

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

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Oregon Judicial Department  
Juvenile Court Improvement Program

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# Juvenile Delinquency

## *Commitment to Oregon Youth Authority*

- ▶ *State v. J.R.C.*, [289 Or App 848 \(2018\)](#)

Youth appealed a delinquency judgment that continued his placement with the Oregon Youth Authority for a period not to exceed five years. Youth argued on appeal that the court committed plain error to the extent it relied on unsworn testimony and relied on documents that weren't properly incorporated into the evidentiary record. The appellate court refused to consider these issues for the first time on appeal. Youth also challenged the juvenile court's failure to include written findings as to why it is in the best interests of the youth offender to be placed in OYA as required by ORS 419C.478(1). The Court of Appeals found the trial court erred by failing to make the written findings, and vacated and remanded the case for the court to make the required written findings under ORS 419C.478(1).

## *Coercion*

- ▶ *State v. R.Y.*, [291 Or App 246 \(2018\)](#)

Youth was found within the jurisdiction of the juvenile court based on acts which if committed by an adult would constitute three counts of coercion under ORS 163.275, in addition to other offenses. Youth appealed, challenging each count. The court affirmed other counts without discussion, and wrote to address youth's challenge regarding the counts of coercion. Youth argued that the evidence was insufficient to prove that youth threatened anyone. The court found that evidence in the record of the recording of the victim's CARES interview, which took place nine days after the incident, was sufficient to prove coercion under ORS 163.275. In response to a question about whether someone told her not to tell, the victim responded, "Yes, he threatened me and he said, 'Dude, I'll kill your mother and you and your brother' --\*\*\*\*\* (Inaudible) kill my family." Affirmed.

## *Conditions of Probation*

- ▶ *State v. B. H. C.*, [288 Or App 120 \(2017\)](#)

Youth, who is under the juvenile court's delinquency jurisdiction, challenges two conditions of probation imposed by the juvenile court: Condition 26 authorizes the juvenile department to sanction youth with detention for probation violations without a court hearing in some circumstances. Condition 31 authorizes the juvenile department to electronically monitor youth and possibly require youth to pay for such monitoring. Youth contends that both conditions are not authorized by the juvenile code. The state argues that youth's challenges are not ripe and fail on their merits.

Held: The text, context, and legislative history of ORS 419C.453 all indicate that the legislature intended to authorize the use of detention to punish a youth for a probation violation only in the manner provided for by that statute. Condition 26 does not comply with that statute because it authorizes someone other than the juvenile court to decide whether detention should be used to punish a probation violation, and because it authorizes that decision to be made without a hearing before the court. The Court of Appeals rejected as unpreserved youth's assertions that the juvenile code does not permit electronic monitoring at all, and that the juvenile court erred by requiring youth to pay for any monitoring required. The court rejected on the merits youth's contention that the juvenile code precludes the juvenile court from giving the juvenile department discretion whether to use the electronic monitoring that the juvenile court has expressly authorized, assuming the juvenile code allows for electronic monitoring in the first instance. Reversed and remanded with directions to strike Condition 26; otherwise affirmed.

### *Forfeiture*

► *State v. N.S.B.*, [290 Or App 576 \(2018\)](#)

Youth appealed a judgment finding him within the jurisdiction of the juvenile court as a result of his unlawful possession of a firearm. The juvenile court imposed special probation conditions, including forfeiture of two handguns and a rifle that had been seized from youth's home. The court required that the rifle would be forfeited if it was not sold within 30 days. Youth argued that the rifle, which was given to him by his mother, was not subject to forfeiture because it was not and could not be "possessed, used or available for use to facilitate the offense of unlawful possession of a firearm." The state conceded and the Court of Appeals agreed that the court should reverse and remand the juvenile court's judgment with instructions for the court to delete the portion of the judgment requiring the youth forfeit the rifle.

### *Modification of Order*

► *State v. E.C.-P.*, [289 Or App 569 \(2017\)](#)

In 2004, youth admitted to having committed acts that would constitute first-degree sodomy if committed by an adult. The juvenile court, in its dispositional order, deferred two conditions: (1) that youth provide a DNA sample at the direction of the probation/parole officer for submission to the DNA databank, and (2) youth comply with sex offender registration as required by law. Additionally the court provided in the order, "The blood draw and sex offender registration are deferred until a decision is made vacating jurisdiction. If the youth successfully completes all conditions of probation, upon written factual findings, the Court may vacate the order taking jurisdiction and have all admissions(s) (sic) set aside and charge(s) dismissed." In 2010, youth pled guilty to two adult felonies and was placed in an adult facility. His OYA parole/probation officer requested that youth's commitment to OYA be terminated and wardship vacated. The court subsequently entered an order terminating jurisdiction under ORS 419C.005(4)(c), without explicitly addressing the two deferred conditions.

In 2014, the state filed a motion asking the court to modify its 2004 order and require youth to provide a DNA sample and register as a sex offender. The court appointed counsel for the youth and, following a hearing, concluded it had authority to modify the 2004 order pursuant to ORS 419C.610. However, the court postponed its ruling to give youth an opportunity to submit evidence, and suggested it would authorize funds for youth to obtain a current psychological evaluation. Youth ultimately submitted favorable letters from his probation officer and former teacher. At a subsequent hearing, the court explained it needed to feel certain that the youth presented a low risk, and that it could not do so without a current psychological evaluation. Accordingly, the court granted the state's motion.

Youth appealed, and argued that ORS 419C.610 did not authorize the court's modification of the order.

Held:

Affirmed.

The court found the issue of whether the court could require youth to register as a sex offender was moot, since the law required youth to register as a sex offender even in the absence of a court order to register.

Regarding the issue of whether the court could order youth to provide a DNA sample, youth argued that ORS 419C.610 does not allow the state to impose additional requirements after the youth has fully served his disposition and jurisdiction has been terminated. The court rejected youth's argument, finding the court did not belatedly impose a suspended sentence or penalize youth for his post-adjudication behavior. Rather, the trial court corrected an unlawful order, which itself implied that the conditions would remain deferred only if youth completed all conditions of probation. The court found ORS 419C.610 gives the juvenile court broad discretion to determine the procedures it will follow when considering a modification under ORS 419C.610 and does not expressly limit when or in what manner a court may modify its orders. Further, the court rejected youth's due process argument, explaining that youth received more process than was required since youth's adjudication was the only predicate for mandatory DNA sampling.

### ***Motion to Suppress***

► ***State v. M.S.S.K., [289 Or App 450 \(2017\)](#)***

After denying youth's motion to suppress statements that she made to her juvenile probation officer, the juvenile court found youth within the jurisdiction of the court for acts which, if committed by an adult, would constitute unauthorized use of a vehicle, ORS 164.135. Youth argued that the statements at issue were the product of a custodial interrogation that was conducted without youth having been properly given a *Miranda* warning. The state argued that the statements should not be suppressed because they were unresponsive to the probation officer's question, and the juvenile court agreed.

## Held:

Reversed.

On appeal, the state conceded the juvenile court's basis for denying the motion to suppress was incorrect (the Court of Appeals agreed). However, the state argued the court should affirm because youth was informed of her Miranda rights by a police officer hours before making the challenged statements to a probation officer and a reasonable person would not have understood her rights to have changed in the meantime.

The court explained the following conditions must be met before the appellate court will affirm a trial court on a "right for the wrong reason" basis:

“The first condition is that, if the question presented is not purely one of law, then the evidentiary record must be sufficient to support the proffered alternative basis for affirmance. That requires: (1) that the facts of record be sufficient to support the alternative basis for affirmance; (2) that the trial court’s ruling be consistent with the view of the evidence under the alternative basis for affirmance; and (3) that the record materially be the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below. In other words, even if the record contains evidence sufficient to support an alternative basis for affirmance, if the losing party might have created a *different* record below had the prevailing party raised that issue, and that record could affect the disposition of the issue, then we will not consider the alternative basis for affirmance. The second condition is that the decision of the lower court must be correct for a reason other than that upon which the lower court relied. Third, and finally, the reasons for the lower court’s decision must be either (a) erroneous or (b) in the reviewing court’s estimation, unnecessary in light of the alternative basis for affirmance.”

In this case, the court declined to consider the state's proffered alternative basis for affirmance, finding youth could have created a different record had the state raised the issue below.

► *State v. K.A.M.*, 279 Or App 191 (2016), *reversed*, [361 Or 805 \(2017\)](#)

## Facts:

Police officers went to a house based on information that a suspected parole violator was there. A person who had rented the house gave the officers permission to look through it. Detective Schwab went into a back bedroom dressed in plain clothes, except for a raid vest that said "POLICE" on it. In the bedroom, he found youth and a young woman who were waiting to find out if they could live in the house for awhile. According to the detective's testimony, he did not explain why the officers were searching the house or why he had come into the bedroom. Rather, he entered the bedroom, noticed that both of them appeared to be under the influence of a stimulant, asked them their names, and asked if they had anything illegal on them. At that point, youth said that he had a pipe on him, which he produced after a request from the officer. The pipe contained methamphetamine residue. The young woman testified that the detective told her she "need[ed] to stay off the meth" before asking for their names. The trial court found there was no coercion or indication that the parties were not free to leave, and denied youth's motion to

suppress the pipe without considering whether the detective reasonably suspected that youth and the young woman had committed or were committing a crime. The court found the youth within the jurisdiction of the court for having committed an act, which if committed by an adult, would constitute possession of methamphetamine.

Youth appealed, challenging the denial of his motion to suppress. The Court of Appeals affirmed the trial court, finding that absent some other show of authority, 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.

Held:

Reversed.

The court considered whether a reasonable person, regardless of age, would have felt free to leave. The court explained that a police officer's request for identification is, in and of itself, not a sufficient show of authority to constitute a stop, however, when the content of the questions, the manner of asking them, or other actions and circumstances would convey to a reasonable person that the police are exercising their authority to coercively detain the citizen, then the encounter rises to the level of a seizure. The inquiry is fact specific and requires an examination of the totality of circumstances.

In this case, the court found the detective's entry into the bedroom without any explanation for his presence coupled with his accusation that the young woman was using methamphetamine was enough to show a reasonable person would perceive the detective was exercising his authority to detain the youth and the young woman. The unexplained entry and accusation created a coercive atmosphere that reasonably conveyed that she and youth were suspected of illegal drug use and were not free to leave until the detective completed his inquiry. This is further supported by the detective's inquiry about whether the young woman or youth had anything illegal on them, and the fact of the officers' unexplained presence in the house.

The remaining question of whether the stop was justified was remanded to the circuit court for further proceedings.

### ***Preservation***

► ***State v. R.W.G., [288 Or App 238 \(2017\)](#)***

The first sentence in youth's closing argument, in which he asserted that "it's our position that this did not happen," was not sufficient to preserve his claim of error. To preserve an "insufficiency of the evidence" claim for appeal through a closing argument, a party must present an argument that seeks to convince the trial court that the evidence is *legally* insufficient to support a verdict for the other party. In this case, youth did not include any contention that the evidence was legally insufficient to support a finding that he was within the juvenile court's jurisdiction. He did not assert the court could not find that he had committed the alleged acts, nor did he argue that the record did not include any evidence that would support such a finding.

## ***Third Degree Assault***

- ▶ *State v. M.A.A.*, [288 Or App 407 \(2017\)](#)

To prove criminal liability for third degree assault as a principal under ORS 163.165(1)(e), the state is required to prove that the defendant caused physical injury to the victim. Under *State v. Pine*, the state is required to prove that the defendant either directly inflicted physical injury or that the defendant engaged in conduct so extensively intertwined with infliction of the injury that such conduct can be found to have produced the injury. In this case, the court found that based on evidence in the record and reasonable inferences, a rational factfinder could find that physical injury to the victim occurred after youth returned to make contact with the victim, and that youth's actions were so extensively intertwined with the infliction of physical injury to the victim that her conduct could be found to have produced the injury.

## **Juvenile Dependency**

### ***Appealability***

- ▶ *Dept. of Human Services v. A.M.G.*, [289 Or App 437 \(2017\)](#)

Mother appealed the juvenile court's determinations in judgments regarding her three children that DHS had made active efforts to reunify the family as required by the Indian Child Welfare Act. Relying on *Dept. of Human Services v. A.B.B.*, 285 Or App 409, *rev allowed*, 361 Or 885 (2017), the Court of Appeals held the judgments were not appealable under ORS 419A.200(1) because they did not alter the status quo of the dependency cases, deny any affirmative relief sought by mother, or otherwise adjust the rights and duties of the parties. The court declined to overrule *A.B.B.* and related previous cases since the Supreme Court has allowed review in *A.B.B.*

### ***Guardianship – Motion to Set Aside***

- ▶ *In re S.H.*, [289 Or App 88 \(2017\)](#)

The court changed the permanency plan for mother's three children from reunification to guardianship in March 2016. Mother appealed the juvenile court's determination asserting that DHS did not make reasonable efforts to support reunification. While the appeal was pending, DHS filed petitions for the juvenile court to establish a guardianship and appoint aunt and uncle as the children's legal guardians. At the hearing, mother stipulated to orders appointing aunt and uncle as guardians with the understanding she was still appealing the court's determination of the permanency plan. In January 2017, the Court of Appeals found there was insufficient evidence to support the juvenile court's finding that DHS made reasonable efforts, and reversed the permanency judgments for all three children. Based on that reversal, mother moved under ORS

419B.923 to set aside the guardianship orders and judgments, and requested a new permanency hearing. The juvenile court denied mother's motions, stating that mother's remedy is provided in ORS 419B.368 (which sets forth a process for vacating a guardianship). Mother appealed, contending the juvenile court had no authority to deny her request to set aside the guardianship judgments because the reversal of the underlying permanency judgments "returned the parties to the status quo ante".

Held:

Reversed and remanded.

Once a juvenile court has taken jurisdiction over a child, it must conduct permanency hearings at relevant intervals based on the child's circumstances. The court must enter an order within 20 days of the hearing that includes the court's determination of the permanency plan. If the plan is guardianship, the judgment must include the court's determination of why neither placement with parents nor adoption is appropriate. ORS 419B.476(5)(e). ORS 419B.366 provides that a motion may be filed to establish the guardianship and specifies the determinations the court must make prior to establishing the guardianship. Further, ORS 419B.366(5) makes clear that the court may only grant a motion for guardianship if the court has approved a plan of guardianship under ORS 419B.476. In other words, a court approved permanency plan of guardianship under ORS 419B.476 is a prerequisite to the establishment of a guardianship under ORS 419B.366.

In this case, once the underlying permanency judgments changing the plan to guardianship were reversed, there was no validly approved plan of guardianship to support the orders and judgments establishing the guardianship. Under those circumstances, the court had no discretion to deny mother's motions to set aside the guardianship judgments under ORS 419B.923.

*Guardianship – Motion to Vacate and Terminate Wardship*

► *Dept. of Human Services v. J.C.*, [289 Or App 19 \(2017\)](#), *rev allowed (2018)*

A, age seven months, was removed from mother's care and placed with a relative, Fuller in March 2012. The juvenile court took jurisdiction based on mother's substance abuse. In November 2013, after the permanency plan was changed to guardianship, the court entered an order under ORS 419B.366 establishing a guardianship with Fuller. In April 2016, mother moved to *vacate the guardianship and terminate the court's wardship over A*. Her motion was based on her abstinence from the use of alcohol or controlled substances, her regular visitation with A and her participation in family counseling with A and Fuller.

At the hearing, mother presented evidence that she was clean and sober. She also presented evidence of her relationship with A, how she would handle the transition if the guardianship were vacated, and that A would still have significant contact with Fuller. The family's therapist testified that it would be detrimental to the child to not see Fuller or her mother. Mother argued the court was required to terminate wardship and vacate the guardianship because she had proven that the factual bases for jurisdiction no longer existed. Fuller and A argued the motion should be denied because mother had not proven it was in A's best interest to vacate the guardianship as

required by ORS 419B.368(3). The juvenile court found, based on the child's relationship with Fuller, that it would not be in her best interest to vacate the guardianship and entered an order continuing wardship over A and continuing Fuller's guardianship of A. Mother appealed.

Held:

The court held the guardianship of A only continues as long as the ward is subject to the court's jurisdiction under ORS 419B.328. ORS 419B.366(6). A court's wardship of a child continues until, among other things, the court dismisses the petition concerning the ward or enters an order terminating the wardship. The court is required to terminate wardship over a child if the bases for juvenile court jurisdiction cease to exist. *Dept. of Human Services v. T.L.*, 279 Or App 673 (2016) When the permanency plan for a child is no longer reunification, a parent making a motion to dismiss based on lack of jurisdiction has the burden of proof if requested by the proponents of jurisdiction.

The court rejected Fuller's argument that ORS 419B.368(3) requires the court to find not only that the jurisdictional bases have been ameliorated, but also that it is in the child's best interest to vacate the guardianship and the parent is presently able and willing to adequately care for the ward. Instead, the court found that for purposes of evaluating mother's *motion to terminate wardship*, the court was required to conduct the two part inquiry in *T.L.*:

- (1) Do the original bases for jurisdiction continue to pose a current threat of serious loss or injury?
- (2) If so, is the risk likely to be realized?

If there is no reasonable likelihood of harm to the child's welfare in the absence of dependency jurisdiction, there is no basis for jurisdiction to continue. The case was vacated and remanded to the juvenile court to make the determination required by *T.L.*

## ***Jurisdiction***

### **UCCJEA**

► ***Dept. of Human Services v. T.F.*, [292 Or App 356 \(2018\)](#)**

Father brought M to Oregon from Louisiana in January 2017. DHS petitioned the court for dependency jurisdiction in April 2017. At the jurisdictional hearing, mother challenged the court's subject matter jurisdiction under the UCCJEA, and asked the court to dismiss the petition. She argued that Oregon was not the child's "home state" under the UCCJEA, because the dependency petition had been filed less than six months after father moved to Oregon with M. M's attorney and father's attorney argued that the jurisdictional challenge was either untimely or had been waived. DHS asserted that jurisdiction was proper pursuant to ORS 419B.803(1)(B), and that there were no time frames that the court should consider when a child is subject to a petition under ORS 419B.100. Mother argued that UCCJEA jurisdiction can be raised at any

time and is more limited than jurisdiction under ORS 419B.100. The court denied mother's motion without explanation. Mother appealed the resulting jurisdictional judgment.

Held:

Reversed.

On appeal, mother argued the juvenile court lacked subject matter jurisdiction under the UCCJEA. Under ORS 109.741, the juvenile court has jurisdiction to make an initial child custody determination if Oregon is the child's "home state" - the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. ORS 109.704(7). DHS conceded that, at the time the dependency petition was filed, Oregon was not M's home state. However, DHS asserted that the juvenile court had subject matter jurisdiction under ORS 109.751(1), which provides temporary emergency jurisdiction "if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." There was nothing in the record to indicate the parties asked the court to take temporary emergency jurisdiction, nor was there any indication that the juvenile court concluded it had subject matter jurisdiction. Since no party presented the juvenile court with any legal or factual issue as to whether temporary emergency jurisdiction was appropriate, the court declined to remand the case to the juvenile court to determine whether temporary emergency jurisdiction was appropriate. Instead, the court concluded the juvenile court erred by denying mother's motion to dismiss.

#### **Conditions and Circumstances: 419B.100(1)(c)**

► *Dept. of Human Services v. J.H.*, [292 Or App 733 \(2018\)](#)

In November 2017, the juvenile court asserted dependency jurisdiction over K, a ten year old girl, based on mother's substance abuse interfering with her ability to safely parent and mother exposing the child to domestic violence. The evidence presented at trial included the following. Mother has a long history of methamphetamine use, treatment and relapse. Her most recent relapse occurred in May 2017, when she used methamphetamine four times at a friend's house while K was in school; didn't use in June or July; and then used twice in August 2017 when K was at her grandparents. Mother testified she was clean on August 17, 2017. Mother and her domestic partner would regularly argue and yell when K was home, primarily in the bedroom with the door closed, although there was also some pushing between the two on the door. Occasionally K could hear what sounded like objects falling. K was scared that someone would get hurt and hates the fighting, but never observed any physical violence. Mother also denied any physical violence. K testified that the only time she didn't feel safe was when mother and her partner were fighting, although she didn't think either mother or her partner would hurt her. She testified that mother always met her day to day needs. K learned of her mother's drug use from a friend, and never directly observed mother using drugs or saw drugs in the house. Once

K understood that mother was a drug user, she thought that might be the reason mother was tired and not as funny or laughter-y.

Held:

Reversed.

Mother argued that there was no evidence she was using drugs at the time of the jurisdictional hearing, nor was there evidence that she used drugs in K's presence. The state argued the juvenile court found mother's testimony wasn't credible, and noted that mother did not respond to a caseworker's messages about voluntary drug testing. K also believed certain aspects of mother's behavior might be due to drug use. The appellate court found the evidence at the jurisdictional hearing was not legally sufficient to permit the juvenile court to assert jurisdiction. A parent's substance abuse alone is not sufficient to assert jurisdiction, even when a child is aware of it. DHS acknowledged there was no evidence that mother failed to provide adequate care to K due to her drug use.

Regarding the domestic violence, the court noted the frequency and intensity of the arguments over a prolonged time period, and the evidence that the arguments did have an emotional impact on K made it a close case. However, there was no evidence that K was at risk of physical injury, either directly or indirectly as a result of the arguments. The alleged risk of harm was emotional or psychological. In cases where there is no physical violence, exposure to frequent and severe verbal altercations between parents or other adults in the child's home may, in some circumstances, give rise to a threat of serious loss of injury in the form of serious emotional or psychological harm to the child. In order to establish such a circumstance, DHS must offer evidence showing the alleged risk of harm to the child, and not just argument or conclusory statements. In this case, the court found DHS failed as a matter of law to establish that mother and W's arguments exposed K to a current threat of serious loss or injury that was likely to be realized.

► *Dept. of Human Services v. T.L.H.S.*, [292 Or App 708 \(2018\)](#)

Father had sole custody of J, and mother had two days of parenting time per week. When J was seven years old, during mother's parenting time, J disclosed that father was sexually abusing her. Mother failed to immediately report it to police, and instead instructed J to tell her teacher what happened to facilitate a mandatory report. Mother returned J to father in accordance with the custody order. J failed to tell the teacher immediately, but did so eventually. After her disclosure, father was arrested and charged, and a no contact order was entered. DHS placed J with mother. Subsequently, mother was depressed and upset and drank alcohol and took Benadryl in an apparent suicide attempt. J was moved to maternal grandparents' home. Mother voluntarily sought treatment for alcohol abuse and began mental health counseling. At the time of the jurisdictional hearing, mother had been engaged in counseling for five or six months and was taking medication. She expressed remorse about her failure to protect J and testified she would immediately call the police or DHS if a similar situation arose in the future. She also had completed the twelve week parenting course recommended by DHS.

The juvenile court asserted dependency jurisdiction based on mother's failure to protect J from father, mother's mental health conditions and father's stipulated unavailability to parent. The court stated repeatedly during the hearing that it did not consider five or six months of sobriety and mental health counseling and a twelve week parenting course a "magic wand" that solved everything. Mother appealed.

Held:

Reversed.

The juvenile court has jurisdiction over a child whose condition or circumstances are such as to endanger the child's welfare. ORS 419B.100(1)(c). For the court to take jurisdiction, 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. DHS must establish the type, degree and duration of the harm. When the risk is caused by a parent's behavior, DHS must establish a nexus between the parent's allegedly risk-causing conduct and the harm to the child. The risk of harm must be nonspeculative; that is, there must be a reasonable likelihood that the threat will be realized.

Juvenile dependency proceedings are not punitive in nature. Their sole purpose is to protect children. The juvenile court's focus at the jurisdictional hearing must be on the child's conditions or circumstances at the time of the hearing and whether the totality of those circumstances demonstrates a reasonable likelihood of harm to the welfare of the child. A risk of "some" harm is not enough. In this case, the court understood that DHS sought to prove that, absent dependency jurisdiction, J would be exposed to ongoing risk of abuse from which mother would fail to protect her, in part due to mother's mental health issues. However, at the time of the jurisdiction hearing six months after mother failed to report the sexual abuse of J, J's circumstances had substantially changed. J had been removed from father's home. Father was subject to a no-contact order and facing criminal charges with the prospect of a lengthy prison term. Mother was planning to request a custody change even if father was not convicted. Mother had stopped drinking and voluntarily completed alcohol treatment, which caused DHS to dismiss substance abuse as an alleged basis for jurisdiction. Mother had been working with a counselor and was taking her medications for anxiety, depression and attention deficit disorder. Mother had believed J's disclosures of abuse, expressed remorse for failing to report it to police, and testified she would immediately call police or DHS in the future in a similar situation.

Complete resolution of mental health issues is not a prerequisite to parenting a child without DHS supervision. The evidence was not legally sufficient to permit the trial court to determine that ORS 419B.100(1)(c) was satisfied.

► *Dept. of Human Services v. S. A. B. O.*, [291 Or App 88 \(2018\)](#)

The juvenile court asserted jurisdiction over mother's two young children in 2015 after mother was convicted of misdemeanor fourth-degree assault, based on an assault of her then boyfriend. In the dependency case, she admitted that her criminal behaviors interfere with her ability to safely parent and that she needed the assistance of DHS and the court to resolve the safety risk to

the children. The safety risk to the children was not further identified in mother's admissions or the jurisdictional judgments. Mother participated in batterer's intervention and parenting classes and eventually the children were placed at home for a trial reunification. Mother was instructed that anyone who was going to babysit the children needed to be approved by DHS, and told mother the children could not be alone with grandmother. The caseworker subsequently made an unscheduled visit to mother's apartment. The caseworker could hear people inside, but nobody would answer the door. After she called police, and they threatened to break down the door, grandmother, who was watching the children while mother was at work, opened the door. The caseworker removed the children based on that incident and other concerns, although the children "appeared fine" in grandmother's care. DHS filed new petitions alleging mother's mental health condition interfered with her ability to safely parent. After the children were taken a second time, mother resumed a relationship with a partner, CV, who had previously assaulted her. She didn't tell DHS or her treatment providers about it because DHS had taken the children and because she was in batterer's intervention for what she did to a different partner. However, she did use the coping skills she learned in her class when CV assaulted her again, obtained a no-contact order and was applying for a restraining order. The opinion contains an extensive recitation of the results of two of mother's psychological evaluations that is not summarized here. At the jurisdictional hearing, after the state rested its case, mother moved to dismiss the petition. The court questioned DHS about what threat mother's mental health condition posed to the children. DHS answered, "injury in the care of unsafe people." DHS argued that mother's mental health condition caused her not to recognize that people like grandmother and CV are dangerous to the children. DHS argued that grandmother was not safe because she had a history with DHS herself, including having children removed from her care, and her delay in answering the door when DHS visited previously. The juvenile court ruled it would take jurisdiction based on the mental health allegation and, after some discussion with the parties, decided that the judgment should focus solely on mother's mental health diagnoses, including reactive attachment disorder, without referencing cognitive limitations. The court went on to make findings that mother's mental health conditions put her and her children at risk of dangerous situations. Mother appealed.

Held:

Reversed.

Mother did not dispute that the record included evidence that she had a mental health condition that contributed to her entering into relationships with individuals who prove violent or unsafe. However, she argued the record did not contain evidence of a nexus between those relationships and a harm to her children that was nonspeculative and current or likely to be realized. Specifically, she argued there was no evidence that her children were present during any incident of domestic violence and that the trial court found that DHS had not proved that grandmother presented a threat of harm to the children.

The court explained when a new or amended petition is filed under ORS 419B.100(1)(c) after the juvenile court has already taken jurisdiction, and a parent challenges a juvenile court's decision to assert jurisdiction on additional bases, the appellate court examines whether sufficient evidence exists from which a reasonable fact finder could conclude by a preponderance of the evidence, either that a current risk of harm exists from the additional allegation standing alone,

or that the additional allegation contributes to or enhances the risk associated with the already established bases of jurisdiction. The court considers each additional allegation in connection with any other allegations because sometimes two allegations together present a more compelling case than either one alone.

In this case, the court found the record included no evidence that any of mother's relationships had resulted in her exposing the children to unsafe people or situations: the juvenile court found specifically that DHS had not proved that grandmother was unsafe, nor was there evidence that the children were present during any of the documented incidents of physical abuse between mother and her partners. Nor was there evidence that domestic violence was so prevalent in mother's relationships that it created the kind of chaotic and physically threatening environment that can be harmful to children. Referring back to the original basis for jurisdiction in this case did not add any information as to how mother's mental health conditions presented a current threat of serious harm to the children because the record contained no information regarding the nature of the safety risk to which mother admitted.

► *State v. G.V.L.*, [291 Or App 53 \(2018\)](#)

Child grew up in Guatemala, where his father physically abused him, his mother and his siblings. Mother eventually left home with the children, however, when the child was age 17 father beat him severely and threatened to kill him once he turned 18. The authorities in Guatemala did not intervene to prevent the abuse. After the child was chased by several men whom father had sent to harm the child, he left for Oregon to live with his brother. In June 2016, when he was still 17, he filed a petition in juvenile court under ORS 419B.100(1)(a),(c) and (e). He sought juvenile court jurisdiction so he could qualify for federal special immigrant juvenile status, which requires a state juvenile court to declare the juvenile immigrant a dependent based on findings that the juvenile cannot be returned to his or her parents due to abuse, neglect or abandonment. After the hearing, the juvenile court did not make explicit factual findings related to petitioner's life before he arrived in the United States. Instead, the court focused on facts about child's entry into the United States, his immigration detention, and immigration status. The court found the harm alleged was speculative and depended on whether he would be deported and returned to Guatemala. Further, the court was not convinced juvenile court protection was warranted even if the child was deported, given his age and ability to travel on his own.

Held:

Reversed.

To determine if a child's welfare is endangered under ORS 419B.100(1)(c), the court looks at whether the child's conditions or circumstances present a threat of serious loss or injury. The key inquiry is whether under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child. The petitioner must also 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 and not merely speculative.

The court found there was no meaningful distinction between this case and *State v. L.P.L.O.*, 280 Or App 292 (2016) that would permit a different conclusion about the necessity of the juvenile court's protection. In this case, father's abuse and threats of future harm and mother's inability to protect child from father created a long-term and ongoing danger to child's welfare. Child was the victim of physical abuse by father, was exposed to father's physical abuse of others, and was at risk of further physical harm from father. The harm that child experienced, from which mother had not been able to protect him and which he feared would continue in the future, directly led to child leaving home, which itself created the reasonable likelihood of harm to the child's welfare. Physical abuse of a child endangers the child's welfare and, thus, furnishes a basis for the exercise of dependency jurisdiction. The fact that parents do not have physical custody of a child at the time of the jurisdictional hearing does not defeat jurisdiction, nor does the child's physical distance from parents, or the child's age and ability to travel on his own.

► *Dept. of Human Services v. J.J.B.*, [291 Or App 226 \(2018\)](#)

The juvenile court asserted jurisdiction over J, a five year old girl, based on parents' substance abuse and domestic violence in parents' home. Father appealed, arguing that DHS failed to prove that any domestic violence occurred, and failed to prove that parents' drug use creates a non-speculative risk of serious loss or injury to J that is likely to be realized in the absence of dependency jurisdiction.

Held:

Reversed.

The juvenile court has jurisdiction over a child whose conditions or circumstances are such as to endanger the child's welfare. To establish jurisdiction, 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. DHS must establish the type, degree and duration of the harm at issue. It must establish a nexus between the allegedly risk-causing conduct and harm to the child. It must also prove that there is a reasonable likelihood that the threat will be realized.

Starting with the domestic violence issue, DHS was required to prove by a preponderance of the evidence both that domestic violence occurred and that it endangered J's welfare within the meaning of the jurisdictional statute. DHS presented evidence that parents verbally fought in front of J in the past which hurt her feelings, but not enough to make her cry. Father had also punched a wall in their "old house" which scared J; mother felt safe "most of the time", which, by implication meant not all of the time. Father also got angry at mother at a DHS office, and appeared to be yelling at her. The court declined to decide whether father's conduct constituted domestic violence. Rather, the court stated the ultimate inquiry is whether violence or aggressive behavior by an adult in the home endangers the child's welfare. In this case, the court found there was insufficient evidence to establish jurisdiction over J based on domestic violence. There was no evidence that father hit or threatened mother. There was evidence the parents argued in front of J, but not recently or to a degree that would expose her to a non-speculative current threat of serious loss or injury that is likely to be realized. The court found there was no

evidence in the record to support the court's statement that domestic violence can have a profound impact on a child's brain development and ability to form attachments. DHS offered no evidence regarding the harm to children associated with exposure to the "power and control" or "yelling" in this case.

Regarding the substance abuse issue, the court has recognized that a parent's substance abuse alone does not create a risk of harm to a child. The same is true of a child seeing a parent under the influence of intoxicants. Rather, DHS must prove that the parent is abusing drugs or alcohol, or exposing a child to drugs or alcohol in a way that puts the child at risk of serious harm. The court has rejected the proposition that any specific condition or circumstance per se does, or does not, establish the juvenile court's jurisdiction. In this case, the parents were found to be in possession of methamphetamine in a motel room where they were staying with the child. Mother admitted that they had relapsed. However, DHS offered no evidence that parents used methamphetamine in J's presence, exposed J to dangerous situations involving methamphetamine, or failed to supervise J due to methamphetamine use. The court cannot rely on generalizations and assumptions about people who use drugs in calculating the risk to the child.

► *Dept. of Human Services v. J.E.F.*, [290 Or App 164 \(2018\)](#)

Allegations in the petition are viewed together and in connection to one another to determine whether they are collectively sufficient, if proven, to establish jurisdiction. In this case, the court found allegation D, alleging father is the biological father of the child, viewed together with allegations F (anger and impulse control), G (domestic violence), and H (does not understand needs of child), were sufficient when considered together, to establish jurisdiction.

► *Dept. of Human Services v. C.T.*, [288 Or App 593 \(2017\)](#), *rev den* (2018)

DHS petitions were precipitated by two incidents. First, in August 2014, aunt reported that S had possibly been sexually abused while staying at grandparents' home. DHS eventually made a founded disposition that grandfather had sexually abused S and that there was a threat of harm of sexual abuse to C because parents allowed C to stay with grandfather after DHS made parents aware of its concerns. The second incident occurred in February 2016, when mother needed a place to stay and moved herself and the children into father's small one-bedroom house. Mother tried to leave after mother and father got in an argument, and mother pushed and threw a glass at father in front of the children. At the time of the jurisdictional hearing in October and December of 2016, mother and father had been married for eleven years but were no longer living together.

The court heard testimony from Dr. Steinhauser, a clinical social worker, that given grandfather's history of sexually abusing children, which was never treated or punished, grandfather posed a risk to C. In addition, a DHS caseworker testified to the circumstances leading to the founded disposition that grandfather had sexually abused S and that C's welfare was endangered. However, S testified in chambers and denied, or couldn't recall, the abuse. Neither father or mother believed that grandfather was a threat to C, and father took the position that he wanted C to live with grandparents. The court took jurisdiction over C and S, finding the domestic violence between the parents was a current threat to the children. Although the parents were no longer living together, the court found father's romantic interest in mother and mother's need for

shelter will likely cause them to reunite. The court also found it was more likely than not that S was sexually abused by grandfather and that her allegation was credible despite her recantation. Father and C appealed. During the pendency of the appeal, the state moved to dismiss, and the court dismissed jurisdiction and wardship for both children.

Held:

The Court of Appeals found the appeal was not moot because of the likelihood that the juvenile court's findings could have adverse consequences on father in a subsequent custody proceeding and on his ability to have the children live with grandfather. The court also found the juvenile court's admission and consideration of expert testimony was not error, or was harmless.

Regarding the jurisdictional determination under ORS 419B.100(1)(c), the Court of Appeals found there was sufficient evidence in the record to support the court's finding that grandfather posed a risk of harm to C. The juvenile court finding that S was abused by grandfather and Steinhauser's testimony established a nexus between grandfather's sexual abuse of his daughters, which went untreated and unpunished, and the risk he posed to C. Similarly, the court found sufficient evidence in the record to support the juvenile court's determination that the children were at current risk of serious loss or injury from exposure to domestic violence between the parents. Although the parents had not spoken since the February 2016 altercation, they remained married at the time of the jurisdictional hearing, and the record contains no indication that dissolution proceedings had been initiated. Moreover, the court found that mother's residential instability contributed to the likelihood that parents would reunite and that father retained a romantic interest in mother.

## *Permanency Hearings*

### **Compelling Reasons**

► *Dept. of Human Services v. J.M.T.M.*, [290 Or App 635 \(2018\)](#)

Mother and her three children appealed permanency judgments changing each child's permanency plan from reunification to adoption. They argued that the evidence presented at the permanency hearing was insufficient to permit an affirmative finding that there was not another permanent plan better suited to meet the health and safety needs of the child, including the need to preserve the child's sibling attachments and relationships under ORS 419B.498(2)(b)(B). Under *S.J.M.*, the party moving to change the permanency plan (in this case DHS) bears the burden of proving that there are no compelling reasons to forgo the filing of a petition to terminate parental rights. 283 Or App 367, *rev allowed*, 361 Or 350 (2017). Before changing a permanency plan to adoption, a juvenile court must be able to find affirmatively from the evidence presented that there is not another permanent plan better suited to meet the health and safety needs of the child, including the need to preserve the child's sibling attachments and relationships. The record must contain sufficient evidence to permit a rational inference that none of the other permanency plans would better meet the child's needs under the circumstances.

In this case, there was sufficient evidence to support a finding that reunification was not a better plan than adoption. However, reunification is not the only permanency plan available, and there was uncontroverted evidence of the children's sibling bonds, bonds with mother, and bonds with extended family. At the time of the hearing, DHS had not identified an adoptive resource, and presented no evidence tending to prove the guardianship was not a better plan. Although counsel for DHS told the court during argument that there was no guardian resource, DHS did not present evidence to support that statement. The record contains no evidence that would permit a finding that there were no potential guardians for the children, or that would otherwise allow for a rational determination that guardianship is not a better plan for the children than adoption. Reversed and remanded.

### **Reasonable Efforts**

► *Dept. of Human Services v. L.L.S.*, [290 Or App 132 \(2018\)](#)

Z was removed from his mother while father was in jail awaiting trial on charges of sex offenses against one of mother's minor relatives. The juvenile court took jurisdiction in May 2016, based on mother's admission that her substance abuse interfered with her ability to safely parent, and father's admission that he had been convicted of sexually abusing another child and is incarcerated and currently unavailable to be a custodial resource. In October 2016, mother died unexpectedly from a drug overdose. Meanwhile, DHS had not had any contact with father who was serving a 30 year sentence at the Eastern Oregon Correctional Institution. The caseworker had contacted father's prison counselor in an attempt to set up phone visits between father and Z, however, no visits occurred until December, 2016 and January, 2017. The caseworker never contacted father personally, however, he did send father an action agreement at the end of December 2016 or early January 2017. The juvenile court held a contested permanency hearing in early February 2017. Father argued DHS failed to make reasonable efforts for purposes of ORS 419B.476(2)(a), and the juvenile court should deny DHS's request to change the permanency plan to adoption. The juvenile court changed the plan from reunification to adoption, finding that DHS efforts were reasonable under the circumstances as there were no services or support that could have ameliorated the jurisdictional bases as they relate to father in this case, and that father had made insufficient progress to permit reunification. In addition, the court found that father's convictions for sexual offenses against a child relieved DHS of its obligation to make reasonable efforts under ORS 419B.340(5)(a)(D) (aggravated circumstances).

On appeal, father argued that DHS's failure to speak to father for the first nine months of the dependency case or to establish contact between father and Z for the first seven months renders DHS efforts unreasonable as a matter of law.

Held:

Reversed.

To change Z's permanency plan, the juvenile court was required to find: (1) that DHS made reasonable efforts to reunify Z with her father; and (2) notwithstanding those efforts, father's

progress was not sufficient to permit reunification. To be reasonable, DHS efforts must focus on ameliorating the adjudicated bases for jurisdiction, and give parents a reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents. The concept of reunifying a child with a parent within the dependency statutes is not limited to physical reunification. In examining the policy underlying the dependency code and a parent's Fourteenth Amendment rights, the court concluded that reunification means restoration of the parent's right to make decisions about the child's care, custody and control without state supervision, even if the child will not be returned to the parent's physical custody. A parent's incarceration in itself does not relieve DHS of the obligation to make reasonable efforts. In this case, the court found that, at a minimum, the caseworker could have discussed the conditions of return with father to see if father had any ideas about how to satisfy the conditions from prison with assistance from DHS. The court found that under these facts, DHS efforts were not reasonable because father was not provided a reasonable opportunity to demonstrate he was capable of parenting Z.

### Commentary:

This case underscores the need for a careful review of reasonable efforts relating to each parent by the court or CRB at the six month review. If the caseworker has not met with the parent to discuss the conditions of return by the six month review, consider making a no reasonable efforts finding.

## **Sufficient Progress**

### ► *Dept. of Human Services v. C.E.*, [288 Or App 649 \(2017\)](#)

In September 2014, DHS removed B and N from father's home after he was arrested for assaulting his wife in the presence of children in his care. The juvenile court later established jurisdiction based on father's substance abuse, domestic violence with the children present, and inappropriate physical discipline of the children. The initial case plan was filed concurrently with the combined jurisdictional and dispositional judgment set forth the conditions of return and recommended that father obtain a psychological evaluation. In February 2015, the evaluator diagnosed father with narcissistic personality disorder with dependent and antisocial features. In assessing the likelihood of father's reunification with his children, the evaluator stated father's potential for change was virtually nonexistent and that he would remain a narcissistic and grandiose person who fails to accept feedback, cannot make changes, mimics remorse and insight, but continues to direct blame toward other individuals while displaying virtually no capacity to internalize his own faults and need for change. In March 2015, father completed a substance abuse treatment program and a "Batterer Treatment Program". N was returned home for approximately six months starting in June 2016 until father was charged with eight counts of promoting prostitution and arrested in early 2017.

In March 2017, B and N sought to change their permanency plans away from reunification, arguing that father's pending charges were relevant as to father's more ambiguous issues around domestic violence related to power and control and issues around women. At the hearing, the

caseworker testified as to the children's significant mental health and behavior issues, and father's inconsistent ability to bring N to counseling and provide the recommended disciplinary techniques. She also testified that when N was still living with father, the caseworker asked N what happens when he gets in trouble. He responded that he couldn't tell her those things because his dad would end up in jail and he'd end up back in foster care. She testified that B was also intensely fearful of father. Father argued that he had made sufficient progress because he had completed substance abuse treatment, and there was no evidence that he had inappropriately physically disciplined his children or abused his current partner.

The juvenile court found DHS had made reasonable efforts and that father had made sufficient progress on the substance abuse allegation. However, the court found on the other two bases of jurisdiction - domestic violence and inappropriate physical discipline - that father had engaged in services but had not adjusted his conduct and that he had rejected or was unable to implement the interventions. The court changed the plan away from reunification. Father appealed, arguing that the juvenile court erroneously considered facts extrinsic to the bases for jurisdiction - specifically the charges against father for promoting prostitution and the information about B's and N's special needs.

Held:

Affirmed.

A juvenile court may not change a ward's permanency plan away from reunification based on conditions or circumstances that are not explicitly stated or fairly implied by the jurisdictional judgment. Reliance on other facts can affect a parent's right to both notice of what conditions or circumstances the parent must remediate and a reasonable opportunity to remediate them. In determining whether a parent was on notice that his or her progress would be assessed based upon particular facts, the court looks to the petition, the jurisdictional judgment, and documentation attached to the jurisdictional judgment providing the parent notice as to the conditions for reunification. To determine whether the relied-upon facts were fairly implied by the jurisdictional judgment, the court assesses whether a reasonable parent would have known that he or she needed to address the condition or circumstances exemplified by those facts. When a jurisdictional judgment or attached documentation specifically identifies a potential cause underlying a jurisdictional finding, it can be fairly implied that the identified cause will be a referent for measuring the parent's progress.

In this case, the court concluded the scope of the jurisdictional basis concerning father's domestic violence includes the potential causes of domestic violence that are explicitly cited in the case plan attached to the jurisdictional judgment - i.e., father's controlling behavior and his pattern of pursuing unhealthy romantic relationships. Facts indicating that those causes have not been ameliorated - such as those concerning father's alleged participation in his romantic partner's prostitution - are relevant to the sufficient progress determination and are not extrinsic to the basis for jurisdiction. Similarly, the court concluded the facts regarding N's and B's special needs were not extrinsic to the inappropriate physical discipline basis of jurisdiction. The case plan included as a condition for reunification that father demonstrate he could utilize services at the level of effort necessary to manage his children's behavior. The court found this provided

father with adequate notice that an assessment of his progress would turn in part on his ability to provide the type of discipline that is appropriate for his children.

► *Dept. of Human Services v. T. L.*, [287 Or App 753 \(2017\)](#)

Facts:

DHS took protective custody of M in 2013, when she was 11 years old. The court asserted jurisdiction based on father's current and historical use of alcohol and controlled substances interfering with his ability to provide safe, appropriate and consistent care for M. Father was ordered to participate in a drug and alcohol evaluation and treatment, random UAs, a psychological evaluation, and parent education classes. In August, 2013, the court changed the permanency plan to guardianship after father's counsel failed to appear. Father appealed, asserting inadequate assistance of counsel. The Court of Appeals affirmed, and then the Supreme Court reversed and remanded to the juvenile court to determine whether father was prejudiced by counsel's absence. On remand, the parties stipulated to an order vacating the permanency judgment and reinstating the plan of reunification. By that time, M was 15 years and had not had in-person contact with father in over two and a half years (*DHS had terminated visitation because father had refused to provide a urine sample - please see commentary below*). The parties also stipulated and the court ordered that DHS arrange for reintegration therapy for M and father to overcome any current feelings of estrangement or alienation. Approximately three months later, the court held a permanency hearing. The parties agreed that father had been sober for some time, had stable housing and full time employment. M testified at the hearing that she did not want to go home with father, but rather, wanted to be adopted by her foster mother. She also testified that if returned to father, she would run away. The CASA argued the plan of adoption would be best for M, while father's attorney and DHS argued the plan could not be changed because estrangement was not part of the jurisdictional basis, among other reasons.

While acknowledging that father had beaten his addiction, the juvenile court found DHS had made reasonable efforts, that father had made insufficient progress for M to safely go home, and ordered the plan be changed to adoption. The court relied largely on the child's testimony that she would revert to unsafe behaviors such as running away, and the language in ORS 419B.476(2)(a) that requires the court to consider the ward's health and safety as the paramount concern in making the reasonable efforts and progress determination. Father appealed, asserting that the juvenile court relied on facts extrinsic to the proven basis for jurisdiction in making its determination that the plan should be adoption.

Held:

Reversed.

DHS efforts and a parent's progress are evaluated with reference to the facts that formed the basis for juvenile court jurisdiction. Facts that are not explicitly stated or fairly implied by the jurisdictional judgment are outside of the court's jurisdiction, and cannot be relied upon as a basis for changing the permanency plan. Facts are not fairly implied by a jurisdictional judgment if a reasonable parent would not have known from the jurisdictional judgment that he or she needed to address the condition or circumstance exemplified by those facts. If a party seeks to

change a child's permanency plan based on a fact other than one explicitly stated or fairly implied by the jurisdictional judgment, the party must petition for and obtain an amended jurisdictional judgment.

In this case, estrangement was not a circumstance that could be fairly implied by the jurisdictional petition or judgment, and could not be a basis of the juvenile court's permanency determination. Father could not be expected to know that his progress in addressing his substance abuse could be measured by his ability to address any estrangement that might develop between him and M. Father is entitled to constitutionally adequate notice of a deficiency that has been identified as a barrier to the child's return home and of a meaningful opportunity to address the deficiency with the support of services provided by DHS. **When a juvenile court has concerns about an unadjudicated condition or circumstance, the court, on the motion of an interested party or on its own motion, can direct that the petition be amended. See ORS 419B.809(6).**

### **Commentary:**

#### Suspension of visitation by DHS.

According to the latest round of Child and Family Services Reviews by the Children's Bureau, *frequent and quality visits with parents and children are associated with better performance on safety, permanency and other well being outcomes*. At every review, Oregon judges are required to review the frequency of visits between parents and the child and determine whether the frequency is in the child's best interest. ORS 419B.449(3)(c); 419B.476(2)(d). If the court doesn't think the visitation plan is adequate, the court may order DHS to change the visitation plan, and DHS is required to develop a plan consistent with the court's order. ORS 419B.337(3).

The [DHS Child Welfare Policy Manual](#) provides that visits should not be cancelled solely due to the act or omission of a parent that is unrelated to the safety or well-being of a child. If there is a safety concern and safety of the child can be managed by supervision, DHS should provide supervised visits instead of terminating visitation. OAR 413-070-0830 (2)(b). In addition, it is important to remember that DHS is required to continue to prioritize visits with the parent (as well as the permanent placement resource) even when the plan is not reunification. OAR 413-070-0855(3).

### ***Request for Continuance***

#### **► *Dept. of Human Services v. N.J.V./D.L.O., [290 Or App 646 \(2018\)](#)***

DHS removed A and J from parents' care and placed them in nonrelative foster care. In December 2015, mother admitted to the following allegation: "Mother has struggled with mental health and substance abuse issues and needs to address those issues in order to be safely reunified with her child[ren] and to prevent a threat of harm to the child[ren]." In July 2016,

after finding mother had made insufficient progress at a permanency hearing, the court changed the permanency plan to guardianship. In May 2017, DHS moved the juvenile court for an order establishing A and J's foster parent as their legal guardian under ORS 419B.366. The court scheduled a hearing for June 20, 2017. Mother's attorney filed a written motion requesting a continuance, stating that on June 5, mother had completed an assessment of her mental status and need for substance abuse treatment, but did not yet have the written results and might not have them by the time of the hearing. Counsel also explained that it would be necessary to call additional witnesses based on the anticipated results of the assessment, and the results were relevant to whether mother could safely parent the children. Mother's motion indicated DHS opposed the postponement but didn't state the reason why. At a trial-readiness hearing held on June 15, the juvenile court denied mother's request for a continuance. There was no other record of the court's decision, including any argument that DHS may have made or that the court may have relied on in exercising its discretion to deny the requested continuance. The pre-trial conference was not recorded. On June 20, the juvenile court conducted the hearing and found that mother's mental health status had not progressed or changed in any way. The court appointed the foster parent as guardian. Mother appealed, arguing it was error for the juvenile court to deny her motion to continue the guardianship hearing.

Held:

Reversed.

The court found there was no record that permitted meaningful review of the juvenile court's exercise of discretion in denying the continuance. There was nothing to suggest that the court considered the reasons set forth in mother's motion and supporting declaration, weighed those against competing considerations, and concluded that those outweighed mother's interest in having the court consider an updated assessment of her mental health status and related substance abuse needs. The court concluded the juvenile court abused its discretion when it denied mother's request for a continuance without expressing any reason. Further, the court found the error was not harmless because the issues mother sought to address with an updated assessment were the issues that the juvenile court considered most significant when deciding whether to appoint A and J's foster parent as their guardian.

Father's separate appeal on a different assignment of error was affirmed.

### ***Review Hearings***

► ***Dept. of Human Services v. H.F.E., [288 Or App 609 \(2017\)](#)***

The court found the juvenile court's lack of findings under ORS 419B.449 was not plain error because it was not obvious the hearing was of the sort that required findings to be made under ORS 419B.449. The hearing was held, in large part, to address issues in child's related juvenile delinquency case. There is nothing in the record that makes it obvious that the relevant hearing

was triggered by a request of any party under ORS 419B.449 or the court's receipt of a report under ORS 419B.440.

### ***Reviewability***

► ***Dept. of Human Services v. A.B., [362 Or 412 \(2018\)](#)***

Mother had sole custody and had been the primary caretaker of her 10 year old child, who has an autism spectrum disorder. After a contested jurisdictional trial, the court established jurisdiction based on the following: (1) mother is aware that her domestic partner has a conviction for a sex offense, has threatened to kill her and her child, has engaged in a pattern of violence, threatening and mentally unstable behavior that presents a threat to the child's safety because the mother continues to allow him in the home and around the child; (2) the child is in need of therapeutic treatment that the mother has failed to provide; (3) mother failed to provide for the educational needs of the child. Father admitted to an allegation that he was willing to be a custodial resource, but does not have sole legal custody and is unable to protect the child from mother's abusive and neglectful behavior. Mother appealed, arguing the evidence was insufficient to support the juvenile court's findings. Subsequently, the juvenile court found that mother had cooperated and worked with DHS and was a minimally adequate parent. Further the court noted DHS had no safety concerns, that mother had benefited from DHS intervention and ordered that the petition be dismissed. After her attorney filed a notice of probable mootness in the appellate court, Mother filed a petition and affidavit stating that she didn't know of her attorney's notice and detailing the collateral consequences she would suffer from the jurisdictional judgment. The Court of Appeals ultimately dismissed mother's appeal, finding it was not persuaded that the circumstances establish the kind of collateral consequences that prevent the appeal from being moot. Mother filed a petition for review in the Oregon Supreme Court, which the court allowed.

#### Held:

On review, the Oregon Supreme Court focused on the second inquiry related to mootness: whether the court's decision will have some practical effect on the parties.

Mother argued that the court should adopt a categorical rule that, when wardship is terminated, the jurisdictional judgment is moot only if DHS shows there is no possibility that any collateral legal consequences will be imposed. The court declined to adopt such a rule, and instead, set out the following analysis that it follows to determine whether a case is moot. The party moving for dismissal has the burden to establish that a case is moot. That includes establishing that the decision being challenged on appeal will have no further practical effect on the rights of the parties. When DHS takes the position that termination of wardship renders an appeal moot and demonstrates that the child is no longer subject to departmental control, the appellant parent must identify any continuing practical effects or collateral consequences that, in the parent's view, render the appeal justiciable. DHS must then demonstrate that the effects or consequences that the parent identifies are either legally insufficient or factually incorrect. An appeal is not moot unless the party moving for dismissal persuades the appellate court that the dismissal is warranted.

In this case, mother contended that the juvenile court's adjudication will: (1) disadvantage her in any future child abuse and neglect proceedings and custody proceedings; (2) limit her options for employment or volunteer work; and (3) stigmatize her with her child's service providers. The court examined a number of circumstances that called into question whether mother would actually suffer collateral consequences, including the juvenile court's findings that the child was extremely attached to mother and that mother quickly took advantage and benefited from the services that were provided, and that the court terminated jurisdiction after finding that mother was a fit parent. In addition, the court found it unlikely that the juvenile court's findings and judgment would disqualify her from work or volunteer opportunities. Finally, since juvenile dependency records are confidential, the court found it unlikely that mother would suffer from social stigma because people are unlikely to learn about the case. In sum, the court found DHS met its burden to persuade the court that the jurisdictional judgment would not have a practical effect on mother's rights. Affirmed.

### *Termination of Parental Rights*

► *Dept. of Human Services v. K.D.S.*, [292 Or App 258 \(2018\)](#)

Mother's parental rights to her two children, C and G, were terminated after she failed to appear for a settlement conference. Mother's attorney made an oral request that mother be allowed to appear by telephone at the settlement conference. The children's attorney objected, arguing there had been no motion to allow a telephonic appearance. The court first denied mother's request to appear by telephone since the child's attorney objected and the parties were not in agreement regarding the telephonic appearance. Mother's attorney explained that mother was homeless and located in another city with no transportation.

DHS argued that the court should allow for the presentation of a *prima facie* case. The court allowed DHS to proceed and determined DHS had established, by clear and convincing evidence, statutory grounds for terminating mother's parental rights, and that it was in the best interests of the children to terminate mother's rights. The court also noted that mother had been personally served; knew of her obligation to be in court; knew that travel vouchers were available; and knew the consequences if she did not appear. However, the court did not indicate whether the its findings were in relation to the denial of mother's request to appear telephonically at the settlement conference or of the court's decision to proceed with a *prima facie* trial, or both.

Held:

Reversed and remanded.

The juvenile court abused its discretion by failing to consider the interests necessarily at stake when deciding whether to proceed with a *prima facie* trial over mother's objection. To the extent the court may have considered those matters, the court erred by failing to make an adequate record. The appellate court noted the interests at stake: a parent's right to her children, the determination of what is in those children's best interests, mother's right to hear and confront the

evidence against her, mother's right to be heard, and mother's right to have the assistance of counsel. By proceeding with a *prima facie* trial, the juvenile court deprived mother of many of those rights outright and dramatically curtailed its protection of others. A juvenile court's decision to allow DHS to proceed against a parent who is neither present nor represented by counsel raises significant concerns. The court did not appear to have considered these concerns before deciding to proceed, and neither the court nor any party identified any interests that might nonetheless have warranted that decision over mother's objection. The record does not reflect any burdens or concerns for the court or the parties that would arise if mother's trial on the merits were to be left on for the previously scheduled dates. Nothing in the record suggests that leaving mother's matters on for trial would have resulted in additional difficulties or have otherwise disturbed the orderly conduct of the court's business. Although the juvenile court did identify a rationale for penalizing mother's absence - that she understood the consequences of not showing up and voluntarily chose not to be in court - it is not clear how the court viewed that failure in light of the serious consequences of terminating her parental rights without her participation. Because the record does not indicate that the court considered those matters, or how it considered them, the court was unable to meaningfully evaluate whether the court properly exercised its discretion in deciding to move forward over mother's objection.

► *Dept. of Human Services v. T.M.D.*, [292 Or App 119 \(2018\)](#)

This case involves an appeal from the juvenile court's dismissal of a petition to terminate parental rights. After a trial, the juvenile court found mother was unfit due to conduct or conditions seriously detrimental to her then 4-year old son and that integration of the child into mother's home was unlikely to occur within a reasonable time. However, the juvenile court found DHS did not establish, by clear and convincing evidence, that it would be in the child's best interest to be freed for adoption. The court found that DHS should consider establishing a permanent guardianship as provided for in ORS 419B.365. The court relied on expert testimony from a child psychologist that, based on the child's current developmental needs, his need for permanency was characterized as urgent. However, the juvenile court found the child psychologist did not expressly favor adoption as a means of achieving permanency, and that, in the psychologist's view, a guardianship could be appropriate. The juvenile court further found that mother and child have a bond despite the limited times they have spent together and despite the fact that the child lived with his aunt and uncle for two years. The court specifically accepted the testimony of the child's maternal grandmother that the child was excited to see his mother during visits, that the two of them played, colored and read books together, and that the child had trouble separating from mother at the end of visits. The court also found that the child was close to both of his maternal grandparents. Even though the juvenile court considered it critical that mother overcome her substance abuse issues, and found the prognosis for doing so was poor, the court concluded it was in the child's best interest to maintain the parent child relationship. The juvenile court reasoned that it was not appropriate to terminate mother's parental rights while any hope for reunification remained.

Held:

Reversed.

On *de novo* review, the court found the record contained clear and convincing evidence that it is in the child's best interests to terminate mother's parental rights. The court concluded that, given the child's pressing need for permanency and the harm that appears likely if permanency is further delayed, it is in the child's best interests to be freed for adoption, rather than waiting indefinitely to see whether mother can eventually become a safe parent for the child. The court noted the circumstances that brought the child under the jurisdiction of the juvenile court remained essentially unchanged at the time of the termination trial nearly two years later, and mother had made no meaningful progress toward ameliorating the bases for the juvenile court's involvement. At the time of the termination trial, DHS established that mother continued to use heroin and other opioids, that she had not made any effort to separate herself from father (who continued to actively use drugs), and that DHS had not been permitted to inspect her home to ensure that it had been safe. Further, the appellate court noted that virtually all of the evidence at trial weighed against the belief that the incentive of a guardianship would give mother an incentive to succeed. The court also found the juvenile court's focus on mother and its desire to see her succeed, rather than focusing on the effects of delaying permanency on the child, was not appropriately child centered. The court further stated that the assumption that permanency would be achieved through the child's current placement with his aunt and uncle was not supported by testimony from the child psychologist that ongoing visits with mom and the state of limbo associated with impermanent placements can lead to anxiety, particularly if there's a question of whether the child will be going to live with mom someday. The court also relied on testimony from the psychologist that the child had developed a secure bond with his uncle, and a subsequent move to another caregiver could be extremely disruptive and stressful. Finally, the court stated that the juvenile code expresses a legislative preference that children be placed in the most permanent setting suitable to their needs, and in this case, adoption is the most permanent placement suitable to the child.

The court declined to address whether the finding that mother was unfit and the child could not be returned within a reasonable time gave rise to a presumption that termination is in the child's best interest, based on the Supreme Court's statement in *State ex rel Juv. Dept. v. Geist*, 310 Or 176 (1990) that "[w]here a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time... the best interests of the child(ren) generally will require termination of the parent's parental rights."

The dissent argued that the majority effectively applied a presumption that termination is in the child's best interest based on the findings that mother is unfit and that integration of the child into mother's home within a reasonable time is not possible. The dissent argued that the child is in a stable placement with his uncle and aunt and, at his young age, is not aware of the relative impermanence of his current placement. Further, the psychologist refused to opine on whether adoption was preferable to another permanent option like permanent guardianship. Likewise, the DHS caseworker, when asked why she thought adoption was the best plan for the child, simply explained that DHS interprets its statutory directive to work towards the most permanent plan. Finally, contrary to the majority view, dismissing the petition and establishing a permanent guardianship would accomplish permanency that cannot be disrupted by mother. ORS 419B.368(7) explicitly states that a parent cannot move to vacate or modify a permanent guardianship under ORS 419B.365.