing and considered parents' motion to dismiss and again changed the plan from reunification to adoption. Regarding the motion to dismiss, the court found that there was still no explanation for C's injuries that was consistent with the medical evidence, and that the injuries to the child were either caused by the parents or the parents should have known of the injuries. In addition, the court found the parents had been resistant to services, and in some circumstances, had refused to gain or learn from the services, and made little progress in understanding or benefitting from services.

With respect to the change in the plan to adoption, the court found, despite DHS's failure to disclose C's developmental delays earlier, DHS had made reasonable efforts. The court found the parents continued to lack the necessary parenting skills to make it possible for C to return home within a reasonable amount of time citing mother's psychological examination; C's autism diagnosis, finding that the parents' progress in meeting the child's high needs was not sufficient; and testimony that C would be emotionally traumatized if she were to leave the foster parents.

Held:

Affirmed.

Regarding the motion to dismiss, DHS has the burden to prove, by a preponderance of the evidence, 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. When a parent has participated in some services, yet there is a concern the parent hasn't internalized better parenting techniques, the dispositive question is what the parent will likely do. Legally sufficient evidence links the lack of insight to the risk of harm. In an unexplained injury case, the court looks at more than the presence or absence of expert testimony about the role that parents' admission might play in treatment or reducing risk to the child. Instead, the court examines the totality of the circumstances. In this case, the juvenile court made findings related to the parents' participation in services as related to their mental health conditions, and that neither parent had made an internal change with regard to their parenting skills. The appellate court found ample evidence in the record of what the parents are likely to do - mother is likely to cover up for father if he engages in a violent explosion directed at C and that parents will fail to provide C with the support required for her autism spectrum disorder and other needs. This was sufficient to conclude that C would experience serious loss or injury as a result.

Regarding the change of the plan from reunification, DHS bears the burden to show by a preponderance of evidence that it made reasonable efforts to reunite the family; and despite those efforts, the parents' progress was insufficient to make it possible for the child to return home safely. In making the determination, the court shall consider the ward's health and safety the

paramount concerns. In determining whether DHS efforts have been reasonable, the court must consider the totality of the circumstances. The court must also consider not only the burdens that the state would shoulder in providing those services, but also what benefit might reasonably be expected to flow from them. In this case, although there was a six month delay from the time C was diagnosed with delays and the time parents' received services relating to this, the record supports an inference that providing the information earlier would not have made a difference. The parents made little progress after learning of C's developmental delays and receiving services tailored to those delays. Finally, the juvenile court considered C's health and safety as its paramount concern finding that visitation was causing more stress on the child than strengthening her relationship with parents, and that service providers had opined that C would be emotionally traumatized if she were to leave her foster parents.

Findings to change or continue permanency plan

- *Dept. of Human Services v. A.S., 278 Or App 493 (2016)*

Facts:

The juvenile court established jurisdiction over K in December 2013, based on parent's stipulations which included domestic violence, mental health and mother's inappropriate physical and emotional discipline. The court held a permanency hearing in June and July of 2015 to consider whether the plan should be changed from reunification. The court heard testimony from the DHS caseworker, several psychologists, service providers, family members and friends. Both parents had been in counseling for four months and were making positive progress, with mother gaining skills to manage conflicts. The parents had also completed 14 weeks of parenting classes. Mother had completed 52 weeks of domestic violence treatment, but had not yet graduated because of her failure to acknowledge the abuse and show empathy for her children. The caseworker also noted progress and a strong relationship with K, but testified the parents failed to acknowledge their former inappropriate physical discipline of father's children and that it had been harmful to K. The child's therapist testified that K was at a stage of development that was critical for experiencing personal attachments, that he was showing signs of emotional problems related to a need for permanency, and that a guardianship would be beneficial to K because he would know he would be growing up in his grandparents' home. The court found DHS had made reasonable efforts, the parents had not made sufficient progress for the child to be safely returned home, and the evidence did not support a determination that further efforts by DHS would make it possible for K to return home within a reasonable time. The court further found the parents lacked insight into the reasons why the court assumed jurisdiction, and would be unlikely to gain that insight within a reasonable time. The court changed the plan to durable guardianship with the maternal grandparents, whom K had lived with since the initial removal in 2013.

Parents appealed.

Held:

Affirmed.

Before the court can change a permanency plan away from reunification, the court is required to determine that DHS has made reasonable efforts to make it possible for the child to safely return home, and that the parents progress was insufficient for the child to safely return home. In addition, the juvenile court may continue a plan of reunification if it determines that further efforts will make it possible for the ward to safely return home within a reasonable time. In this case, the Court of Appeals found the evidence was legally sufficient to support the juvenile court's determinations. With respect to the reasonable time determination, it was permissible for the juvenile court to infer that it will take mother at least a year to parent when the juvenile court noted mother's inability to regulate her behavior based on her testimony, mother's refusal to admit she had caused harm to father's older children, and there was testimony from a psychologist that mother would not experience sustained improvement with respect to empathy and accountability for her behavior for at least eight to 10 months from the date of the hearing.

► *Dept. of Human Services v. C.M.E., [278 Or App 297 \(2016\)](#)*

Facts:

M was in foster care between May, 2007 and 2010 based on mother's mental health and substance abuse problems. After returning to mother's care, M maintained a close relationship with foster parents. Over the next few years, DHS received several reports about mother's parenting. M was removed from mother again in 2014, after she had been off of her mental health medications for a year, and was living in unsanitary and unsafe conditions. In May, 2014, the court took jurisdiction based on mother's mental health and her failure to improve her parenting skills despite having received services.

At a permanency hearing in December, 2014, the court found DHS had failed to make reasonable efforts during the first seven months of the case, and declined to change the permanency plan. At the next permanency hearing in August, 2015, evidence was presented that mother had made some progress, and DHS had developed an in home safety plan involving a grandparent, allowing M to return home. Although the safety plan was similar to the one in effect in 2010, additional protections had been added: grandmother was now listed on mother's lease, had a key to mother's apartment and was appointed as mother's legal guardian. However, the child and the CASA argued the court should change the plan to adoption, because mother continued to show lack of insight into her mental health and although participating in services, mother had failed to learn from them and develop an adequate parental role in relation to M. The child, age 8, expressed a desire to live with the foster parents until he turned 18. A psychological report on M indicated that he had possible cognitive impairments; that he needed a secure caregiver (as provided by his foster parents); and needed a caregiver who could advocate for M's needs at school and provide him with a stable and enriched environment.

The juvenile court determined the plan should be changed to adoption and found: (1) DHS made reasonable efforts; (2) Mother failed to make sufficient progress; (3) M could not be safely returned within a reasonable time that meets M's needs (M needed permanency, and a subsequent removal would be catastrophic for him); and (4) there was no compelling reason that a TPR petition should not be filed.

Held:

Affirmed.

The court set forth the test for changing a permanency plan from reunification to adoption: the court must find DHS made reasonable efforts and the parents made insufficient progress for the child to safely return home. DHS's efforts and the parent's progress is evaluated according to the facts that formed the bases for juvenile court jurisdiction. If the court changes the permanency plan to adoption, the court's order must include the court's determination as to whether one of the circumstances in ORS 419B.498(2) is applicable. In addition, the court reiterated (citing *Dept. of Human Services v. M.H.*, 266 Or App 361, 367 (2014)), that ORS 419B.498(2) requires the court to determine whether it is in the child's best interests not to file a petition for termination because the child can be returned home within a reasonable time.

In this case, the court found the juvenile court's determination that mother had made insufficient progress was supported by evidence in the record. Service providers expressed significant concerns about mother's parenting abilities; her failure to develop a parental role with M; her lack of knowledge about how to meet M's needs; her inability to independently care for herself and M; and continuing lack of insight into the cause of DHS's involvement with the family. In evaluating mother's argument that she is not required to be able to parent the child independently to have M returned home, the court distinguished this case from other cases in which the parent had access to live-in parenting support or permanent, alternative living arrangements. In contrast, the proposed safety plan would only require members of mother's support network to check in twice a day to monitor mother. The juvenile court was permitted to find this was insufficient, especially in light of the fact that a similar safety plan lead to the M's removal.

With respect to the ORS 419B.498(2)(b)(B) question of whether the bond between mother and M was a compelling reason for the court to decline to change the plan to adoption, the court found sufficient evidence for the juvenile court's determination that it was not, including the child's testimony, additional evidence in the record that M had developed a strong attachment to his foster family, and reports from service providers that mother's role was that of a friend, peer or play partner to M.

► ***Dept. of Human Services v. T.M.S.,* [273 Or App 286 \(2015\).](#)**

Facts:

T was removed from mother's care at age five. The juvenile court established jurisdiction based on mother's substance abuse. Mother was provided with counseling, medication management, a psychological evaluation, drug intervention and housing with an intensive case management program. Thirteen months after entry into care, T was returned home on a trial reunification. During that time, it took vigorous prompting by service providers for mother to follow through with services for herself and for T. She also relapsed on methamphetamine. Six months later, a week after police were called to the home to respond to late night partying and domestic

violence, T was removed again. Mother was referred back to mental health and intensive outpatient treatment. She tested positive for methamphetamine in September, 2014 and was discharged from treatment in November for noncompliance.

At the permanency hearing in November, mother and child argued any change in plan should be delayed pending the completion of a psychological evaluation that was ordered by the juvenile court three months earlier. The juvenile court rejected that argument and changed the permanency plan to adoption finding that mother had made insufficient progress for T to safely return home . Mother and child appealed.

Held:

Affirmed.

(1) The evidence was legally sufficient to support the court's determination that mother had not made sufficient progress under ORS 419B.476(2)(a). The juvenile court found any progress made was due to the considerable help of service providers and mother was unable to progress on her own. The juvenile court also noted mother's repeated relapses and recent discharge from treatment due to noncompliance.

(2) The evidence was legally sufficient to support a determination that the bond between mother and T did not constitute a compelling reason to avoid a change in plan under ORS 419B.498(2)(b). The court found the caseworker's testimony that T "loves her mother very, very much", T's decision to appeal the change of permanency plan at age six, and mother's counsel's statement that mother desired to parent T and be a good parent were inadequate to establish a compelling reason under the statute. Nor was there persuasive evidence that adoption was unlikely to be achieved when relatives in Texas expressed an interest in being an adoptive resource.

(3) The record did not establish a reason for not filing a termination of parental rights petition under ORS 419B.498(2)(c). The evidence did not establish the juvenile court needed an updated psychological evaluation in order to assess mother's progress in addressing substance abuse, which was the basis of jurisdiction. Mother and T did not establish the services an updated psychological evaluation could have provided were different than what mother was already receiving.

Reasonable Efforts

► *Dept of Human Services v. S.S., 278 Or App 725 (2016)*

Facts:

M and J, two and three years old, were removed from their mother's care in July, 2013. DHS scheduled visits between mother and the children during July and August 2013. In September 2013, mother was arrested on charges including attempted murder and numerous counts of identity theft. Mother admitted to a jurisdictional allegation that she was incarcerated for an unknown period of time, and was unable to be a custodial resource for the children. In October

2013, the juvenile court took jurisdiction based on mother's admission and father's failure to appear.

The children had extraordinary behavioral difficulties. While mother was in jail, DHS decided that visits would not be appropriate for the children. Mother began writing letters to them, and the caseworker believed the content was appropriate. However, the caseworker decided in December 2013, in consultation with the foster mother, that it may be inappropriate to bring up the letters with their children due to their age. M's therapist also recommended against sharing mother's letters due to M's age. In April 2014, the juvenile court referee found DHS had made reasonable efforts to reunite the children with mother, but noted it was unclear why the therapist was recommending no contact. The court ordered DHS to ensure that the children re-establish contact with the mother as soon as appropriate. Meanwhile, M made a sex abuse disclosure. Shortly thereafter, when the caseworker read a letter from mother to M and J, it appeared to trigger some past anxiety responses.

Mother continued to write letters and requested telephone calls. At a permanency hearing in June 2014, the referee continued the permanency plan of reunification and found that DHS had made reasonable efforts toward reunification. The referee explained that M's therapist was recommending against contact due to the children's reactions to the contact, and that DHS was arranging for mother to have phone contact with the therapist to assist both parties to have more understanding of the history and current needs of the children. However, due to the therapist's hours, DHS did not arrange contact.

In September 2014, mother pleaded guilty to three counts of identity theft and one count of third-degree assault. She was sentenced to 48 months and expected to be released between late 2015 and mid-2016. She was moved to the Coffee Creek Correctional Facility, where there are facilities to allow visits with children. In December 2014, the referee deferred findings on DHS's efforts to reunify, finding that mother still had not had visitation with the children and her letters had not been delivered. The referee ordered DHS to refer the family to a therapist able to assist mother and children to reestablish relationships. However, DHS did not find a new therapist for M. Instead, the existing therapist tried discussing mother with M during therapy sessions, and each time, M would regress.

In March 2015, at the next permanency hearing, the caseworker testified: (1) there remained concerns that M would be traumatized from contact with mother; (2) mother had participated in all services and programs available to her, including alcoholics anonymous, narcotics anonymous meetings and a parenting class; and (3) mother would not be available to parent for 18 months - a period that would be too long for the children to wait given their ages and need for permanency. The referee found that DHS had made reasonable efforts to reunify during the period since the last hearing and that mother had failed to make progress sufficient to allow for reunification within a reasonable amount of time.

Mother sought a rehearing *de novo*, which took place in July 2015. At the rehearing, the evidence was similar, although there were a couple of updates: (1) Mother acted appropriately during a visit with J, however, J regressed after the visit and M was afraid she would have to see mother as well; and (2) mother was going to be the teaching assistant the next time the parenting

class was offered; was in minimum security and working in an office; hoped to be placed in d/a treatment soon; and had no disciplinary reports. The court found that M and J had not developed a meaningful relationship with mother before she was incarcerated, and that the children were traumatized in mother's care and continue to suffer from trauma. In addition, DHS did not obtain a therapist skilled at rebuilding the parent-child relationship after the permanency hearing in December, 2014, but there was no "no reasonable efforts" finding in the case. The juvenile court "affirmed" the referee's determination that the permanency plan should be changed to adoption.

On appeal, mother argued it was error for the juvenile court to change the plan based only on the determination that DHS's efforts between January and April 2015 were reasonable. Mother argued that DHS's efforts over the life of the case were not reasonable as a matter of law because DHS cut off all contact between mother and the children for more than a year and then made only four months of efforts toward reunification.

Held:

Reversed and remanded.

The court explained that evaluation of the reasonableness of DHS's efforts includes efforts over the life of the case. The type and sufficiency of efforts that the state is required to make and whether the types of actions it requires parents to make are reasonable depends on the particular circumstances.

In this case, mother took full advantage of the services available to her and consistently sought contact with the children. Her criminal activity and consequent incarceration as well as lack of contact with the children were the cause of the court's jurisdiction. The period from December 2014 to April 2015 was not sufficient in length to afford a good opportunity to assess the family's progress toward reunification - specifically to assess the children's progress toward being able to reestablish their relationship with mother. The court found it was error to fail to consider DHS's efforts over a longer period before deciding whether those efforts were reasonable. Even assuming DHS efforts prior to June 2014 were reasonable, no efforts for a six month period (July and December 2014) and then four months of reasonable efforts, was not sufficient. The period of DHS efforts to reunify the family was too short (in light of DHS's previous failure to make efforts) to allow the court to meaningfully assess whether the family was making progress toward reunification.

Given that the children's lack of a relationship with mother was among the adjudicated circumstances that endangered them, the court concluded that four months of efforts to rebuild the relationship was not enough to compensate for six months of failure to allow contact or even prepare the children for contact with their mother.

Reviewability

- *Dept. of Human Services v. B. P., [277 Or App 23 \(2016\)](#)*

Facts:

The court made the following orders and judgments related to the petition and amended petitions filed as to M:

9/2/14: An order was signed by a referee reflecting that mother stipulated to petition allegations, and that allegations as to father were being set for trial.

10/10/14: An order was signed by a judge finding the child within the jurisdiction of the court and containing findings and orders regarding one parent.

11/21/14: An order was signed by a referee with findings and orders regarding both parents. It referenced jurisdictional findings made on 10/10/14 and made dispositional orders.

Father filed a rehearing request within 10 days, seeking a rehearing on "disposition".

12/19/14: Rehearing held in front of judge. Father argued the judge's findings on 10/10/14 were insufficient to justify jurisdiction and moved to dismiss. Judge ruled that a rehearing on a ruling made by another judge is not appropriate and advised father he could appeal that decision. As to the rehearing of the dispositional order on 11/21/14, the court entered an order on 1/6/15 "affirming" the referee's decision.

1/29/15: The referee entered a "Judgment Establishing Dependency Jurisdiction as to Both Parents" and "Judgment of Disposition" as a judge pro tempore indicating that the dispositional orders from 11/21/14 were final because no party had requested a rehearing.

Father filed a notice of appeal of the judge's 1/6/15 order, which the Court of Appeals found was not appealable. Father filed an amended notice of appeal indicating he was also appealing the 1/29/15 order.

2/19/15 - Review hearing held. Referee signed a review order.

3/18/15 - The same referee entered a review judgment as a judge pro tempore, which incorporated the 2/19/15 order in its entirety into the judgment as a final judgment

4/7/15 - Father filed another amended notice of appeal as to the 3/18 judgment; then requested a summary determination of appealability of 3/18 judgment. The Chief Judge of the Court of Appeals concluded the 3/18/15 judgment was not appealable, rather, it was simply a judgment that adopted a prior referee order.

Father challenged the juvenile court's decision to take jurisdiction over his daughter. The child and DHS argued father's appeal should be dismissed because the juvenile court's decision finding M within the jurisdiction of the court was not made in the form of an appealable judgment. The issue on appeal is whether the appellate court could review father's challenge to the court's assertion of jurisdiction in the 1/29/15 judgment.

Held:

The judgment entered on 1/29/15 is appropriately reviewable by the Court of Appeals.

The court stated the dispositive issue was whether the 1/29/15 judgment is properly characterized as a jurisdictional judgment. A jurisdictional judgment in juvenile court proceedings, for purposes of appeal, includes a judgment finding a child within the jurisdiction of the court. ORS 419A.205(1)(a). The court recognized in *State ex rel Juv Dept v J.W.*, 345 Or 292 (2008), a judgment under the juvenile appeals statutes (ORS 419A.200 and ORS 419A.205(1)(a)) must also comply with the statutes in ORS chapter 18 that govern judgments generally. In interpreting ORS 18.005, the Oregon Supreme Court has explained that a judgment consists of two distinct parts: (1) substantively, the trial court must make a concluding decision on one or more requests for relief; and (2) formally, the trial court must ensure that the concluding decision is reflected in the judgment document.

With that background in mind, the court stated the dispositive question was whether the 1/29/15 judgment substantively expressed a concluding decision on jurisdiction over M. The court found it was significant that the juvenile court labeled the 1/29/15 judgment explicitly as a jurisdictional judgment. In addition, the court found the incorporation of the 11/21/14 order in its entirety fairly demonstrated the court intended to issue a concluding decision on jurisdiction.

On the merits, the court accepted DHS's concession that the evidence was legally insufficient to support jurisdiction. Reversed.

Commentary:

This case raises a number of procedural issues around how jurisdiction is established post *Dept. of Human Services v. W.A.C.*, [263 Or App 382 \(2014\)](#) when one parent admits to allegations and the other parent requests a trial. JCIP developed an Admissions to Petition form in cooperation with the JELI Model Forms Committee, OPDS and attorneys representing the state as a way to allow the court to take one parent's admissions pending resolution of the other parent's allegations. Putting the admitted and proven allegations together into a jurisdictional judgment at the conclusion of trial provides a mechanism for a parent to appeal if desired. Beware, however, that if the admitted allegations no longer reflect the child's condition and circumstances at the time of the hearing, the judgment is at risk of being reversed. See *Dept. of Human Services v. A.F.*, [268 Or App 340 \(2014\)](#)

The admissions form and the jurisdictional and dispositional judgments are posted on the JCIP website:

<http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/jcip/pages/2010jcipforms.aspx>

Service

- *Dept. of Human Services v. K.G.A.B.*, 278 Or App 391 (2016)

Facts:

DHS filed a petition to terminate mother's parental rights. Two months later, after DHS attempted to personally serve mother, it filed a motion requesting authorization to serve the summons by publication in a newspaper with general circulation in Deschutes County. In support of the motion, DHS filed an affidavit detailing unsuccessful efforts to locate a valid address for mother, including searching the records of numerous state agencies, records of the federal bureau of prisons and two publicly available locator websites. DHS provided further detail in an affidavit, stating it found five differing addresses for mother in or near Deschutes county and two in Portland, but none were current. DHS also located an account for mother on Facebook where mother posted she resided in the Bend, Oregon area. The affidavit did not state that mother's Facebook page also contained a reference to mother being in Florida, close to Tampa. The court granted DHS's motion, and mother was served by publication in the Bend Bulletin.

At the termination hearing, mother did not appear, and mother's attorney argued service was ineffective because the summons and petition should have been published in Florida, near Tampa, in addition to Deschutes County. The juvenile court found DHS did not have enough information about mother's location to view it as a location that might reasonably result in actual notice to mother, and ruled the order authorizing service was adequate. The court conducting the hearing in mother's absence and terminated mother's rights.

On appeal, the court considered whether or not the juvenile court could validly authorize service by publication in Deschutes County considering the failure of DHS to disclose that mother's Facebook page indicated she was in Florida.

Held:

Affirmed.

Citing ORS 419B.824(6)(c), the court explained, an order for service by publication must direct that the publication be made in a newspaper of general circulation where the action was commenced, or if there is no such newspaper, in a newspaper designated as most likely to give notice to the person to be served. If DHS knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice, this must be stated in the affidavit and the court may order publication in that location in lieu of, or in addition to, publication in the county where the action is commenced. In this case, the court found the evidence regarding mother's location in Facebook did not establish that mother resided in Florida or that she would be there for any length of time. Under these circumstances, the record supported the trial court's finding that the information DHS possessed was too tenuous for DHS to understand Florida to be a location that might reasonably result in actual notice.

► *Dept. of Human Services v. M.C.-C.*, [275 Or App 121 \(2015\)](#)

Facts:

This dependency proceeding involved four children who live in Oregon. Father lived in Mexico. DHS sent a summons to father in Mexico in August, 2012 through a delivery service that required his signature. Subsequently, father appeared in the proceeding multiple times, personally by telephone and through counsel. He participated in a range of hearings, and affirmatively invoked the assistance of the court by requesting continuances and disclosure of protected information about his children.

More than two years after service, father moved to dismiss for lack of personal jurisdiction based on defective service. The juvenile court denied father's motion.

Held:

Affirmed.

The Hague Service Convention requires that the service of civil complaints, including juvenile dependency petitions, be made through the Mexican Central Authority. The method of service used in this case did not comply with the Convention. However, under Oregon law, a party claiming that a court lacks personal jurisdiction because of a defect in service must raise that issue at the earliest possible occasion. If a party appears and requests relief that could only be granted if the court had jurisdiction, and fails to promptly raise any issues about defects in service or lack of personal jurisdiction, then the party waives the ability to raise those issues. Citing ORS 419B.836 in a footnote, the court noted that language in the juvenile code indicates that the legislature generally intended that defects in service not obstruct the exercise of jurisdiction, unless due process requires otherwise.

Termination of Parental Rights

► *Dept. of Human Services v. K.M.J.*, [276 Or App 823 \(2016\)](#)

Facts:

The state filed petitions to terminate mother's parental rights to C and S. Mother was served with a summons directing her to file a written answer to the petition no later than 30 days after the date of service to admit or deny the allegations in the petition. The summons also stated that if she failed to file a written answer or appear at any subsequent hearing, the court may, without further notice, terminate her parental rights. Mother filed a written answer denying the allegations in the petition. The court issued a notice of termination trial for March 6 and 7, 2014. In February, 2014, mother wrote letters to her attorney, DHS and the court, indicating she was aware of the trial dates, but that she lacked transportation to the hearing in Oregon and had no telephone. Mother did not appear on March 6, 2014, however, her attorney was present. The court asked mother's counsel if there was any reason the court shouldn't proceed with the trial. Counsel replied no.

The court allowed DHS to present evidence and testimony in mother's absence, including testimony that mother had a mental illness and borderline IQ functioning. The court found mother had adequate notice, relying on the attorney's statement that his office sent notice to mother's address, on the caseworker's testimony that she had recently spoken with mother and she was aware of the trial date, and on mother's letter that indicated she knew of the trial date. The court terminated mother's rights.

Mother appealed, arguing the court did not give her the notice required by ORS 419B.820 and therefore lacked the authority to terminate her rights.

Held:

Reversed.

ORS 419B.819(7) authorizes the juvenile court to terminate a parent's parental rights when a parent fails to appear at a hearing related to the petition after being served with a summons and a true copy of the petition under ORS 419B.819(1) and (2). When a summons requires the parent to file a written answer under ORS 419B.819(2)(c) and the parent files an answer contesting the petition, the court is required to provide an additional oral or written order providing the parent with notice of the items in ORS 419B.820(1) through (5). The court found it was plain error to terminate mother's parental rights in her absence, prior to providing the requisite notice set forth in ORS 419B.820. Even though mother had actual knowledge of the trial date, the appellate court found that the notice provided in the summons more than a year prior to the trial date was insufficient to ensure that mother knew the consequences of her failure to appear.

► *Dept. of Human Services v. T. M. B.*, 276 Or App 641 (2016).

Facts:

DHS filed petitions to terminate mother's parental rights to children A and B. DHS served mother with the petition and summons, which provided the juvenile court could terminate mother's parental rights in her absence and without further notice if she failed to appear at subsequent proceedings based on ORS 419B.819(7) and ORS 419B.819(4)(b). The juvenile court provided mother with written and verbal notice of the trial date of March 31, 2015 at 9:00 a.m. Mother failed to appear at that time. The juvenile court postponed the proceedings for two hours in case mother was late or lost while Mother's attorney's office tried to contact her by phone and e-mail. When the juvenile court reconvened two hours later, mother's attorney reported that mother e-mailed him at 12:34 a.m. that day, stating she had arrived in Portland, and would be coming in to meet the attorney in his office that morning before trial. The juvenile court proceeded to trial in mother's absence and terminated mother's parental rights to both children. Later that day, mother's attorney moved the juvenile court to set aside the termination judgments asserting mother's failure to appear was due to good cause because she mistakenly believed that the trial began on April 1 rather than March 31. The juvenile court denied the motions, noting that mother had been provided notice, many email attempts were made to contact her and she failed to appear.

In the termination judgments, the juvenile court set out written findings stating that mother sent an email to her attorney at 12:30 a.m. on March 31st, indicating that she had arrived in Portland and that she would see him that morning in his office. She later failed to show up.

Mother appealed, arguing her nonappearance was due to excusable neglect and that the juvenile court abused its discretion by denying the motions.

Held:

Affirmed.

ORS 419B.923(1)(b) authorizes a juvenile court to set aside termination judgments in cases of excusable neglect, and requires the court to engage in a two step process: (1) a party must establish that the party's nonappearance was the result of excusable neglect; and (2) if the party makes that predicate showing, the juvenile court retains some range of discretion to determine whether, in the totality of the circumstances, to allow the motion. In accordance with the legislative history, the court has interpreted excusable neglect to encompass a parent's reasonable, good faith mistake as to the time or place of a dependency proceeding. This includes a good faith mistake as to the time of the hearing, even if it is careless.

In this case, the record allows the inference that mother provided contradictory information regarding her nonappearance. Mother's explanation for her failure to appear was controverted by her own earlier statement that she would be coming to her attorney's office to meet him before trial on March 31. As a matter of law, the record did not establish that mother made a good faith mistake regarding her court date.

► ***Dept. of Human Services v. A.W.,* [274 Or App 493 \(2015\)](#)**

Facts:

Mother's termination of parental rights trial began on December 17, 2014. On the second day, her attorney requested a continuance "at least for the day" to allow mother to seek medical attention after suffering an assault from her husband and his girlfriend. The juvenile court agreed to continue the trial until the afternoon to allow mother time to go to the hospital. Her attorney requested a second continuance in the afternoon, since mother was still at the hospital waiting to be evaluated. The juvenile court allowed this and scheduled a status conference for December 29, explaining it was to make sure everyone is on the same page about how the case is reset, and whether it would be set at the same time as another dependency case involving one of mother's children. The court also stated that if mother was unable to make it for health reasons, that would be the only excuse the court was willing to accept. Mother's caseworker informed mother of the status conference. Mother's attorney appeared at the status conference, but mother failed to appear. DHS moved for an order of default. The court noted DHS was within its rights to ask for a default but there was insufficient time to hear DHS's *prima facie* case. A subsequent hearing was scheduled for December 31. Again, mother's attorney appeared and mother did not. The court found that mother's failure to appear on both dates constituted a default, and signed an

order of default. The court proceeded to hear DHS's *prima facie* case and entered a judgment terminating mother's parental rights to Z.

Mother appealed, arguing the juvenile court erred in finding she was in default, because she was not required to attend the December 29 status conference.

Held:

Reversed and remanded.

On appeal, the court considered whether the juvenile court's actions were authorized by ORS 419B.819(7), which allows the court to terminate a parent's rights if he or she fails to appear as directed by the summons or court order for any hearing related to the termination petition. The court noted that ORS 419B.819(8) requires the parent to appear personally, and not through counsel, when the summons requires the parent to appear personally, or if a court orders the parent to appear personally at a hearing in the manner provided in ORS 419B.820. In this case, DHS conceded the court had not made such an order for the hearing on December 29, so a default was not appropriate. Since mother did not have actual notice of the hearing date on December 31, there was no basis for finding her in default on that date.

► ***Dept. of Human Services v. E.N.,* [273 Or App 134 \(2015\)](#)**

Facts:

This case involves an appeal from a judgment denying DHS's petition to terminate mother's parental rights to A based on ORS 419B.504 (unfitness). The juvenile court found DHS failed to meet its burden of proof that mother's conduct and conditions were seriously detrimental to A at the time of the termination hearing because lack of specific cognizable mental or physical harm to A. At the time of trial, A was doing well in foster care, however, there was testimony from a child psychologist that she was not bonded with mother, and that her window for establishing a bond with a new caregiver was closing.

A and DHS appealed.

Held:

Reversed.

The general test for termination of parental rights based on unfitness is: (1) the parent has engaged in conduct or is characterized by a condition that is seriously detrimental to the child; (2) integration of the child into the parent's care is improbable within a reasonable time due to conduct or conditions not likely to change; and (3) termination is in the best interests of the child.

On *de novo* review, the court considered testimony from A's caseworker and foster parent that A needs a stable, calm, child focused primary caregiver in order to avoid risk of emotional and behavioral regulation issues, attachment difficulties and mental health issues. That testimony, combined with evidence that mother still had problems with drug use, mental health, failed to have a thought out plan for reunification, had an inability to commit to a long-term adjustment of her circumstances through participation in services, and her stop-and-start treatment behavior, established she would provide A with instability and exposure to a chaotic lifestyle. *The court*

found potential harm to the child can be sufficient, and the child's wellness at the time of trial does not preclude a determination of serious detriment. In sum, the court found there was clear and convincing evidence that mother's conduct and conditions would be seriously detrimental to A.

With respect to the second prong of the test, the court found the evidence established the window for A to form a new primary attachment was closing. Although mother had made recent progress in DBT, her 3 1/2 year history of starting and stopping treatment, continued resistance to long term change, and unwillingness to work with DHS to identify and access services made it improbable that A could be integrated into mother's care within a reasonable time.

Finally, considering the history and circumstances set forth in the opinion, the court found termination of mother's rights was in A's best interests.