22nd Annual Through the Eyes of a Child

2019 Conference Program Agenda

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August 11-12, 2019

Through the Eyes of a Child

Oregon Garden Resort

Silverton, OR

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"Raising the profile and priority of child abuse and neglect cases in Oregon courts"

Program Agenda Through the Eyes of a Child
(for Judicial Officers Only)

Sunday, August 11, 2019
Oregon Garden Resort

1:00 pm — **Welcome & Introduction**

Justice Rebecca Duncan, Oregon Supreme Court

1:15pm — **Appellate Update**

The Honorable Darleen Ortega
Megan Hassen, JCIP

2:30 pm — **Break**

2:45 pm — **The Permanency Judgment Update**

Megan Hassen, Senior Juvenile Law Analyst, JCIP
Holly Rudolph, ESD

3:15 pm — **Legislative Update**

Leola McKenzie, Director JFCPD
Kristen Farnworth, Senior Juvenile Law Analyst, JCIP

4:15 pm — **Visions, Initiatives & Barriers (VIBS) Break Out**

- Small
- Medium
- Large

6:00 pm — **Dinner Speaker Leigh Anne Jasheway**

Upcoming Juvenile Law Events for Oregon Judges….

October 21, 2019	Juvenile Judges Meeting at Judicial Conference
November 8, 2019	Tribal Court Visit at Confederated Tribes of the Umatilla Indian Reservation
December 19, 2019	Judicial Summit on SB 1008 (Juvenile Delinquency Law Changes)
January 28-29, 2020	Mini CANI (Child Abuse & Neglect Institute) – for judges with less than 2 years of experience hearing juvenile dependency cases

Through the Eyes of a Child

Program Agenda Through the Eyes of a Child
(for Judicial Officers Only)

Monday, August 12, 2019
Oregon Garden Resort

7:30 am	**JELI Executive Committee Meeting**
7:30 am	**Breakfast**
8:30 am	**JCIP Update** Leola McKenzie
9:00 am	**UCCJEA For Juvenile Court Judges (Anatomy)** Senior Judge Maureen McKnight
10:00 am	Break
10:15 am	**Minimally Adequate Parenting (Anatomy)** The Honorable Bethany Flint
11:00 am	**Interstate Compact on the Placement of Children (ICPC) (Anatomy)** The Honorable Dawn McIntosh and Vera James, DHS
12:00 pm	**Lunch Presentation of Juvenile Court Champion Awards**
1:00 pm	**Hague Service Convention (Anatomy)** Jordan Bates, Youth Rights & Justice Catherine Terwilliger, Department of Justice
2:00 pm	**Decision Making: The Permanency Plan (Anatomy)** Heidi Strauch, Referee, Marion County / Circuit Court Judge, Pro-Tem
3:00 pm	**Break -**
3:15 pm	**Assessing the Comprehensive Transition Plan (Anatomy)** Carrie van Dijk, DHS
4:15 pm	**Through the Eyes of a Caseworker: Courtroom Experiences from the Perspective of the Case Worker** The Honorable Patrick Henry Anani Kuffner, DHS Kim Lorz, DHS
5:00 pm	**Adjourn**

Through the Eyes of a Child

Program Agenda Through the Eyes of a Child
Sunday August 11, 2019

1:15 pm
Appellate Update
Megan Hassen, Senior Juvenile Law Analyst JCIP
Hon. Darleen Ortega

These documents have been posted on the JCIP website:

- 2019 Appellate Update PowerPoint
- Juvenile Appellate Update
- Appellate Update Handout

APPELLATE UPDATE – 2019 THROUGH THE EYES OF A CHILD CONFERENCE

Jurisdiction

419B.100; 419B.305 (hold hearing and order disposition within 60 days)

- **Test for 419B.100(1)(c) cases:** 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 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"; there must be a reasonable likelihood that the threat will be realized.
- **Pre-requisites**: Subject matter jurisdiction under UCCJEA (ORS 419B.803(2)); ORS 419B.816 notice to parent(before proceeding without a parent); and if ICWA applies, 10 day notice to parent or Indian Custodian and Tribe and expert testimony by a Qualifed Expert Witness (see ICWA Benchcard)

Reasonable/Active Efforts

Has DHS made reasonable/active efforts to provide services to make it possible for the child to safely return home? ORS 419B.340; 419B.476(2)(a)

- **General rules**:
  - Efforts must be rationally related to the jurisdictional requirements. ORS 419B.343(1)(a)
  - Efforts must be made for *each* parent, including incarcerated parents (see back for examples).
  - DHS must provide appropriate services to allow the parent the opportunity to adjust his or her circumstances, conduct or conditions to make it possible for the child to safely return home within a reasonable time.
  - The focus is on DHS conduct, and a parent's resistance to DHS efforts does not categorically excuse DHS from making meaningful efforts toward that parent. However, evidence specifically tied to the parent's willingness and ability to participate in services may be considered when assessing DHS efforts.
  - If the case is subject to ICWA, the caseworker must make active efforts by assisting the parent through the steps of reunification.
- **Timing**:
  - Efforts are evaluated over the entire duration of the case, with an emphasis on a period before the hearing sufficient in length to afford a good opportunity to assess parental progress.
  - If efforts related to the jurisdictional bases are only provided for a short period of time between disposition and the permanency hearing, that may not be sufficient. *DHS v. J.E.R.,* 293 Or App 387 (2018)

Sufficient Progress

Have the parents made sufficient progress to make it possible for the child to safely return home? ORS 419B.476(2)(b)

- Does the parent have ***notice*** of what is required (is it implied by the jurisdictional bases)? *DHS v. C.E.,* 288 Or App 649 (2017)
- **Has the behavior or condition identified in the jurisdictional judgment been ameliorated?** Has the parent changed his or her behavior? The court shall consider the ward's health and safety the paramount concerns. ORS 419B.476(2)(b); *DHS v. M.K.,* 285 Or App 448 (2017)

Permanency Plan Determination

ORS 419B.476(5)(b)

- **When the plan is reunification**:
  - Has DHS made ***reasonable/active efforts***?
  - If so, has the parent made ***sufficient progress***?
  - If not, will further efforts make it possible for the child to safely return home ***within a reasonable time***? ORS 419B.476(4)(c). A *reasonable time* is a period of time that is reasonable given a child's emotional and developmental needs and ability to form and maintain lasting attachments. ORS 419A.004(23) (see back for additional considerations)
  - If the court determines the plan should be changed to adoption, is there a ***compelling reason*** that TPR would not be in the child's best interest? ORS 419B.476(5)(d); 419B.498(2)**(BOP on person asserting**) *DHS v. SJM*, 364 OR 37 (2018)
    - ***Compelling reasons may include***, but aren't limited to: The child is being cared for by a relative in a placement that is intended to be permanent and a different plan is more appropriate; Another permanent plan is better suited to meet the health and safey needs of the child, including the need to preserve the child's sibling attachments and relationships; The parent is successfully participating in services that will make it possible for the child to safely return home within a reasonable time; The court or CRB made a previous "no reasonable efforts" finding; DHS has not provided family the services it deems necessary for the child to safely return.

APPELLATE UPDATE – 2019 THROUGH THE EYES OF A CHILD CONFERENCE

Reasonable efforts considerations for incarcerated parents.

- **Has the caseworker**:
  - Had regular contact with the parent?
  - Assessed the parent's strengths and weaknesses?
  - Provided services that bear a rational relationship to the basis for jurisdiction, or explained why the service has not been provided? (If DHS is relying on services within the facility, the caseworker needs to assess whether they are sufficiently tailored to the basis of jurisdiction.) *DHS v. CLH*, 283 Or App 313 (2017)
  - Arranged for contact or visitation with the child, or explained why it's not appropriate?
  - Communicated the conditions of return to the parent and discussed how those conditions might be satisfied, even if the parent won't be available to have physical custody of the child. This may include exploring whether the parent will make a plan for someone else to care for the child while the parent is incarcerated. *DHS v. LLS*, 290 Or App 132 (2018)
  - Communicated with the parent's prison counselor and service providers about the parent's progress?
  - If the parent is willing to engage and if the parent would benefit from additional services that would materially contribute to the goal of ameliorating the jurisdictional basis, has DHS met the parent's efforts in kind? *DHS v. SMH*, 283 Or App 295 (2017)

Reasonable time considerations.

- **Reasonable time defined**: A period of time that is reasonable given a child's emotional and developmental needs and ability to form and maintain lasting attachments. ORS 419A.004(23)
- The court considers the child's particular needs and circumstances and any barriers the parents might face. *DHS v. D.I.R.* 285 Or App 60 (2017) Considerations may include:
  - whether the child's placement in substitute care would be unacceptably long given her age;
  - the amount of time the child has already spent in foster care;
  - the child's unique permanency needs;
  - how long the parent would have to remain in services before the child could safely return home, and how such a delay would impair the child's best interests;
  - whether the parent suffers from a drug or alcohol addiction, or has mental health issues that are too severe to alleviate within the foreseeable future; and
  - the parent's participation and progress in services at the time of the permanency hearing.

Termination of Parental Rights Based on Unfitness: ORS 419B.504

- **General test:**
- (1) Whether the parent has engaged in some conduct or is charterized by some condition, and
- (2) the conduct or condition is seriously detrimental to the child
- (3) If (1) and (2) are yes, the court must also find that integration of the child into the home is improbable within a reasonable time due to conduct or conditions not likely to change.
- (4) The court must also find that TPR is in the child's best interests.
- **Parental fitness**: measured at the time of the TPR trial. Focus is on the impact to the child. *DHS v. MAH,* 297 Or App 725 (2019)
- **Standard of proof**: clear and convincing (beyond a reasonable doubt if ICWA applies)

JUVENILE APPELLATE UPDATE

August 2018 – July 2019

Through the Eyes of a Child Conference, August 11, 2019

Contents

Delinquency

Aggravated Murder

- ***State v. Link*, 297 Or App 126 (2019)**

Defendant appeals from a judgment of conviction for aggravated murder. ORS 163.095. He assigns error to the imposition of a mandatory life sentence pursuant to ORS 163.105. On appeal, defendant argues that, as a juvenile, the imposition of such a sentence without the individualized considerations of the qualities of youth by the sentencing court violates the Eighth Amendment to the United States Constitution as articulated in *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). The state responds that *Miller* is limited to two types of sentences--death and life without parole--and neither is applicable in this case. Alternatively, the state contends that the sentence imposed on defendant contains a procedural mechanism that allows for the individualized considerations of the qualities of youth: namely, the murder review hearing, which would be held no earlier than 30 years after the imposition of the sentence pursuant to ORS 163.105(2).

Held:

For sentencing purposes, a court cannot impose the state's most severe penalties on a juvenile offender without individualized considerations of the unique qualities of youth that might make imposition of that sentence inappropriate. In this case, the trial court imposed a mandatory sentence of life in prison pursuant to ORS 163.105--one of the state's most severe sentences--on a juvenile offender without an individualized consideration of his unique qualities of youth. The possibility of a murder review hearing by the parole board 30 years in the future was not a constitutionally-adequate substitution for that consideration. Moreover, the several statutes that comprise the Oregon scheme for imposition of the severe sentence options for aggravated murder on a juvenile fail the procedural obligation--the affirmative duty--to assess the role of youth at the time of sentencing in order to determine a constitutionally-proportionate sentence. As such, the Court of Appeals concluded that the application of ORS 163.105 as written, to a juvenile defendant, violated the Eighth Amendment. Sentence on Count 4 vacated; remanded for resentencing, otherwise affirmed.

Double Jeopardy

- ***State v. C. C. W.*, 294 Or App 701 (2018)**

After an altercation involving youth, the state filed a petition to find him within the juvenile court's jurisdiction for acts that, if committed by an adult, would constitute second-degree criminal mischief, ORS 164.354. In a colloquy at trial, the court declared that youth was within its jurisdiction based on acts that would constitute a lesser-included offense, third-degree criminal mischief. The verbal ruling stemmed from a misunderstanding about needing proof of property value as an element of the offense. After some discussion about whether the court could correct the error, the court flagged the issue for the upcoming disposition hearing and in the interim, directed the parties to brief it. Immediately following trial, the court entered a judgment finding youth within its jurisdiction based on acts

constituting the lesser included offense. On the judgment form, the court checked a box continuing the matter to a later date for disposition and motion.

At the subsequent hearing, the court decided it had authority to change or amend the judgment and it found youth within its jurisdiction for the originally charged act. Youth appealed, arguing the juvenile court violated his rights against double jeopardy under the federal and state constitutions because the court had previously entered a judgment finding him to be within its jurisdiction for the same acts constituting the lesser-included offense of third-degree criminal mischief, ORS 164.345.

Held:

On appeal, the court considered whether the initial judgment finding youth within the court's jurisdiction was conclusive so as to constitute an acquittal as to acts related to the original charge, thus precluding the subsequent judgment. The court considered the finality of a juvenile court's initial judgment for double jeopardy purposes, by examining cases involving claim preclusion. Oregon courts have determined that a judge may change his or her mind concerning the proper disposition between the time of a hearing and final action which takes place when the order disposing of the matter is signed. Once the court enters a written judgment or final order, the court is bound by it, even though the record may indicate that the court meant to rule otherwise. A limited exception to that general rule exits where the final order was ambiguous and internally inconsistent because of an obvious clerical error. Under such circumstances, the court can examine the record to discern the trial court's real intent. Otherwise, the written language will prevail over spoken statements by the trial judge.

In this case, the court concluded that the original judgment finding youth within the court's jurisdiction was final because the juvenile court committed it to writing and duly entered it as a judgment. The initial judgment does mention a future hearing regarding disposition and motion, but it is unequivocal in finding youth within the court's jurisdiction for acts that would constitute third-degree criminal mischief. That adjudication is neither ambiguous nor internally inconsistent and no one alleges that it was clerical error. The notation that future hearing will determine a motion merely means that the court will determine whether it can change its determination about the acts that would constitute third-degree criminal mischief, and does not make the initial decision less of a final judgment. The signed judgment taking jurisdiction – not the statements from the judge, the state or youth – governs the court's determination of what was decided. The court's judgment had the legal effect of acquitting youth of the greater offense, precluding further adjudication of it. Amendment of the initial judgment violated youth's right against double jeopardy under the Fifth Amendment and Article I, section 12.

Expunction

- ***State v. P.T.,*** **295 Or App 205 (2018)**

Youth was found under juvenile court jurisdiction for acts that, if committed by an adult, would constitute sodomy in the first degree, ORS 163.405. After youth successfully completed probation in 2013, he moved to dismiss the petition. The juvenile court allowed the request and set aside the jurisdictional judgment. In 2016, youth applied for expunction of his juvenile record under ORS 419A.262(8), which authorizes the juvenile court to order expunction of "all or any part of the person's record if it finds that to do so would be in the best interests of the person and the public." The court

denied the request, concluding ORS 419A.260(1)(d)(J) precludes expunction when the underlying offense is first degree sodomy. Youth appealed.

Held:

Affirmed.

On appeal, youth argued that he is not a person "found" to be within the court's jurisdiction for purposes of ORS 419A.260(1)(d)(J) because the judgment was set aside in 2013. The court examined the text of ORS 419A.260(1)(d)(J), which precludes expunction when the juvenile court found a person to be within the court's jurisdiction for certain conduct. The court found the use of the past tense places the focus on the historical event in which youth was found under the court's jurisdiction, and not what happened after the event was completed. The court noted the absence of any reference to post-judgment events in the statute and compared it to other times that the legislature has allowed for post-judgment relief after a judgment has been set aside. Finally, the court pointed out that the legislature created some express exceptions to ORS 419A.260(1)(d)(J) if certain criteria provided in ORS 419A.262 are satisfied, but was silent on the issue of post judgment set asides.

Merger

- ***State v. K.R.S.,* 298 Or App 318 (2019)**

Youth appeals two judgments of the juvenile court. The first judgment adjudicated youth as being within the delinquency jurisdiction of the juvenile court for conduct that, if committed by an adult, would constitute one count of first-degree unlawful sexual penetration, ORS 163.411, and three counts of first-degree sexual abuse, ORS 163.427. In the second judgment, regarding disposition, the juvenile court placed youth on probation for five years with conditions that include sex offender treatment and registration requirements. On appeal, youth raises a single assignment of error, arguing that the juvenile court erred when it refused to merge the three counts of first-degree sexual abuse into a single adjudication because, under ORS 161.067(3), merger would be required under the circumstances of this case if it were a criminal proceeding, and merger principles apply in juvenile delinquency proceedings.

The allegations against youth relate to his conduct during one night when he was sleeping in a bed with the victim. The victim woke to the youth rubbing the top part of her body and trying to kiss her cheek. Youth touched her vagina for about five minutes, then put victim's hand into his underwear and made her touch his "private parts." The victim went to the bathroom, and it didn't happen again after that.

Held: The legislature intended that the number of convictions on a person's record accurately reflect that person's criminal conduct – including that the record not portray the person as having engaged in more acts of criminal conduct than the person actually committed. The court found these concerns are at least as applicable in the juvenile delinquency context, which is focused on rehabilitation, as they are in the criminal context. The court determined that ORS 161.067(3) applies to delinquency adjudications in the same way that it does to determinations of guilt in criminal cases. In this case, the entire episode occurred in a confined space without interruption by a significant event or a sufficient pause to separate the conduct that formed the basis for each of the sex abuse adjudications. Citing *State v. Nelson*, 282 Or App 427 (2016), the court also explained that merger is not defeated simply because each count is based on touching a different body part.

Jurisdictional judgment reversed and remanded for entry of a judgment reflecting adjudication for a single count of first-degree sexual abuse; otherwise affirmed. Dispositional judgment vacated and remanded.

Motion to Set Aside Order

- ***State v. J.S.W.,*** **295 Or App 420 (2018)**

Youth filed a motion in juvenile court to set aside a 1995 delinquency adjudication for conduct that, if committed by an adult, would constitute sexual abuse in the first degree and sodomy in the second degree. Youth argued the adjudication was invalid because he had not knowingly or voluntarily waived his right to counsel or entered a valid plea due to the juvenile court's alleged failure to inform him of a potential statutory defense and that his adjudication would result in a mandatory lifetime obligation to register as a sex offender. He argued that his case was analogous to *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 175 L Ed 284 (2010), in which the United States Supreme Court determined that criminal defendants have a constitutional right to be informed whether deportation is a possible consequence of a guilty plea.

Youth was 14 at the time of the incident, and the victim was 12. Youth waived his right to counsel and admitted to the charges. Youth signed a document called "Petition Admitting Allegations That Child is Within the Jurisdiction of the Court. Waiver of Right to an Attorney." The document provided that the youth had the right to an attorney, and was entitled to an attorney at all times in court or when questioned about the matter. Also, it advised that the youth could hire an attorney or have one appointed if youth was without sufficient funds. Youth checked a box on the form to indicate he was proceeding without an attorney representing him, and left the box to indicate he was proceeding with an attorney unchecked. The petition also provided the maximum period of confinement and the maximum fine, however, it did not contain a notice that youth would have to register as a sex offender if he admitted to the charges and did not notify him of any possible defenses he could raise. There was nothing in the record to indicate whether the court informed youth of the collateral consequences of his plea, including mandatory sex offender registration, or advised youth of the specific risks of entering a plea without consulting an attorney.

The juvenile court denied youth's motion and youth appealed.

Held:

Affirmed.

A youth who files a motion to set aside a juvenile adjudication has the burden to prove by a preponderance of the evidence that the plea was invalid. ORS 419C.615(2)(b). The juvenile court has the authority to set aside an order for reasons including a substantial denial of the person's constitutional rights if the denial rendered the adjudication void. ORS 419C.615(1)(a).

The juvenile court was not required to inform youth of potential statutory defenses to obtain a valid waiver of counsel and voluntary plea. The plea agreement informed youth of the charges against him,

his right to an attorney, and the maximum possible punishment that he faced by admitting to the charges. Even under the Sixth Amendment, a court would not be obligated to advise youth that waiving the right to an attorney entails the risk that a viable defense will be overlooked.

In addition, the Court of Appeals has held it is not inadequate or ineffective assistance of counsel under Article I, section II, or under the Sixth Amendment for defense counsel to fail to inform a client of the collateral consequence of mandatory sex-offender registration prior to a plea. Registration is not considered a form of increased punishment. The United States Supreme Court has held that a defendant must have some apprehension only of the range of allowable punishments before the trial court can accept an uncounseled plea. The court also rejected youth's argument that *Padilla* applies retroactively.

Motion to Suppress

- ***State v. J.D.H*, 294 Or App 364 (2018)**

The trial court's determination that youth's mother gave officers consent to search youth's room "for evidence that might be relevant to a planned school shooting," including a search for and of youth's journal was supported by evidence in the record when: (1) mother consented to the search without expressing any limitation after she was told about the school shooting plan investigation; (2) mother actively assisted officers in their search for the notebook by providing the notebook to an officer after she was informed the officers were looking for a notebook or journal; and (3) mother failed to object or express any limitation on the officers' search after she was made aware that officers were looking for a notebook in the youth's room. In addition, based on the particular parent-child relationship in this case, as well as mother's access to and control over youth's room, mother had actual authority to consent to the search of his room, his guitar case, and his journal.

- ***State of Oregon v. A.S.*, 296 Or App 722 (2019)**

Youth appeals a judgment finding him within the jurisdiction of the juvenile court for acts that, if committed by an adult, would constitute one count of unlawful possession of a firearm. Youth assigns error to the trial court's denial of his motion to suppress evidence of a gun that police found in his room when they searched it based on consent given by youth's grandmother, arguing that the consent was invalid because youth was physically there and expressly objected to the search.

Held:

Under the common authority doctrine, the general rule is that co-occupants of a common premises have actual authority to consent to a search. However, that presumption gives way if the co-occupants have a mutual agreement giving one of them exclusive authority over the premises or the portion searched, or if one of the occupants has superior authority to control the premises and has not ceded control to the co-occupant. The United States Supreme Court has also adopted an exception (*not* adopted under Article 1, Section 9 of the Oregon Constitution) that if one occupant is physically present and objects to a search of the commonly used premises, the objection of the co-occupant prevails. When the co-occupants are adults and minors, the rights and responsibilities of the adults, as property owners or parents, give rise to superior authority over the minors. However, the analysis is

fact specific and depends on the extent to which the adults in a family home, expressly or through some common understanding, have agreed to a minor's exercise of common or exclusive control over areas of the shared household.

In this case, the juvenile court's determination that grandmother gave officers valid consent to search youth's room was supported by the evidence in the record. Grandmother's assertion of her authority to access items in youth's room and to go in without youth's permission, coupled with grandmother's status as family elder and homeowner, led the Court of Appeals to conclude that the juvenile court did not err when it determined that grandmother had actual authority to consent to a search of the items in youth's room. Affirmed.

Possession of Methamphetamine

- ***State v. F. R.-S.,*** **294 Or App 656 (2018)**

Youth appealed a juvenile court's judgment finding him within the jurisdiction of the court under ORS 419C.005 for committing an act that, if committed by an adult, would constitute possession of methamphetamine, ORS 475.894. Youth argued that the state failed to prove beyond a reasonable doubt that white residue found in a pipe that youth possessed was methamphetamine. Specifically, youth argued that the officers' testimony that youth shook his head and said "yeah" when asked whether his fingerprints would be on the pipe, along with their testimony that the substance "appeared" to be methamphetamine or looked like what "usually" is identified as methamphetamine, was not sufficient evidence from which a rational factfinder drawing reasonable inferences could have found that the substance was, beyond a reasonable doubt, methamphetamine.

Held:

At the hearing, the state did not present any direct evidence identifying the substance in the pipe. In proving the identity of a substance beyond a reasonable doubt, the state may properly rely on circumstantial evidence and reasonable inferences flowing from that evidence. However, the state may not rely on evidence that requires speculation or guesswork. Whether particular circumstantial evidence is sufficient to support a particular inference is a legal question for a court to decide. We agree with youth that the state's evidence in this case falls on the side of impermissible speculation and is thus insufficient to support the inference that the substance inside the pipe was methamphetamine. The Supreme Court has recognized that methamphetamine is not self-identifying as some other substances might be because something that appears to be a white substance could also be cocaine, heroin or some other harmless substance. Youth did not admit to having used the pipe to smoke methamphetamine, nor did he give any other indication that the substance inside of the pipe was methamphetamine. In addition, the police officers offered statements such as the substance "appeared" to be methamphetamine. ORS 475.894 requires identification of a specific drug. The trial court erred in finding youth within the jurisdiction of the court for possession of methamphetamine because the state did not present sufficient evidence from which a reasonable trier of fact could find that the substance in the pipe was methamphetamine. Adjudication for possession of methamphetamine reversed; remanded for further proceedings; otherwise affirmed.

Dependency

Discovery Sanctions

- ***Dept. of Human Services v. R.A.B.,*** **293 Or App 582 (2018)**

Mother appealed a judgment terminating her parental rights to her two children on the grounds of extreme conduct and unfitness. On appeal, the Court of Appeals considered whether the juvenile court erred by excluding the testimony of one of her expert witnesses, Poppleton, as a discovery sanction for failing to produce a report from Poppleton to DHS and children's counsel.

The grounds for termination were partially due to disclosures mother's two children made regarding physical and sexual abuse. Mother believed those disclosures might have been the result of coaching by the children's father. Mother retained an expert witness, Poppleton, to testify about the coaching of witnesses. On 10/23/17, children's counsel filed a motion *in limine* for an order prohibiting mother from presenting non-discovered evidence, and argued mother was violating ORS 419B.881 by not providing information as to the content or length of any witnesses' testimony with the exception of one draft report from a "professional witness". Children's counsel also argued that mother was trying to force a postponement by purposefully engaging in discovery violations, and that the court should order that mother may not offer oral testimony or written material of any witness or any material that has not been disclosed.

At a hearing on the issue on 10/25/17, mother's counsel indicated a report had been requested from Poppleton, but it wasn't clear when the report would be ready. The court had previously set a discovery deadline for 10/26/17. The court indicated it would give leeway for the report from Poppleton and ordered the attorney to provide a copy of the report as soon as it was received.

Poppleton appeared for testimony on the eighth day of trial. Children's counsel objected to his testimony, and in aid of that objection asked if he had been asked to prepare a report regarding the records he reviewed for mother. Poppleton testified he had not been asked by mother to prepare a report. He also testified that he had been contacted by mother to do the records review about two and a half weeks prior to trial, and estimated the date was 10/25/17. Children's counsel argued mother had not disclosed that Poppleton was asked to do a records review, and instead mother's counsel led them to believe a report was being generated. Children's attorney and DHS's attorney moved to exclude the testimony, arguing they were prejudiced because they did not know how Poppleton was going to testify about the records he reviewed, which they believed violated the discovery schedule, and they would have presented their case-in-chief differently had they known of Poppleton's testimony in advance.

The juvenile court made findings that mother had made a representation to the judge at the 10/25/17 hearing that mother had requested a report from all of mother's experts, and that mother had never disclosed the subject of Poppleton's testimony. The juvenile court concluded a discovery violation had been committed and granted the motion to exclude Poppleton's testimony. Mother made an offer of proof that Poppleton would testify that the children's interview responses should be looked at with an eye of skepticism, and that the interview was not done correctly, or in a way that would decrease the reliability when looked at in the context of the development and memory of the children. The juvenile court terminated mother's parental rights.

Held:

On appeal, mother assigned error to the exclusion of Poppleton's testimony, and argued she did not violate ORS 419B.881 by not providing a written report of Poppleton's anticipated testimony because no such report existed.

Discovery violations in juvenile proceedings are governed by ORS 419B.881. Reading the statute as a whole, while the juvenile court has authority to supervise and manage discovery, and can restrict discovery obligations, the court does not have the authority to unilaterally create new discovery obligations beyond those mandated by ORS 419B.881(1). The plain text of ORS 419B.881(1)(c) requires that any reports or statements of experts who will be called as witnesses be disclosed to the other party or parties. While mother would have been obligated to disclose a report Poppleton created, the statute creates no obligation for mother to request that Poppleton create such a report. Further, the court's authority to impose a discovery violation derives from ORS 419B.881(10), which is tied to the discovery obligations created by ORS 419B.881(1). The statute does not authorize the imposition of a sanction for violation of a discovery obligation beyond those set forth in the statute. Thus, Poppleton could not be excluded as a witness as a discovery sanction for failure to create a report, when creation of such a report is not required by the discovery statute. The failure to produce a nonexistent report was not itself a discovery violation, and the trial court erred in concluding otherwise.

The party seeking reversal based on the exclusion of evidence bears the burden of demonstrating that the error was not harmless. Mother's offer of proof regarding Poppleton's testimony does not establish that the exclusion of that testimony was prejudicial to mother because the testimony was a commentary on the credibility of a witness. The court does not have discretion to admit improper vouching or credibility testimony, whether offered by an expert or lay witness. Based on the offer of proof, Poppleton's testimony would have been inadmissible regardless of whether its exclusion was an appropriate remedy for a perceived discovery violation. Therefore, any error in excluding Poppleton's testimony was unlikely to affect the verdict and was harmless.

Affirmed.

Disposition

- ***Dept. of Human Services v. A.F.,*** **295 Or App 69 (2018)**

D, age 3, was removed from his mother's care in October of 2017. D was covered in scars, was thin, and suffered gastrointestinal problems. He also tested positive for methamphetamine. Before scheduled visits with mother, he would express happiness initially but later say that mother was "mean," ask whether mother was going to freak out or hurt him and expressed fear of being left alone with her.

In January of 2018, mother admitted to, and the juvenile court asserted jurisdiction over D based on: (1) mother has exposed child to unsafe and unsanitary living conditions, including exposure to drugs, drug paraphernalia, and unsafe persons; (2) mother has left child with unsafe caregivers without making appropriate plans for the care of the child; and (3) mother has a drug and/or alcohol problem which impairs her ability to safely parent. DHS requested that the court order a psychological evaluation, but mother objected. She argued her poor parenting was caused by untreated use of methamphetamines for two years. The court continued the matter for an evidentiary hearing in February of 2018. By the

time of the hearing, mother had participated in a drug and alcohol assessment, but had not followed through with treatment, had attended only three of at least 10 offered visits with D, and was in only sporadic contact with DHS. After a hearing, the juvenile court ordered that mother participate in a psychological evaluation. Mother appealed.

Held:

Affirmed.

When the court asserts jurisdiction over a child and places the child in the legal custody of DHS, the court may specify the care, supervision or services that DHS is to provide both to the child and to the child's parents. ORS 419B.337(2). The Court of Appeals has interpreted this provision as only allowing the juvenile court to order DHS to provide those services that bear a rational relationship to the jurisdictional findings. The question on appeal is whether the psychological evaluation ordered by the juvenile court bears a rational relationship to the jurisdictional bases for purposes of ORS 419B.337(2) (the court did not consider the application of ORS 419B.387 because it was not argued below).

The provision of psychological services to parents is not limited to cases in which a parent's mental health condition is a basis for jurisdiction. If evidence in the record rationally leads the juvenile court to believe that a parent's mental health might be contributing to an established jurisdictional basis, it is permissible for the court to order an evaluation of the parent to determine whether a mental health issue exists. If there is reason to believe (based on the evidence) that a parent might not be able to ameliorate an existing basis for jurisdiction without mental health services, then ordering a psychological evaluation is rationally related to the jurisdictional bases.

In this case, the court found the low threshold for a rational relationship was met. The juvenile court could rationally conclude from the evidence that something more than drug addiction might be at play with respect to mother's substantial neglect of D and slow engagement in services, specifically a possible mental health issue that might prevent mother from successfully ameliorating the jurisdictional bases unless identified and addressed.

- ***Dept of Human Services v. K.J.,*** **295 Or App 544 (2019)**

The juvenile court established jurisdiction over K based on father's significant medical issues that interfere with his ability to parent. The court added another basis for jurisdiction relating to father's lack of housing about eight weeks prior to the first permanency hearing. At the permanency hearing, the caseworker, Stan, testified about the barriers to returning K home to father. Father's doctor had provided a release letter stating father's only being seen for diabetes, hypertension and chronic back pain. However, father had told Stan that he needed a double hip replacement and a kidney transplant and also indicated on Facebook that he had renal cancer. Father did not have any of these conditions. Stan testified father's misrepresentations were not a barrier to reunification but having accurate information about father's medical condition was an issue. Stan indicated that housing was the main barrier to reunification. Father had followed through on most or all of DHS's housing recommendations, however, the caseworker indicated that father should have acted sooner. Stan testified that a psychological evaluation might be helpful to identifying what the barrier is with respect to housing and might reveal how best to approach the issue with father.

At the end of the permanency hearing, the juvenile court ordered father to undergo a psychological evaluation. Father appealed, arguing there is no rational relationship between a psychological evaluation and the jurisdictional bases.

Held:

Reversed.

The Court of Appeals has interpreted ORS 419B.337(2) as granting the juvenile court authority to order DHS to provide services only if they are rationally related to the jurisdictional findings. The bar is low to establish a rational relationship between a psychological evaluation and a jurisdictional basis, and certainty about the existence of a mental health issue is not needed.

In this case, the caseworker testified that father's medical conditions were not a barrier to reunification, and that the misrepresentations were a concern because of the need for accurate information about father's medical condition. However, the court found that accurate information about father's physical health is not something that a psychological evaluation would provide. The court found there was no evidence that father's misrepresentation of medical conditions to Stan or on Facebook was contributing to the jurisdictional basis or was a barrier to reunification. Regarding the housing issue, DHS did not identify any evidence that reasonably suggested that a mental health issue might be contributing to father's housing situation. The caseworker's testimony that the evaluation may be helpful in identifying a barrier that was keeping father from fully engaging was insufficient.

The court concluded the evaluation was not rationally related, for purposes of ORS 419B.337(2), to either jurisdictional bases. The court declined to address father's argument that the juvenile court failed to consider ORS 419B.387 in ordering the psychological evaluation because it was not raised below.

Evidence

- ***Dept. of Human Services v. G.C.P.*, 297 Or App 455 (2019)**

Mother and father were engaged in a custody battle over their four-year-old child and both contacted DHS to report concerns about eachother. The child was subsequently examined by a pediatrician at Liberty House, Dr. Hedlund, who gave child a diagnosis of "highly concerning for physical abuse." At the jurisdictional trial, the following exchange took place:

> "[DHS's counsel]: And can you say to a reasonable degree of medical certainty that the bruise happened due to a nonaccidental injury?
>
> "[Hedlund]: Based on [child] saying "Daddy did it," I—I trust a child when they say something like that.
>
> "[Father's counsel]: Object as vouching. Move to strike.
>
> "THE COURT: It's overruled.
>
> "[Hedlund]: One of the hard pieces with diagnosing and why we use the phrase "highly concerning" and not "definitive this is," is because I didn't see it happen, so the injuries are consistent with what [child] said. So that's why I made the diagnosis of highly concerning.
>
> "* * * * *

"[DHS's counsel]: Okay. How do you, as a doctor, assess out whether the child has been coached by another parent to perhaps say something?

"[Hedlund]: That is very challenging. That often comes out more in the interview setting, because they ask those specific questions and they're able to. When I interact with a child, I ask a question, they answer rapidly without thinking about it. You know, it's—the child's being honest and telling you is the perception. If that makes sense.

"[Father's counsel]: I'm going to object as vouching.
Move to strike again.

"THE COURT: It's overruled."

The juvenile court entered a jurisdictional judgment over child on the ground that, child "suffered unexplained physical injury while in the custody and care of Father." Father appealed, arguing, among other things, that the juvenile court erred in overruling his objections to Dr. Hedlund's testimony as impermissible vouching.

Held:

Reversed.

The court applied the analysis recently stated in *State v. Black*, 364 Or 579 (2019), that when a party objects to testimony as improper vouching, the court must determine whether the testimony provides an opinion on truthfulness, or instead, provides a tool that the factfinder could use in assessing credibility. Although DHS conceded that both of Hedlund's statements were vouching, the court stated that Hedlund's second statement – regarding a child answering "without thinking about it" because "the child's being honest and telling you is the perception" – arguably could be a tool that the factfinder could have used in assessing credibility. However, the court did not resolve that issue, but rather, reversed the judgment based on the admission of Hedlund's first statement and because the issue would not arise again in this case (wardship had been terminated by the juvenile court while the appeal was pending).

Inadequate Assistance of Counsel

- ***Dept. of Human Services v. M.E.*, 297 Or App 233 (2019)**

Mother's three children were removed from her care in December 2013 and were made wards of the juvenile court in April 2014. Mother's thinking became increasingly erratic, disorganized, delusional and paranoid over the course of the dependency proceeding and after an evidentiary hearing, the court appointed a Guardian ad Litem (GAL) under ORS 419B.231. A petition to terminate mother's parental rights was filed in August 2017. Mother's GAL filed a declaration in the termination cases informing the court that she had been appointed GAL in the dependency cases and that she had no information to believe that mother was no longer in need of a GAL. Based on that declaration, the court entered an order (without holding a hearing) continuing mother's GAL in the termination proceeding. Mother's counsel and GAL opposed the termination of mother's parental rights. After a stipulated trial, the court entered judgments terminating mother's parental rights.

Mother appealed and raised eight assignments of error, which fell into three broad claims: (1) the juvenile court erred when it continued the appointment of mother's guardian ad litem (GAL) from the

dependency proceeding to the termination proceeding without holding a hearing; (2) mother's counsel was inadequate for failing to object to the continuation of the GAL's appointment; and (3) as a result, the juvenile court erred when it terminated mother's parental rights.

Held:

Vacated and remanded.

Mother's first claim was unpreserved. Although the juvenile court entered the order continuing the GAL without a hearing, there were other opportunities to object prior the TPR trial. The court concluded that plain-error review was not appropriate because it is not clear that the court was required to conduct a hearing under ORS 419B.231 before continuing the GAL's appointment in the termination proceeding. Therefore, the court rejected her first two assignments of error.

Mother's six remaining assignments of error were dependent on her claim that she received inadequate assistance of counsel in her termination proceeding due to her counsel's failure to object to the continuing appointment of the GAL. Mother did not preserve that claim, however, the court can consider it for the first time on direct appeal. When reviewing a claim of inadequate assistance of counsel, the court considers whether the underlying proceeding was fundamentally fair. A parent raising the issue bears the burden of proving that trial counsel was inadequate and that the inadequacy prejudiced the parent's rights to the extent that the merits of the juvenile court's decision are called into question. In this case, the court found the record on appeal was inadequate to review that claim. Accordingly, the court vacated the judgment terminating mother's parental rights and remanded to the juvenile court with instructions to hold an evidentiary hearing on mother's claim of inadequate assistance of counsel.

- ***Dept. of Human Services v. P. W.,*** **296 Or App 548 (2019)**

DHS filed a petition on July 21, 2017 to terminate mother's parental rights to her son. Mother appeared in court as required by the summons and contested the petition. During that appearance, the court scheduled a trial readiness hearing for December 5, 2017, but that hearing was rescheduled to April 6, 2018. Although mother received notice, she did not appear. DHS moved to proceed with a prima facie case, and mother's counsel objected and stated that he did not know why mother was not in court. Mother's counsel did not raise an objection based on any deficiency in the notice required by ORS 419B.820. After DHS's presentation of evidence, the court orally granted the termination petition. After the court entered judgment, mother filed a motion to set aside the judgment under ORS 419B.923. In a supporting declaration, mother's counsel stated that mother's failure to appear was due to transportation problems. A hearing was held on the motion on July 27, 2018 and mother failed to appear. Mother's counsel indicated he did not know where she was. The court denied mother's motion, noting that the attorney's declaration did not comply with ORS 419B.923(2)(requiring the motion to be accompanied by an affidavit that states the facts and legal basis for the motion) and found no excusable neglect. Mother appealed, arguing that her trial counsel provided inadequate legal assistance by (1) failing to adequately plead the excusable neglect theory; (2) failing to advance a well-settled theory that notice is required under ORS 419B.820 before the court can enter a default; and (3) abandoning his prosecution of the set-aside motion at the hearing because he could not find mother.

Held:

The Court of Appeals found that the record was insufficiently developed for resolution of mother's inadequate-assistance claim and remanded the case for an evidentiary hearing under the terms stated in *Dept. of Human Services v. M.U.L.,* 281 Or App 120 (2016).

Note: An Order to Appear has been developed for purposes of providing notice to a parent who is contesting the petition in compliance with ORS 419B.820 (TPR cases) and ORS 419B.816 (dependency cases). The forms are on the JCIP website here: https://www.courts.oregon.gov/programs/jcip/ModelCourtForms/Pages/default.aspx

Jurisdiction

ICWA

- ***Dept. of Human Services v. J.L.R.,* 296 Or App 356 (2019)**

Father appealed a judgment establishing jurisdiction over his daughter. He raised three assignments of error, including failure to meet ICWA's procedural requirement of notice. In involuntary child custody proceedings, ICWA requires the party seeking the foster care placement to notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of the right to intervention. 25 U.S.C. §1912(a). DHS acknowledged that it failed to provide the required notice. The Court of Appeals accepted the concession and reversed the juvenile court's judgment.

Note: The child custody proceeding cannot be held until 10 days have expired after receipt of the notice. If requested, the parent, Indian custodian or the tribe must be granted up to 20 additional days to prepare. 25 U.S.C. §1912(a).

Sufficiency of Allegations under ORS 419B.100(1)(c)

- ***Dept. of Human Services v. J.G.K*, 298 Or App 398 (2019)**

Father challenges jurisdictional judgments with respect to his son B and daughter O. Father assigns error to the juvenile court's exclusion of evidence, on the grounds of relevance, that father's sister, the children's paternal aunt, was prepared to assist him with parenting.

Held: The legal questions presented at an initial jurisdictional hearing are the same as those presented on any subsequent motion to dismiss dependency jurisdiction: Do the alleged (in the case of an initial jurisdictional hearing) or the established (in the case of a motion to dismiss jurisdiction) jurisdictional bases pose a "current threat of serious loss or injury" to the child, and if so, is there a "reasonable likelihood that the threat will be realized"? In either instance, evidence that a parent has the assistance of friends and family members is relevant to the jurisdictional inquiry, because it is probative of how likely it is that the threat of harm or injury presented by the alleged or established jurisdictional bases will be realized.

The juvenile court should have permitted father to develop the evidence regarding paternal aunt's ability to assist him in caring for B and taken that evidence into account in assessing whether any risks to

which B was exposed were the sort for which the law authorized the court's exercise of dependency jurisdiction. However, that error was harmless because the testimony developed through father's offer of proof showed that there was no concrete plan in place to help father parent B, let alone O--just that paternal aunt and father's friend had discussed how to help father get back on his feet.

Affirmed.

- ***Dept. of Human Services v. C.L.R.,*** **295 Or App 749 (2019) (mental health)**

Mother had a mental breakdown on April 2, 2018, and imagined an intruder broke into her apartment where she lived with her 12-year-old daughter, E. She started throwing things at the imagined intruder to protect herself and E and then fled to two neighboring apartments. Mother called 9-1-1 several times because she felt they were not responding quickly enough, and falsely stated she had slit her own throat. At mother's request, father came and picked up E. He later testified E was scared and crying. Mother was treated for the next few weeks in a hospital and another facility. DHS filed a dependency petition, alleging that mother's mental health problems impaired her parenting ability, and her resulting behaviors created a risk of harm to E and that she was not available to be a parenting resource because she was hospitalized.

At the jurisdictional hearing in June of 2018, mother acknowledged that she had mental health issues on the night of April 2 and that there was nobody in her apartment. She also recognized her behavior had scared and upset E, and said she was making appointments for family counseling with E to ensure that they have a healthy parent-child relationship. She indicated she had not had any other episodes like the one on April 2, either before or since then. She also was taking her medication at the time of the incident and takes her medication faithfully. Rosanski, mother's treatment provider, testified that mother had two medication management appointments since the April incident, and that her medication had been increased. He also testified that mother would decompensate if she doesn't take her medications and would benefit from a psychological evaluation and talk therapy. Finally, he testified that nothing but speculation would lead him to believe that mother would decompensate like she did no April 2. Father testified that he had seen behavior like that with mother when she was drinking or taking drugs, but not to the same extent as on April 2.

The juvenile court found E within the court's jurisdiction, and mother appealed.

Held:

Reversed.

The court set out the test for jurisdiction under ORS 419B.100(1)(c). The juvenile court may assert dependency jurisdiction over a child whose condition or circumstances endanger the welfare of the child or others. There must be a current threat of serious loss or injury to the child and a reasonable likelihood that the threat will be realized. The threat must be based on the child's current conditions and circumstances, and not on some point in the past.

In this case, there was nothing in the record to support a finding that it was reasonably likely mother would suffer a comparable episode of decompensation in the future. There was no testimony that there had been any other extreme episode like the one on April 2. There was also no evidence that mother would stop taking her medications or engage in a pattern of behavior that would lead to a similar

incident. Also, there was no evidence that mother's mental health challenges put E at risk of serious loss or harm. Although E was scared and upset by the incident on April 2, there was no evidence that E had suffered significant or persistent psychological harm from the incident, of would be at risk for such harm if it happened again. Mother's acknowledgment that she needs counseling to have a healthy parent-child relationship with E also doesn't establish a risk of serious harm in the absence of evidence that mother's relationship with E is compromised in a way that puts E at risk.

- ***Dept. of Human Services v. D.W.M.,*** **296 Or App 109 (2019) (Domestic violence, sex abuse, substance abuse)**

The juvenile court established jurisdiction over a 14-year-old child based on findings that father perpetuated domestic violence against mother and that father's substance abuse interfered with his ability to safely parent, and dismissed DHS's allegation that father's sexual abuse of child endangers her welfare. Father appealed the finding of jurisdiction, and DHS and child cross-appealed the dismissal of the sex abuse allegation. The Court of Appeals exercised its discretion to review the case de novo finding it is an exceptional case under ORAP 5.40(8)(c).

Mother and father have two biological daughters, child, who is 14 years old and child's sister, who is 24 years old and no longer lives in the home. On July 31, 2017, mother and father got into a verbal altercation, and father disclosed that he had touched child's sister inappropriately. Father was arrested on September 1, 2017 based on the sexual abuse allegation. Child admitted that father had sexually abused her as well. DHS petitioned the court to take jurisdiction over the child based on father's sexual abuse of the child; father's domestic violence against mother in the presence of child; and father's substance abuse. Mother admitted to allegations that were not contested on appeal.

At the jurisdictional trial, child testified that her parents get drunk every night about an hour before child would go to bed, so she didn't have to deal with it. They also would argue a lot and push and shove each other. The physical fights occurred once every month or two. Several years earlier, child had observed father choking mother. When child tried to intervene, father said mother needed to learn a lesson and threw her phone into a wall. Child also testified that father used to spank her and threatened to slap her if she did something wrong. She also described an incident in which father grabbed her hand and held it really, really, really tight. Father also slammed her dog's body and head into the dryer several times. When child grabbed his shirt and ripped it and screamed, "Stop!" father chased her upstairs. Child was able to lock herself in her room and described being scared of father that night. In addition, child testified that father sexually abused her when she was seven or eight years old. The touching stopped by the time she was in the third or fourth grade, but father would talk to and look at her in a sexual way. When asked how the abuse impacted her, child indicated she would cut herself for about three years because of the sexual abuse and other reasons. Child's sister also testified that father sexually abused her beginning when she was a freshman in high school – the same age as child. The caseworker testified that child had anxiety, may be suffering from depression, was having difficulty in school and had difficulty staying committed to things.

The court set out the general test for jurisdiction under ORS 419B.100(1)(c). Juvenile court jurisdiction is warranted if a child's conditions and circumstances are such as to endanger his or her welfare – that is, if they give rise to a threat of serious loss or injury. DHS has the burden to establish a nexus between the allegedly risk causing conduct or circumstances and the risk of harm to the child by a preponderance of the evidence. The risk of harm must be present at the time of the hearing and not merely speculative and DHS must present evidence of the type, degree and duration of the harm to the child.

Starting with the sex abuse allegation, the court found that child faces a present risk of harm from sexual abuse by father. DHS proved by a preponderance of evidence that father sexually abused child and child's sister. The court found there was evidence that father sexually abused child four times and there is no evidence that he engaged in treatment or acknowledged the harm to child. Father continued to say sexually inappropriate things to child and to regard her in a sexual way. Also, father sexually abused child's sister when she was the same age as child is now, supporting a concern that child continues to be in the class of father's victims.

Regarding the domestic violence, the court found that father perpetuated domestic violence against mother and that child was exposed to the domestic violence. The court also found that father abuses alcohol. However, evidence that a child is exposed to an intoxicated parent or to domestic violence is not, in itself, a basis for juvenile court jurisdiction. The state must establish both that the child is at risk of a certain severity of harm and that there is a reasonable likelihood that the risk will occur. Although the child testified that her parents pushed and shoved each other, the record does not establish how she was put at physical risk. There is no evidence that father injured or assaulted child during her parents' fights. Testimony regarding the spanking and the squeezing of her hand is not sufficient to establish a risk of injury to support jurisdiction. The court rejected DHS's argument that the child is at risk of psychological harm because she suffers from depression and anxiety and was harming herself, finding insufficient evidence regarding the type, degree and duration of the emotional harm. Nor did the caseworker's testimony establish a nexus between the depression, anxiety and cutting and father's domestic violence and drinking.

The judgment of the juvenile court dismissing the sexual abuse allegation was reversed and remanded and the judgment finding jurisdiction based on father's substance abuse and domestic violence was reversed.

- ***Dept. of Human Services v. M.F.,*** **294 Or App 688 (2018) (Unable to care for child's special needs; lack of custody order)**

Child was born in 2012 and initially lived with both parents. When the child was two, father moved out. In 2015, father saw that mother was having some issues and took the child into his home. During that period, child got out of father's home twice, was found unsupervised in a parking lot and was returned to father by police officers. Father installed child-proof locks on his doors after the second incident, at a police officer's instruction. Although child exhibited pica, father did not feel that her needs rose to the level of developmental disabilities. After the child lived with father for a month, mother came to father's home with police officers. Father had not yet been legally determined to be child's father and he relinquished child to mother. Two and half years later, DHS received reports that mother was neglecting child, who was then five years old. Child was assessed with significant disabilities, including autism spectrum disorder, cognitive and motor skills delays, and pica. Child is mostly non-verbal, does not use a toilet independently, and will eat feces and other non-edible, hazardous items if not constantly supervised. She only sleeps three to five hours each night and requires round-the-clock supervision.

DHS filed a petition in September 2017 and an amended petition in October 2017, after father contacted the agency (paternity had been established). The amended petition included the following allegations: (1) father is "unable to protect the child from the mother because he lacks full custody" and (2) father needs assistance from the court and the state to meet child's basic and special needs. At the jurisdictional hearing, DHS caseworker Golden testified about the agency's involvement between August

2017 through the time of the hearing in February 2018. There had been numerous meetings about child's needs and developing an individual support plan and other supports for her. The caseworker did not update father after the Individual Service Plan (ISP) was developed, but rather urged father to contact the child's developmental-disabilities (DD) caseworker directly. DHS also failed to respond to a request from father's attorney for information about the child's school and service providers. Father testified in December he had not contacted the child's DD caseworker because, in his view, somebody from DHS was supposed to call him and never did. He also testified that that he did not speak with the DD caseworker to understand the child's needs because he has taken care of DD children most of his life. However, by the second day of the jurisdictional hearing father called the DD caseworker and they had an in-depth conversation about services and what it could look like for father if child lived with him. The caseworker testified she had concerns about father's plan to have his partner provide caregiving to child in light of his partner's child welfare history. Father, who lived in east Portland, missed most of the visits with child that had been scheduled in Salem between December 2017 and February 2018. He had five visits, most of which occurred before the jurisdictional hearing began in December. He alerted DHS when he was going to miss a visit, some of which he missed due to transportation difficulties. A visitation worker testified father was attentive to child's special needs, was gentle and patient with child, redirected her when necessary, was cheerful and attended to her needs. A file note indicates the worker had no concerns regarding father's ability to parent his child. Father testified about his plans to care for child, including taking her to appointments, ensuring she goes to school, making sure she doesn't put anything in her mouth and taking care of her individual needs. He would draw on his previous experiences working as a caregiver for other people with disabilities, including autism and pica. He has training in CPR, first aid and completed an eight-hour course on caring for children with autism. He had located DD services and a school in Portland with services that could accommodate child. He testified he would quit his job and be a stay-at-home father to child.

The juvenile court found DHS proved that father needs the help of the Court and State to meet the child's basic and special needs and that father is unable to protect the mother because he lacks full custody. The court focused on the month in 2015 during which child lived with father, noting the two times child wandered outside and father's failure to take her to early intervention services. The court also observed that father had not attempted to have contact with child or to inquire about her well-being when she lived with mother from 2015 to 2017. The court expressed concern about father's level of commitment to follow through and care for child's needs. The court also expressed concern about father having relinquished child to mother in 2015, concluding the incident demonstrated father's inability to protect child from mother absent a custody order. Father appealed.

Held:

Reversed.

Under ORS 419B.100(1)(c), a juvenile court may assert dependency jurisdiction over a child if the child's condition or circumstances are such as to endanger the welfare of the child or of others. To endanger the child's welfare, the conditions or circumstances must create a current threat of serious loss or injury to the child and there must be a reasonable likelihood that the threat will be realized. The focus must be on the child's current conditions and circumstances and not on some point in the past.

The record included no evidence that mother is *currently* in a position to insist that father deliver child to her, that she is likely to make such a demand, or that father would be unable to resist it. Although the court found the record supported the determination that there is a reasonable likelihood that child will

suffer serious loss or injury if her caregiver is not closely attentive, the record did not support a determination that the threat of that harm currently exists and is reasonably likely to be realized. The juvenile court's reliance on events that happened two years prior to the jurisdictional hearing were insufficient to support a determination that the child currently would be at risk if returned to father's care. In addition, the juvenile court's reliance on father's lack of communication with mother and with DHS does not equate with proof that it is reasonably likely that child will suffer harm if returned to his care.

UCCJEA

Jurisdiction – UCCJEA

- ***Dept. of Human Services v. M.R.,*** **298 Or App 59 (2019)**

Child was taken into shelter care in early September, 2018. A dependency petition was filed the next day alleging the child was within the court's dependency jurisdiction based on conditions and circumstances including mother's substance abuse, criminal activities, and neglect of child, as well as father's incarceration and unavailability. Several days later, child's maternal grandparents requested an emergency hearing for the return of the child, asserting that mother had signed over legal custody/guardianship of the child in August 2017. They also petitioned a New York court to enforce the August 2017 document, and asserted that Oregon is not the child's home state. Mother filed a motion to dismiss, asserting that the Oregon court lacked subject matter jurisdiction under the UCCJEA.

At the hearing on the motion, mother explained that she brought the child to Oregon in early April 2018, after the child had been living with maternal grandparents in Virginia for nine months. DHS began an assessment investigation regarding the child a few weeks later, and mother and child left for California in early June. California authorities returned the child to Oregon. Mother testified she brought child to Oregon for a temporary visit, to see whether they would eventually move to Oregon. She also testified that if the case was dismissed, maternal grandparents would fly to Oregon to retrieve child. Mother would enter treatment and would revoke her delegation of custody to maternal grandparents only if she could support her child. She also testified that the forms she signed to delegate custody were only valid for six months. Grandfather testified that he understood that mother was taking the child to Oregon for a vacation and then would be back to Virginia. In closing, mother argued there was no basis for emergency jurisdiction under the UCCJEA because the child would not be at risk of harm if the case were dismissed, as she then would return to grandparents' care. DHS did not argue for temporary emergency jurisdiction, but argued that Oregon had jurisdiction under the UCCJEA because no court of any other state would have jurisdiction.

The juvenile court ruled it had temporary emergency jurisdiction, focusing on concerns that maternal grandparents would not be able to keep the child safe if mother decided to remove child from their care. The juvenile court also denied mother's motion to dismiss and subsequently took dependency jurisdiction over child.

Held:

The juvenile court erred when it ruled that it had "temporary emergency jurisdiction" under the UCCJEA because the record contained no basis for a finding that the child would be "at immediate risk of harm"

if returned to mother's care. DHS acknowledged that Oregon is not the child's home state because the child had not been in Oregon for the requisite six months under ORS 109.704(7).

The court considered whether Oregon had subject matter jurisdiction under ORS 109.741(1)(d), because Oregon is not the child's home state and no other state has jurisdiction under the criteria in the other subsections of ORS 109.741(1). The only other state that might have jurisdiction was Virginia, however, the record contained evidence from which a reasonable factfinder could come to different conclusions regarding whether the child's absence from Virginia was "temporary" under the UCCJEA. The court left that question for the juvenile court to address on remand. Similarly, the court declined to determine whether the child's grandparents were acting as the child's parent for purposes of the UCCJEA, finding the question could not be resolved based on the record available for review.

The court vacated the judgment and remanded to the juvenile court for further proceedings.

- ***Dept. of Human Services v. S.S.,*** **294 Or App 786 (2018).**

Mother appealed from a judgment establishing dependency jurisdiction over her child. The evidence was undisputed that mother resided in Missouri, and the child and father moved to Oregon the same month that the juvenile court entered the jurisdictional judgment. On appeal, DHS conceded that the record demonstrated Oregon was not the child's home state under the Uniform Child Custody Jurisdiction and Enforcement Act, since the child had not lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the child custody proceeding. ORS 109.704(7) DHS further conceded the record did not contain any evidence that would support a determination that the juvenile court had subject matter jurisdiction under the UCCJEA, and that the juvenile court was not authorized to enter the jurisdictional judgment. The court agreed and reversed.

Motion to Set Aside

- ***Dept. of Human Services v. M.M.R.,*** **296 Or App 48 (2019)**

Mother appealed an order denying her motion under ORS 419B.923 to set aside a judgment terminating her parental rights to her daughter, A. While the appeal was pending, a petition for A's adoption was granted. DHS filed a motion to dismiss the appeal as moot under ORS 419B.923(3) in light of the child's adoption. ORS 419B.923(3) provides that a judgment terminating parental rights may not be set aside or modified after a petition for adoption has been granted.

On appeal, mother argued that the juvenile court has inherent authority to set aside the TPR judgment under ORS 419B.923(8) which provides: "This section does not limit the inherent power of a court to modify an order or judgment within a reasonable time or the power of a court to set aside an order of judgment for fraud upon the court." Mother alleged she was entitled to relief from the TPR judgment based on fraud because her DHS caseworker made false statements on the witness stand, and because her psychological evaluation was founded, in part, on incorrect information that was provided to the psychologist by DHS. The Court of Appeals rejected this argument and stated that Oregon precedent has established a court's inherent authority extends only to setting aside a judgment for extrinsic fraud. Intrinsic fraud includes acts that pertain to the merits of the case, while extrinsic fraud consists of

acts *not* involved in the consideration of the merits of the case. In this case, mother's allegations of false statements involved intrinsic fraud that could have been contested during the trial.

The court also rejected mother's argument that she would be denied procedural due process if her appeal was barred because there are procedural mechanisms to maintain the status quo during the pendency of an appeal. For example, mother could have requested the juvenile court enjoin DHS from consenting to A's adoption during the pendency of the appeal.

The court determined the appeal was moot and dismissed it.

- ***Dept. of Human Services v. A.O.*, 296 Or App 746 (2019)**

The juvenile court entered a judgment terminating mother's parental rights after she failed to appear at the termination trial. Subsequently, mother filed a motion to set aside the judgment under ORS 419B.923(1), which allows the court to modify or set aside an order or judgment based on "excusable neglect" among other reasons. At the hearing on the motion, mother's counsel was present and argued the motion, but mother failed to appear. The juvenile court denied mother's motion based on a "lack of prosecution, given that mother is not here."

Held:

Reversed and remanded for a hearing on the merits of mother's motion to set aside the termination judgment. Under ORS 419B.923(1), it was not necessary for mother to be personally present at the hearing for the juvenile court to rule on the merits of mother's motion.

Permanency Hearing

Compelling Reasons

- ***Dept. of Human Services v. M.T.P.*, 294 Or App 208 (2018)**

C was taken into protective custody at age four after a man was stabbed in mother's home in a dispute over illegal drugs. The juvenile court took jurisdiction because father was incarcerated and unavailable to parent due to his violent and impulsive behavior, because mother's substance abuse interfered with her ability to safely parent, and because mother exposed C to an unsafe living environment where he had access to illicit drugs and paraphernalia, and he had exposure to criminal activities and unsafe persons.

C was placed with maternal grandmother for approximately two years. DHS reported concerns that grandmother was inappropriately disciplining C with cold showers, spanking and making him sleep in the laundry room after urinating in his bedroom. C was then placed in a trial reunification with father. C did well with his father for about six months when father relapsed and was arrested for DUII, discharging a gun while driving, and being a felon in possession of a firearm. He was convicted and incarcerated, and his earliest release date is July 2022. DHS indicated C was very bonded with his father.

C was placed with a maternal cousin, KG. Over the next six months, C developed a significant bond with KG. KG was instructed not to allow C to have unsupervised time with grandmother due to her inappropriate discipline of C. At the time of a permanency hearing in December 2017, C was eight. He was significantly behind his peers academically and had a lot of behavioral issues. His mental health assessment indicated concerns about irritability, inability to concentrate, hyperactivity and bedwetting. DHS reported that he needs to be able to bond and form healthy attachments to his long-term caregivers given the unavailability of his parents. DHS recommended a change in plan to adoption because adoption is the most permanent, most stable plan that C could have, and would assure the stability and permanency he needs to grow and thrive. DHS noted that KG was willing to adopt, but that DHS was also conducting a diligent relative search to identify potential additional relative adoptive resources. Father opposed the change of plan, instead preferring guardianship with KG. DHS expressed concern that KG had struggled to follow the conditions that DHS put in place for C's safety – among other things, she allowed C to be cared for by grandmother when KG was out of town.

The juvenile court found DHS had made reasonable efforts toward reunification; that the parents had made insufficient progress for C to be returned home; and that none of the circumstances described in ORS 419B.498(2) applied because, among other things, there was not a compelling reason within the meaning of the statute for determining that filing a petition to terminate parental rights would not be in the child's best interests.

Father appealed, arguing that another permanency plan, such as guardianship, is better suited to C's needs. He reasoned that maintaining C's bonds with his father and with KG is in C's best interests.

Held:

Affirmed. At the time of the permanency hearing, the child had been in substitute care for 15 out of the prior 22 months. At that stage, DHS is required to file a petition to terminate parental rights under ORS 419B.498(1) unless one of the circumstances in ORS 419B.498(2) applies. When the juvenile court determines the permanency plan should be adoption, ORS 419B.476(5)(d) requires the order to include the court's determination of whether one of the circumstances in ORS 419B.498(2) is applicable. Under ORS 419B.498(2)(b), DHS is required to initiate a petition to terminate parental rights unless there is a compelling reason, which is documented in the case plan, for determining that filing such a petition would not be in the best interests of the child or ward. Compelling reasons include, but are not limited to: "Another permanent plan is better suited to meet the health and safety needs of the child or ward, including the need to preserve the child's or ward's sibling attachments and relationships." ORS 419B.498(2)(b)(B). The court has not determined if the statute, referring to the child's sibling attachments, includes the bond between a parent and a child. The court assumed without deciding that father's bond with C could be found to be a compelling reason to conclude that a termination petition would not be in C's best interests.

The court held there was sufficient evidence from which the juvenile court could conclude there was no compelling reason that a termination petition was not in C's best interests. By the time of the permanency hearing, C had been a ward of the court for four years. Mother was not available and father's earliest release date was in 2022. Father proffered KG as a guardian, however, DHS provided information that KG had not followed the child's safety plan, and despite reminders, resisted the plan's directions. The juvenile court elicited colloquy with both KG and the grandmother and was able to assess their demeanor. The court had evidence that the grandmother employed discipline inappropriate to C's vulnerability and that the proposed guardian failed to appreciate that problem and

resisted the safety plan. On this record, the juvenile court could conclude that the form of guardianship that father sought was contrary to the evidence that C needed to form a lasting bond with a long-term caregiver. The juvenile court could also conclude that a guardianship, which would be revisited upon father's eventual release, would leave C in what would amount to protracted foster care for another four critical years of his life – then be disrupted just as C is about to become a teenager.

Dissent

The dissent argued that the majority's construction functionally presumes that adoption is the best plan for every child and misplaces the burden of providing otherwise on father. ORS 419B.498(2) requires the juvenile court to engage in a meaningful inquiry as to whether a plan other than adoption is better suited to meet the health and safety needs of the child. Before the juvenile court may approve a plan of adoption, DHS must establish that there is not a compelling reason to forgo implementation of a plan of adoption. Here, DHS failed to meet that burden. C's attachment to father was well documented in the file, and there was no dispute that C did well when he was in father's care. Father continued to communicate with C by phone, and the child's attorney expressed that C continued to want to live with father. C was in a stable placement with his maternal cousin, KG. DHS must present evidence that it inquired into whether and how other permanency plans would meet the child's needs, and that such an inquiry revealed that, under the circumstances, no plan other than adoption would better serve the child's needs. In this case, DHS merely raised concerns about the guardian father had proposed, and the court briefly inquired into the nature of DHS's concerns. The court did not engage in the necessary meaningful inquiry to support its determination, and DHS did not present legally sufficient evidence that another plan such as a guardianship would not be better suited to meet C's health and safety needs than terminating father's parental rights.

- ***Dept. of Human Services v. S.J.M.,*** **364 Or 37 (2018)**

This case involved an appeal from a permanency hearing in which the juvenile court changed the permanency plan for two children, L and A, from reunification to adoption. L was removed from the home after AJB, the father of A, hit and injured L. A was subsequently born and also placed in foster care. The juvenile court took jurisdiction based on the parents' lack of parenting skills, father's physical abuse of L, mother's failure to protect L, and father's mental health condition. At the first permanency hearing, the juvenile court found DHS had made reasonable efforts, and that the parents had not made sufficient progress to make it possible for the children to safely return home. The court also found that the evidence did not support a determination that further efforts would make it possible for the child to safely return home within a reasonable time. Based on those findings, the court changed the permanency plans for the children from reunification to adoption. Pursuant to the directive in ORS 419B.476(5)(d), the juvenile court considered whether any of the circumstances in ORS 419B.498(2) (compelling reasons) were applicable. The juvenile court found there was not a compelling reason for determining that filing a petition to terminate the parents' rights was not in the children's best interests.

Parents appealed to the Court of Appeals. The Court of Appeals held that the compelling reasons determination is required, and that the juvenile court's findings under ORS 419B.476(5)(d) and ORS 419B.498(2)(b) were not supported by evidence in the record. DHS challenged the portion of the Court of Appeals implicit conclusion that DHS, as the party urging the court to change the permanency plan, bore the burden of proving that there was no compelling reason not to change that plan. Instead, DHS

argued that the burden to establish there is a compelling reason should be placed on the party opposing the change of plan from reunification to adoption.

Held:

The Supreme Court examined the text of the applicable statutes. ORS 419B.498(1)(a) requires DHS to file a petition to terminate parental rights when a child has been in substitute care under the responsibility of DHS for 15 of the most recent 22 months. ORS 419B.498(2) permits DHS not to proceed with a petition to terminate rights when there is a compelling reason, which is documented in the case plan, for determining that filing such a petition would not be in the best interests of the child. Unless the exception in ORS 419B.498(2) applies, DHS must proceed to file a TPR petition. When DHS invokes the exception because of the existence of a compelling reason, the statutory text plainly places the burden on DHS to document the compelling reason in the case plan.

The court considered the text of ORS 419B.476(5)(d) and ORS 419B.498(2) and held the party that argues for the exception (compelling reason) has the burden of proof. The court found further support for this interpretation in the Adoption and Safe Families Act of 1997, which Oregon's statute is modeled after, and by comparing ORS 419B.498(2) to other provisions in the juvenile code. The court also looked to OEC 305, which provides that a party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting. Parents' assertion that there are compelling reasons that filing termination petitions would not be in the children's best interest is essentially a defense to the consequences that would flow the juvenile court's initial determination to change the plans to adoption.

In sum, the Supreme Court held that once DHS met its burden to show that the requirements in ORS 419B.476 for changing the permanency plans from reunification had been met, it was the parents' burden, as the parties arguing for a compelling reason determination, to show that there was a compelling reason under ORS 419B.498(2) for DHS not to proceed with petitions to terminate parental rights. In these cases, the court found sufficient evidence in the record to support the juvenile court's legal conclusions, including its determination that there was no compelling reason that the filing of TPR petitions would not be in the best interests of the children.

Decisions of the Court of Appeals reversed, and the judgments of the circuit court affirmed.

Concurring Opinion:

Chief Justice Walters wrote a concurring opinion to address the requirements for changing the permanency plan from reunification to adoption. The juvenile court must consider whether (1) DHS has made reasonable or active efforts to make it possible for the child to return home; and (2) the parents have made sufficient progress to make it possible for the child to safely return home. ORS 419B.476(2)(a). The court must continue the plan of reunification if it answers both questions affirmatively or if it finds that DHS did not make the required efforts. However, if the court finds that DHS made reasonable efforts but the parents have not made sufficient progress, the court must consider a third question – whether further efforts will make it possible for the ward to safely return home within a reasonable time. ORS 419B.476(4)(c). When a juvenile court finds that further efforts will make safe reunification possible within a reasonable time, it has no choice but to order parents to participate in and make progress in those efforts and continue the plan of reunification. It is only when

a court finds that further efforts will not make reunification possible within a reasonable time that a juvenile court may adopt a permanency plan other than reunification.

After the Supreme Court's decision in *S.J.M II*, the Court of Appeals considered requests for remands in two cases involving parents who had appealed a permanency plan change on the basis that DHS had not met its burden that there were no compelling reasons under ORS 419B.498(2). The cases had been decided in the juvenile court before the Supreme Court's decision in *S.J.M. II.* The parents argued that they should be given an opportunity to meet the newly announced burden of proof before the juvenile court. In both cases, the Court of Appeals declined to remand the cases relying in part on ORS 419B.470(6), which provides a party the right to request a permanency hearing unless good cause is otherwise shown. See *Dept. of Human Services v. G.P.B*, 296 Or App 391 (2019); and *Dept. of Human Services v. S.J.K.,* 296 Or App 416 (2019).

Reasonable Efforts

- ***Dept. of Human Services v. J.E.R.,* 293 Or App 387 (2018)**

Dependency petitions were filed as to C, D and E on 7/26/16. The juvenile court authorized DHS to remove the children after a shelter hearing, and DHS placed them in foster care. A jurisdictional hearing was set over several times and eventually held on 11/28/16. Mother admitted that she lacked the parenting skills to safely parent in exchange for DHS's dismissal of the other allegations against her. A contested dispositional hearing was held on 3/9/17, and dispositional judgments were entered on 4/24/17, approximately nine months following the filing of the petitions. Mother refused to participate in DHS services during that nine-month period and asserted she was not required to do so until the court decided what services were required to ameliorate the basis of jurisdiction.

On 5/2/17, the caseworker met with mother and provided her with an action agreement. Mother began engaging in the DHS recommended services: on 6/1/17 she began individualized family sexual abuse treatment with her mental health counselor who observed progress in her sessions from June forward; she participated in a psychological evaluation on 6/13/17; and she participated in recommended DBT therapy as soon as it was available beginning 8/28/17.

In late September 2017, about five months following entry of the dispositional judgments, the juvenile court held a permanency hearing. DHS acknowledged mother was doing well but asked the court to change the plan from reunification to adoption citing concerns that mother would not be able to make sufficient progress within a reasonable time. The children's psychological evaluators believed all three required highly skilled caregivers and should not be required to wait longer for permanency. At the permanency hearing, mother argued the nine-month delay could not be attributed to her and that she had been successfully engaging in services for the five months post-disposition. The juvenile court noted the nine-month period before disposition was unusually long and allocated responsibility to all involved. The court considered the services DHS offered, including the pre-jurisdiction period in which mother refused services. Based on that consideration, the court determined DHS had made reasonable efforts, and ultimately changed the permanency plans from reunification to adoption. Mother appealed.

Held:

On appeal, mother argued the juvenile court erred in considering the pre-jurisdiction efforts by DHS because, until jurisdiction was determined and disposition was ordered, she was not required to engage in services and the court could not assess whether DHS was providing mother with a reasonable opportunity to ameliorate the original basis for jurisdiction.

The particular circumstances of each case dictate the type and sufficiency of efforts the state is required to make and whether the types of actions it has required parents to take are reasonable. DHS's efforts are reasonable only if DHS has given the parents a reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents. The issues identified in the jurisdictional judgment provide the framework for the court's analysis of reasonable efforts and of the parent's progress to make it possible for the child to return home safely. DHS's efforts are evaluated over the entire duration of the case, with an emphasis on a period before the permanency hearing sufficient in length to afford a good opportunity to assess parental progress.

Under the facts of this case, the juvenile court could not assess whether DHS efforts were reasonable through the lens of the jurisdictional basis until after the dispositional judgments required mother to engage in services. Because mother contested the need for services and the dispositional judgments were delayed for nine months, the juvenile court erred in concluding that it could consider the time period *before* the entry of the jurisdictional and dispositional judgments in evaluating reasonable efforts. DHS's efforts during that time period were not appropriately part of the reasonable efforts analysis under ORS 419B.476(2)(a). In addition, DHS efforts made after the entry of the jurisdiction and disposition judgments were insufficient for the trial court to conclude that DHS made reasonable efforts, given the short time frame that the court had to assess mother's progress and mother's limited opportunity to engage in the services offered. Although mother immediately engaged in DBT sessions when they were available after the dispositional judgment, a one-month period of DBT was not sufficient in length to afford a good opportunity to assess parental progress.

Reversed and remanded.

Termination of Parental Rights

- ***Dept. of Human Services v. T.M.D.*, 365 Or 143 (2019)**

From the Oregon Supreme Court Media Release:

Today, the Oregon Supreme Court held that termination of mother's parental rights was not in child's best interest, given child's need to maintain his maternal familial relationships, and that his need for permanency could be satisfied by making his maternal uncle and aunt his permanent guardians.

Following a permanency hearing in which the juvenile court changed child's plan from reunification with mother to adoption, the Department of Human Services (department) filed a petition to terminate mother's parental rights so that child could be adopted. The department alleged, and the juvenile court found, that mother was unfit and that child could not be returned to her care within a reasonable period of time. However, the juvenile court further found, contrary to the department's allegation, that termination of mother's parental rights was not in child's best interest. The juvenile court determined that child needed permanency, but it also determined that child needed to maintain his maternal

familial relationships. The juvenile court reasoned that a permanent guardianship could suffice in providing child the permanency that he needs. The juvenile court viewed this placement as providing an "incentive" to mother.

The department appealed. It took issue with the juvenile court's rationale and argued that, once a parent is proven to be unfit and that return of a child to the parent's care is improbable within a reasonable period of time, it should be presumed that termination of parental rights is in the child's best interest. The Court of Appeals, in a split decision, declined to address the presumption issue, but it nonetheless reversed the judgment of the juvenile court. The Court of Appeals determined that the juvenile court's approach to the best-interest inquiry was not child centered and instead was focused on providing mother an incentive to succeed. The Court of Appeals reasoned that a permanent guardianship, although providing child with some degree of permanency, was not the most permanent placement suitable to child and that freeing child for adoption would give child the permanency he requires. Accordingly, the Court of Appeals held that it was in child's best interest to terminate mother's parental rights.

In an opinion authored by Chief Justice Martha L. Walters, the Supreme Court reversed the decision of the Court of Appeals. The Court first determined that, when it is established that a parent is unfit and that returning a child to that parent's care is improbable within a reasonable period of time, there is not a presumption that termination is in the child's best interest. The Court also determined that there is not a legislative preference for termination in those circumstances. The Court explained that there was nothing in the text of the relevant statutes, the context of the statutory scheme, or the legislative history that demonstrated that the best-interest inquiry is weighted with such a presumption or preference. The Court then addressed whether termination was in child's best interest. Reviewing *de novo,* the Court gave significant weight to the evidence demonstrating child's bond with mother and her relatives, and it reasoned that a permanent guardianship -- which is not a temporary arrangement intended to give mother more time to become a fit caretaker -- would provide child with the permanency he needs. The Court held that it was not in child's best interest to terminate mother's parental rights.

Justice Thomas A. Balmer filed a concurring opinion. He explained that he fully agreed with the Court's opinion, but emphasized that the case was a close one, and cautioned lower courts against "fact-matching" in their application of the "best interest of the child" standard.

- ***Dept. of Human Services v. M.A.H.,*** **297 Or App 725 (2019)**

M and T were removed from parents' care in 2010 and A was removed in 2013. The children were returned to parents briefly in 2014 and later brought back into care after mother starting using drugs again. The case recites a long history of drug use, physical and medical neglect of the children, domestic violence, child abuse and mental health issues.

By the time of the termination trial, mother had made some progress. Dr. Basham testified that he wasn't fluent with the needs of the children but he saw mother as a having a positive prognosis for living a reasonably stable life and engaging as a parent. However, he did not think that mother had attained the insight needed and that she failed to take responsibility for the behavior that led to the children's removal. Although mother had not had visits close in time to the TPR trial, previous visits had been described as chaotic. Mother yelled at the children and allowed them to physically fight. M reported

that, when he lived with mother, she had hit him with items such as belts and a coat hanger, as well as yanking the children by the hair and pushing them around. The two older children experienced significant trauma and have emotional and behavioral health issues. All three children are bonded with the grandparents, whom they have lived during most of their time in foster care.

The juvenile court denied mother's motion to terminate A's wardship and terminated mother's parental rights to all three children based on unfitness. Mother appealed.

Held:

Affirmed. On de novo review, the Court of Appeals concluded that the evidence is clear and convincing that, despite the progress that mother made the year before trial, she is nevertheless unfit due to current conditions that remain seriously detrimental to the children.

To determine if a parent is unfit, the court determines (1) whether the parent has engaged in some conduct or is characterized by some condition; and (2) the conduct or condition is "seriously detrimental" to the child. If the parent meets both criteria, the court must also find that integration of the child into the home of the parent is improbable within a reasonable time due to conduct or conditions not likely to change. A parent's fitness is measured at the time of the termination trial and the focus is on the child, not just the seriousness of the parent's conduct or condition in the abstract. Finally, the court must find that termination of parental rights is in the child's best interests.

In this case, the court found that the children had endured a history of neglect and deprivation and a series of placement disruptions. Mother indicated an intention to terminate the children's relationship with grandparents, whom she blamed for the fact that the older two children did not want to return to her care, despite her knowledge that it would have a detrimental impact on the children. Her failure to recognize her own pattern of relapse and how that may play into the fears of her children undercuts her claims that drug use is no longer of concern; her period of sobriety has occurred while the children were out of her custody, and her failure to reckon with the costs to the children of her history of drug dependence rises to the level of present unfitness even if she is sober. So does her lack of concern about disrupting the child's current attachments. Mother's inability to recognize how her history has contributed to her children's emotional and behavioral challenges, and instead blaming the caregivers who have provided the children with a stable environment, undermines her claim that she is ready to provide them with minimally adequate care. Finally, the court concluded that termination is in the children's best interest. The court found continued delays in permanency for A will compromise her best interests in forming healthy attachments. Mother's unwillingness to grapple with the reasons for M and T's emotional and behavioral challenges makes termination of mother's parental rights the best option for achieving the stability they need.

- ***Dept. of Human Services v. H.R.E.,*** **297 Or App 247 (2019)**

The juvenile court took jurisdiction over child in 2016, after police stopped a car driven by mother and father and found methamphetamine and syringes inside. Mother and father both displayed physical signs associated with methamphetamine use. After child was removed, mother engaged in substance abuse treatment and underwent urine testing, which came back negative for illegal drugs. Mother also attended parenting classes and participated in regular visits with the child. Family members attended classes to help them recognize signs of relapse in persons addicted to drugs. Six months prior to the

termination trial, mother obtained full-time employment and was required to undergo random drug testing as part of that employment.

At the time of the TPR trial, mother was living in her parents' home with two of her adult children. The home was determined to be an approved placement for the child, provided that mother did not live there. Although mother denied having used methamphetamine at any time during the dependency case, two hair follicle tests conducted three to four months and a week or two prior to the TPR trial detected low levels of methamphetamine. A DHS expert witness testified that the test revealed very low levels of methamphetamine. The psychologist who evaluated mother a year and a half prior to the trial stated in his evaluation that if mother continued to stay with her family (and remain separated from father), he would have no significant concerns with respect to her readiness to care for the child. However, at trial he expressed concern about mother's prognosis to parent in light of the hair test results, because methamphetamine use is very disruptive. He also indicated that mother is defensive and not receptive to mental health treatment, however, she did not have any identified mental health problems.

The juvenile court found that DHS had established unfitness and neglect and terminated mother's parental rights under ORS 419B.504 and ORS 419B.506. Mother appealed.

Held:

Reversed and remanded.

The court set forth the test for unfitness under ORS 419B.504. The court must find that: (1) the parent has engaged in some conduct or is characterized by some condition; and (2) the conduct or condition is seriously detrimental to the child. If the parent meets those criteria, the court must also find that integration of the child into the home is improbable within a reasonable time due to conduct or conditions not likely to change. In determining whether the parent's conduct or condition is seriously detrimental, the focus is on the effect on the child, or the potential for harm to the child. The inquiry is child specific. DHS also must prove that the conduct or condition is seriously detrimental *at the time of the TPR hearing.*

On de novo review, the Court of Appeals was not persuaded, by clear and convincing evidence, that mother's conduct or condition at the time of the termination trial was seriously detrimental to child and, accordingly, found it was error to terminate mother's parental rights based on unfitness. Other than the hair follicle test, the court found mother had no other signs of a relapse. She had participated in treatment, was gainfully employed and had made significant efforts to maintain her connection with child over the course of the case. In the absence of evidence that mother's seemingly incidental use of methamphetamine negatively affected her employment, relationships, or other parts of her life in any way, the test results alone did not persuade the court that mother was unfit.

Mother's rights were also terminated for neglect on the ground that she had, without reasonable and lawful cause, failed to provide care or pay a reasonable portion of substitute physical care and maintenance while the child was lodged with others. The Court of Appeals found there was no evidence regarding whether mother had or had not paid any costs of the child's substitute care, nor was there any evidence that mother had ever been ordered or instructed to do so. In the absence of evidence, the court found DHS had not proved by clear and convincing evidence that mother had failed or neglected without reasonable and lawful cause to provide for the needs of the child under ORS 419B.506.

- ***Dept. of Human Services v. T.L.B.,* 294 Or App 514 (2018)**

This case involves an appeal from a judgment terminating mother's rights to her two-year-old daughter, K. When K was born in October of 2015, six of mother's children were in foster care. Mother had multiple children with three abusive partners and had a history of DHS involvement dating back to 2003. After a dependency petition was filed regarding K, mother admitted to engaging in a pattern of abusive relationships that had not been ameliorated despite receiving services and to having mental health problems that interfere with her ability to safely parent K. Father, RP, admitted he had substance abuse problems and engaged in violent and erratic behaviors. The court took jurisdiction and K was placed at home. Mother was ordered to participate in parent-child therapy, ISRS services with a demonstration of skills learned, and domestic violence counseling with a DHS-approved provider. The court ordered father not have any contact with K except as authorized or supervised by DHS.

In March 2016, police responded to a 9-1-1 call from mother's home. When they arrived, mother was covered in blood, and there was blood on the walls and floor. Mother told police that RP had forced his way through a window, cutting himself in the process. Mother said she barricaded herself in a bedroom with H and K. Mother and RP later acknowledged they had been having contact, despite the restrictions in place prohibiting RP from being in the home. DHS placed K in foster care. At a permanency hearing approximately four months later, the court changed the permanency plan to adoption.

At the termination of parental rights trial, the court heard testimony from psychologist Glenna Giesick, who conducted evaluations of K and several of her siblings. Dr. Giesick noted that the children had experienced a great deal of trauma, neglect and were possibly exposed to domestic violence. They had a variety of diagnoses – from PTSD to oppositional-defiant disorder – which Dr. Giesick testified could largely be attributed to their chaotic and unregulated environment while in mother's care. All of the children had measurably improved since they had been in foster care. Dr. Giesick opined that returning K home would place her at risk for developing a mental health condition or behavioral concerns. In foster care, K did not meet the diagnostic criteria for any major mental illness or behavioral disorder, and her primary attachment figure was her foster mother. Dr. Geisick believed it was not reasonable for K to wait any longer for her parents to adjust their conditions and circumstances given that mother had not been able to maintain positive changes, and it seemed counterproductive to expose a well-developing toddler to the stress and instability that reunification would likely entail. Finally, Dr. Giesick testified that K needed to develop permanency as soon as possible to minimize the risk of impairing her psychological, interpersonal and academic development. Testimony from Lee Ann Wichmann, a licensed marital and family therapist added that there was no evidence that mother could sustain effective parenting skills in a home setting, without DHS involvement and supervision. She expressed considerable doubt that mother could demonstrate the ability to safely parent K within a reasonable time given K's developmental needs. The longer K stayed in foster care, the greater the risk she would face developing attachment issues and other difficulties. Evidence was also presented that mother had been diagnosed with dependent personality disorder, with persistent depressive disorder and dependent personality disorder with antisocial features to be ruled out. In addition, given mother's minimal progress over the last two years, she was given a timetable of over one year to make any significant lasting change. She was given a poor prognosis for change given her lack of insight into dependent personality disorder, which was not being treated.

The juvenile court found DHS had established by clear and convincing evidence that mother was unfit to parent K, that reintegration into mother's care within a reasonable time was improbable because the conduct or conditions that caused her to be unfit were unlikely to change within a reasonable time, and that it was in K''s best interests that mother's parental rights be terminated and K be freed for adoption. Mother appealed.

Held:

Affirmed.

Mother argued that since she was showing progress in services and had not been having contact with RP for six months prior to the TPR trial (and didn't plan to reunite), there was insufficient evidence to establish she was unfit under ORS 419B.504. The court rejected this argument based on expert testimony that mother had made little or no progress in addressing the pattern of returning to abusive partners, and mother's repeated assurances to others that she knew she needed to avoid her abusers, only to continue contacting them behind the back of DHS and treatment providers. The court found the balance of evidence supported the finding that mother lacked the parenting and other skills necessary to maintain both a suitable living situation and a safe and stable home for K. The court found mother is unfit and that K cannot be reunited with mother within a reasonable time because those circumstances are unlikely to change.

Regarding the question of whether termination is in K's best interest, the court emphasized that this determination is a child-centered inquiry. The court must determine whether clear and convincing evidence relevant to K's circumstances supports the conclusion that it is in her best interests to be freed for adoption. An undifferentiated assertion that a given child requires permanency as soon as possible provides no child-specific information and will not satisfy DHS's burden. The court contrasted this case with *Dept. of Human Services v. M.P.-P.,* because the evidence of K's bond with mother was substantially more limited than that present in *M.P.-P.* The court relied on testimony from Wichmann that K was securely attached in her foster home, and that she had a less secure attachment with her mother. Further, Wichmann testified that mother had demonstrated an inability to maintain a safe and stable home for K and her siblings and nothing had changed for several years, and there were no indications that things would change. Finally, the court noted the evidence regarding K's siblings' health, safely and development when they were in mother's care, and what that may mean for K if mother were to retain her parental rights. The court concluded it was in K's best interests that mother's parental rights be terminated.

- ***Dept. of Human Services v. T. L. M. H.,* 294 Or App 749 (2018)**

Mother appealed a juvenile court judgment terminating her parental rights to her son, B, over the opposition of mother and B. Mother's rights were terminated on the grounds that she is unfit to parent B under ORS 419B.504 and that it is otherwise in B's best interest that mother's rights are terminated. On appeal, mother contested the determination that termination of her rights is in B's best interest.

On mandatory de novo review, the court was not persuaded that there was clear and convincing evidence in the record to show that termination of mother's parental rights is in B's best interest. First, the court was persuaded by the evidence that B was strongly bonded to his mother and older sister, and that it would be best for B if those attachments could be maintained. *See* ORS 419B.498(2)(b)(B). None

of the facts establishing mother's unfitness involved abuse of B. The psychologist who evaluated B opined that it would be disrupting to B to cut off his contact with mother, and that it would be best for B to have ongoing contact with mother, provided she consistently attends visits and can be supportive of the permanent placement plan for B. In addition, the psychologist opined it would be best for B to have ongoing contact with other relatives and adults who have become important to B, so long as they are deemed to be safe, stable and appropriate. Second, the court stated the record offered little evidence about the viability of other potential permanent arrangements for B that would allow for a meaningful evaluation of whether and how B's attachments could be preserved in a manner consistent with his permanency needs. The psychologist testified that B needs to be in a home that he considers permanent and that won't change. But, the psychologist did not differentiate or give an opinion on whether adoption, guardianship or some other plan would be best for B. DHS also presented no evidence addressing whether B's potential adoptive resource and placement – his grandparents – were amenable to a guardianship and the extent to which they would be willing to facilitate B's relationship with mother, his sister, and other's if mother's parental rights were terminated. Finally, the court noted the record lacked the evidence to assess meaningfully whether severance of mother's relationship with B might be necessary to ensure mother does not undermine the efforts of B's primary caregivers to provide him the type of stable and permanent home he needs.

The court rejected an argument from DHS that no other permanency plan can provide the safety and security of adoption and that other forms of permanency would create uncertainty for B. Rather, the court observed the juvenile code demands a persuasive factual showing that termination of parental rights to a particular child is in that child's best interest, in view of the particular needs and circumstances of the child.

Reversed and remanded.

Program Agenda Through the Eyes of a Child
Sunday August 11, 2019

2:45 pm
The Permanency Judgment Update
Megan Hassen, Senior Juvenile Law Analyst, JCIP
Holly Rudolph, Executive Services Division

These documents have been posted on the JCIP website:

- Using Guide & File for Permanency Judgments PowerPoint
- Notice about Expunction (Dependency)
- Form - Permanency Judgment

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR _____ COUNTY

In the Matter of:	)	Case Number: _____
	)	
_____	)	**PERMANENCY JUDGMENT**
A Child.	)	**(Voluntary Placement or Custody Agreement)**

► **This matter came before the Court on _____, 20_____.**

Persons appearing:

Legal Father *(name)*:	Attorney:
Putative Father *(name)*:	Attorney:
Mother:	Attorney:
Child:	Attorney:
Tribe:	Tribal Atty/Rep:

CASA:	Deputy D.A:
Guardian:	Assist. Atty Gen'l:
DHS Caseworker:	Other:
Guardian Ad Litem:	Other:

Type of Permanency Hearing:

☐ **Annual Review:** 14 months after original voluntary placement or custody agreement or subsequent annual review. ORS 418.312; OAR 413-040-0130.

☐ **At the request of**: _____ ☐ **By order of the court.** ORS 419B.470(5)

INDIAN CHILD WELFARE ACT (ICWA):

☐ ICWA **does not** apply.

☐ ICWA **does** apply, because the child is an "Indian child" under the ICWA (25 USC §§ 1901-63), who is a member of, or is eligible for membership in, the following Indian tribe(s): _____.

Standard of Proof / Evidence Considered:

The Findings made below are based on ☐ a preponderance of the evidence ☐ clear and convincing evidence, because the child is an "Indian child" under the ICWA (25 USC §§ 1901-63).

The court considered the following evidence in making the Findings and Orders in this Judgment:

☐ Stipulations by the parties.
☐ The exhibits admitted by the court.
☐ The testimony of the witness(es) at the hearing.
☐ The following facts and/or law, of which the court has taken judicial notice:_____
_____
_____.

DRAFT

THE COURT MAKES THE FOLLOWING FINDINGS AND ORDERS:

1. NOTICE AND PARTICIPATION

►**Foster Parent(s)/Care Provider(s)**

☐ The child is in substitute care, and DHS ☐ **did** ☐ **did not** give the foster parent(s)/current care provider(s) notice of the hearing.

☐ The foster parent(s)/current care provider(s) **did not attend** the hearing.

☐ The foster parent(s)/current care provider(s) **attended** the hearing and had an opportunity to be heard.

►**Grandparent(s)**

DHS ☐**made** ☐**did not** make diligent efforts to identify, obtain contact information for, and notify all grandparents of the hearing.

☐ No grandparents attended the hearing, *or*

The following grandparents attending the hearing and had an opportunity to be heard:

Maternal: ☐ grandmother ☐ grandfather

Paternal: ☐ grandmother ☐ grandfather

☐ The grandparents who attended the hearing were informed of the date of a future hearing.

☐ DHS **did not** give the grandparents notice of the hearing because: _____.

☐ For good cause shown, the court relieves DHS of the responsibility to provide notice of this hearing.

2. DILIGENT EFFORTS – CHILD IN SUBSTITUTE CARE:

►Relative Placement

☐ The child is in substitute care, and DHS ☐ **has made** ☐ **has not made** diligent efforts to place the child with a relative/person who has a caregiver relationship with the child, as required by ORS 419B.192.

☐ DHS has decided to place the child with a relative/person who has a caregiver relationship with the child, but that placement is not in the child's best interest, because: _____

_____

►Sibling Placement

☐ The child is in substitute care and has one or more siblings in substitute care.

DHS ☐ **has made** ☐ **has not made** diligent efforts to place the child with siblings, as required by ORS 419B.192. ☐ Placement together is not in the best interest of the child or sibling.

3. PLACEMENT

► **Placement:**

The child's current placement is: ☐ in home with parent or guardian (or)

substitute care: ☐ relative ☐ current caretaker ☐ non-relative/non-current caretaker ☐ permanent foster care ☐ residential ☐ adoptive resource ☐ Other: _____

- placement ☐ **is** ☐ **is not** an interstate placement
- placement ☐ **is** ☐ **is not** the least restrictive, most family-like setting that meets the health and safety needs of the child and is in reasonable proximity to the child's home.

- ☐ The placement **is** in the best interests of the child.
- ☐ The placement **is not in the best interests of the child**. DHS is ordered to place the child in:
  - ☐ home with parent or ☐ substitute care with: ☐ relative ☐ current caretaker ☐ non-relative/non-current caretaker ☐ residential ☐ other:

    _____

- ☐ ICWA applies. The court finds that the selected placement ☐ does comply ☐ does not comply with the placement preference(s) established by 25 USC §1915. Additional findings/ orders: _____

DRAFT

4. NUMBER OF PLACEMENTS, VISITS, SCHOOL CHANGES AND DHS CONTACTS

Since the child has been in the guardianship or legal custody of DHS the child has had:

Item	Number	Is the number in the child's best interest?
Face to face contacts with caseworker		☐ yes ☐ no
Out of home placements		☐ yes ☐ no
Visits with Mother		☐ yes ☐ no
Visits with Father		☐ yes ☐ no
Visits with sibling(s)		☐ yes ☐ no
Schools attended		☐ yes ☐ no

► **School of origin**.

☐ The court finds **it is** in the child's best interest to attend the child's school of origin.

☐ The court finds **it is not** in the child's best interest to attend the child's school of origin or any other school in the child's district of origin.

►**Additional findings:** _____

5. EDUCATION (CHILD 14 OR OLDER)

The child ☐ **is** ☐ **is not** progressing adequately toward graduation from high school, needs _____ more credits to graduate, and is expected to graduate _____, 20_____.

DHS **has made** the following efforts to assist the child to graduate: _____
_____.

DHS **is ordered to make** the following additional efforts: _____
_____.

6. TRANSITION PLAN

☐ **Plan review not required**

☐ **Plan review required:** The child is 14 years or older.

- The comprehensive plan ☐ **is adequate** ☐ **is not adequate** to ensure the child's transition to a successful adulthood.
- DHS ☐ **has** ☐ **has not** offered appropriate services pursuant to the comprehensive plan and ☐ **has** ☐ **has not** involved the child in the development of the comprehensive plan.

☐ DHS is ordered to modify the comprehensive plan and/or the development of the plan, as follows:_____
_____

7. PERMANENT PLAN - *REUNIFICATION* (ORS 419B.476(2)(a) AND (5)):

☐ Reunification of the family is the permanent plan (case plan) in effect at the time of this hearing.

► DHS reunification effort

DHS ☐ **has** ☐ **has not** made ☐ **reasonable** ☐ **active** efforts to reunify the family. The court considered whether placement of the child and referral to the Strengthening, Preserving and Reunifying Families Program is in the child's best interest as required by ORS 418.595. DHS efforts include the following: _____
_____

☐ Description of reasonable/active efforts is attached as Exhibit ____, and is adopted as the Court's written findings.

DHS ☐ **has** ☐ **has not** made reasonable efforts to finalize the permanent plan of reunification.

► **The reunification efforts of DHS (*i.e.*, services provided either directly or through DHS referrals or financial support) include the following:**

Child		*Mental Health/Behavior Support*	*Mother*	*Father*	*Parenting and Home*	*Mother*	*Father*	*Child Treatment & Care*
☐		Residential Services	☐	☐	Specialized parent training	☐	☐	Counseling or treatment & assessment
☐		Other:	☐	☐	Parent training	☐	☐	Development of safety plan
		Family Reintegration				☐	☐	Individual counseling
☐		Family time				☐	☐	Intensive Family Services
☐		Family counseling				☐	☐	*Other:*
						☐	☐	

► **Case Plan Compliance/Progress:**

DHS	☐ DHS **is** in compliance with the current case plan. ☐ DHS **is not** in compliance with the current case plan, and, to correct the non-compliance, DHS is ordered to:_____ ☐ DHS is ordered to develop/modify the case plan, as follows within ____ days of this permanency hearing and to provide a case progress report to the court and the parties: _____
Mother:	☐ Mother **is** involved in the case and ☐ **has** ☐ **has not** made sufficient progress toward meeting the expectations set forth in the family support services plan and the child ☐ **can be** ☐ **cannot be** ☐ **has been** safely returned to mother's care. Additional findings: _____
	☐ Mother **is not** involved in the case, because mother's parental rights were terminated/relinquished or mother is deceased, or ☐ other: _____
Father:	☐ Father **is** involved in the case and ☐ **has** ☐ **has not** made sufficient progress toward meeting the expectations set forth in the family support services plan, and the child ☐ **can be** ☐ **cannot be** ☐ **has been** safely returned to father's care. Additional findings: _____ ☐ Father **is not** involved in the case, because father's parental rights were terminated/ relinquished, father is deceased, or ☐ other: _____

DRAFT

CONCURRENT PLANNING:

☐ There **is** a concurrent plan: ☐ Adoption ☐ Permanent guardianship under ORS 419B.365 ☐ Guardianship under ORS 419B.366 ☐ Placement with a fit and willing relative ☐ A planned permanent living arrangement (APPLA), which is ☐ permanent foster care ☐ permanent connections and support (residential treatment, independent living, substitute caregiver).

DHS has made the following efforts to develop the concurrent plan, which ☐ **include** ☐ **do not include** efforts to identify appropriate permanent placement options both inside and outside this state:

_____

_____

Those efforts ☐ **are** ☐ **are not** sufficient. ☐ DHS is ordered to make the following additional efforts to develop the concurrent plan and report those efforts to the court:

_____.

Note: a concurrent plan will not be implemented unless a dependency petition is filed and other legal requirements have been satisfied.

☐ There **is not** a concurrent plan because:_____

_____

_____

8. COURT'S DETERMINATION OF THE PERMANENCY PLAN. ORS 419B.476(5)(a)-(g)

The court orders the plan be continued as follows:

☐ **REUNIFICATION**, under ORS 419B.476 (4)(c) and (5)(c), because further efforts will make it possible for the child to be safely returned to ☐ **mother's** ☐ **father's** care within a reasonable time.

THEREFORE, between _____, 20___ and _____, 20_____. the parents are ordered to participate in the following services and make the progress specified below:

Mother	Services:
	Progress:
Father	Services:
	Progress:

9. SUBSTITUTE CARE

☐ The child is in substitute care**,** which is not a permanent placement, and continued substitute care is necessary and is in the child's best interest for the following reasons:_____

_____.

☐ Parent(s) and DHS indicate they agree to continue the voluntary placement/custody agreement.

It ☐ is ☐ is not in the child's best interest to continue under the voluntary ☐ placement ☐ custody agreement.

Termination of the child's voluntary ☐ placement ☐ custody agreement is expected to occur by, or before, _____, 20

DRAFT

Under ORS 419A.255(4)(a)(C), the Court consents to the use and disclosure of records, reports, materials or documents in the record of the case or the supplemental confidential file by DHS if such use and disclosure is reasonably necessary to perform its official duties related to the involvement of the child with the juvenile court.

10. ADDITIONAL FINDINGS AND ORDERS:

- ☐ The court incorporates and adopts by this reference the oral findings made by the court at the conclusion of the permanency hearing.
- The court ☐ **has** ☐ **has not** consulted with the child, in an age appropriate manner, regarding the permanency and transition plans proposed for child, as required by 42 U.S.C. § 675.

The court makes the following additional findings and orders: _____

_____

_____

☐ **All parties present were notified of these court dates and are ordered to appear.**

APPEARANCE TYPE:	**DATE:**	**TIME:**
►Review hearing		
►Permanency hearing		
►Because the child is placed in substitute care pursuant to an agreement with DHS, the CRB will conduct a review of this case in:	☐ six months ☐ three months	
► Other:		
►☐ No further review necessary.		

DATED: _____.

_____
CIRCUIT JUDGE

_____
Print, Type or Stamp Name of Judge

DRAFT

Notice about Expunction (Dependency)
Cases Related to Child's Act or Behavior (ORS 419A.260)

You may have the right to request expunction of records relating to your contact with law enforcement (police), the juvenile department, the juvenile court, and other related agencies, if that contact was related to your behavior.

> Note: The information below is only a partial summary of Oregon law on expunction. For a more detailed and complete statement of the law, please read ORS 419A.260 to ORS 419A.265 or talk to an attorney.

What is expunction?

Expunction is a process allowed under Oregon law (ORS 419A.262) that allows a judge to order the destruction or sealing of certain court, agency and law enforcement records about a child or youth.

Which records can be expunged?

Records that have information about **a child's behavior** that resulted in contact with law enforcement, the juvenile court, the juvenile department, the Psychiatric Security Review Board, the Department of Human Services and the Oregon Health Authority, may be expunged, with some exceptions. For example, appellate court records can't be expunged. There are other types of records outlined in ORS 419A.260(1)(d) that can't be expunged, including records of certain serious offenses.

Records that contain information about a case or investigation that was **based on the parent's behavior** (neglect or abuse) **can not be expunged**.

Who can request expunction?

The child who the records are about may request that the records be expunged. The juvenile department may also request the records be expunged. The court may also order expunction after providing notice to the child, in some circumstances.

How do I ask the judge to expunge my records?

Check with the juvenile court in the county where you resided when your case was closed. Most courts have a specific form that you will need to fill out and may require that it be notarized. Follow any instructions provided by the court.

What happens when records are expunged?

When the court orders records be expunged, the juvenile court sends a copy of the judgment to each agency subject to the judgment. To comply, records of the child's contact with those agencies must be removed and destroyed or sealed, with some exceptions. The juvenile court assembles a list of complying agencies and sends it, along with a copy of the expunction judgment, to the person whose records have been expunged.

When a record has been expunged, it's treated like it no longer exists. The person who was the subject of the record may say that the record never existed and the contact never occurred without committing perjury or false swearing under Oregon law.

When can I request that my records be expunged?

The court has authority to expunge a record when:

- ✓ The person is at least 18 years old and was never found within the jurisdiction of the court; or
- ✓ The court finds expunction is in the best interests of the person and the public; or
- ✓ At least five years have passed since the case was dismissed and (1) there are no pending juvenile or criminal proceedings against the person; (2) the juvenile department is aware of no pending law enforcement investigation into the conduct of the person; and (3) since the juvenile case was dismissed, the person has not been convicted of a person or Class A misdemeanor.

Can an attorney help me with the request for expungement?

You may hire your own attorney. If a hearing is held and you can't afford an attorney, you may request that the court appoint an attorney to represent you. Contact the court for instructions on how to apply for a court appointed attorney. If the court does not want to grant your request for expunction, or the district attorney objects to the request, a hearing will be held. Most cases do not involve a hearing.

The Oregon State Bar offers programs to help find a lawyer, including lawyers who are willing to work for a reduced rate. Please visit https://www.osbar.org/public/ris/ or call 503-684-3763 or toll-free in Oregon at 800-452-7636 for more information.

Program Agenda Through the Eyes of a Child
Sunday August 11, 2019

3:15 pm
Legislative Update
Leola McKenzie, Director JFCPD
Kristen Farnworth, Senior Juvenile Law Analyst, JCIP

These documents have been posted on the JCIP website:

- JCIP Update PowerPoint
- Links to SB 171, 181, 1008 and HB 2849
- Protective Custody Hearings Handout

2019 Legislative Update

Kristen Farnworth, Senior Juvenile Law Analyst
- Kristen.P.Farnworth@ojd.state.or.us

Oregon Judicial Department
- Juvenile and Family Court Programs Division

https://www.oregonlegislature.gov

- Read bills/download bills
- Watch hearings
- View exhibits submitted at hearing
- Today's Presentation is a Summary of Bills
  - Not intended to be comprehensive in depth review of each bill

HOT BILL: HOUSE BILL 2849

- History:

ORS 419B.150 allows a child to be placed into protective custody if the child's, "condition or surrounding reasonably appear to be such as to jeopardize the child's welfare."

4th and 14th Amendments to the US Constitution directs that placement of a child into protective custody requires a showing of both *exigency* and *severe harm*.

HOT BILL: HOUSE BILL 2849 *(Continued)*

- Result:
- January 1, 2020
- Requires court order to take a child into protective custody **unless** reasonable cause to believe:
  - There is an imminent threat of severe harm to the child
  - The child poses an imminent threat of severe harm to self or others
  - There is an imminent threat that the child's parent/guardian will cause the child to be beyond the reach of the juvenile court before the child can be taken into protective custody
  - If there is reason to know that the child is an Indian child, the child may be placed into protective custody without court order when it is necessary to prevent imminent physical damage or harm to the child.

Family First Prevention Services Act

- FFPSA federal legislation signed into law February 9, 2018.
- Family First x 3
  - Keep children safely at home by providing services to prevent removals.
  - When children need out of home placements, children should be served in family foster homes not congregate care settings.
  - Recruit and retain high quality foster families and relative providers.
- Basis for and goals of FFPSA
  - Preserving Families: States have repeatedly made the case they can reduce costs and keeps families together if they can use IV-E funds for prevention services.
  - Systemically addressing substance use/opioid issues (A major reason children come into foster care is parental substance abuse.)
  - Paying for what works/evaluate programs to make sure they're effective Moving forward, a goal of Congress is to focus on what works and to evaluate the effectiveness of federally-funded programs.

HOT BILL: SENATE BILL 171

Effective July 23, 2019* Oregon implementation of QRTP provisions July 1, 2020

Authorizes (DHS) to make payment for services to make available, maintain, and operate child-caring agency/agencies that are a qualified residential treatment program (QRTP).

Court to approve/disapprove placement at hearing. Must make findings:

- If the needs of the child or ward can be met through placement in a foster family home or in a proctor family home.
- If not, is the placement of that child or ward into a QRPT
  - the least restrictive setting to provide the most effective and appropriate level of care?
  - consistent with the individual's case plan?
- The court may receive testimony, reports or other material relating to the child or ward's mental, physical and social history and prognosis without regard to the competency or relevancy of the testimony, reports or other materials under the rules of evidence.
- If the court enters an order disapproving the placement, DHS shall move the child or ward to a placement consistent with the court's order no later than 30 days following the date the court enters the order.

Modifies Definition of "Child-caring agency" & establishes reporting requirements for county juvenile departments' court reports that are related to Title IV-E participation

SENATE BILL

181

June 27, 2019

- The Children's Care Licensing Program (CCLP) licenses child-caring agencies.
- Senate Bill 181 A modifies the definition of "child-caring agency" to include county programs that provide care or services to children in custody of Department of Human Services or Oregon Youth Authority but does not include any local juvenile detention facility that receives state services provided and coordinated by DOS under ORS 169.070.
- Now these programs are under the licensing authority of the CCLP.
- Previously, DHS required contracted county programs to obtain "approval" from the CCLP,
  - inconsistencies between approval and licensing processes.

Modifies Definition of "Child-caring agency" & establishes reporting requirements for county juvenile departments and court findings related to Title IV-E participation

SENATE BILL

181

June 27, 2019

(Section 3) ORS 419C.620 is amended to read:

- (1) When required by the court, the Oregon Youth Authority or a private agency having guardianship or legal custody of a youth offender pursuant to court order shall file reports on the youth offender with the juvenile court that entered the original order concerning the youth offender.
- **(2) A county juvenile department shall file a report with the juvenile court under this section if a youth offender remains under juvenile department care for six consecutive months from the date of initial placement and:**
  - **(a) The county juvenile department is a county program, as defined in ORS 418.205;**
  - **(b) The county juvenile department is participating in programs related to Title IV-E of the Social Security Act;**
  - **(c) The county juvenile department has responsibility for the care and placement of the youth offender; and**
  - **(d) The placement is not a detention facility.**

Modifies Definition of "Child-caring agency" & establishes reporting requirements for county juvenile departments and court findings related to Title IV-E participation

SENATE BILL

181

June 27, 2019

(Section 5)ORS 419C.626 is amended to read:

- **After receiving a report required by ORS 419C.620 (2), if requested by the county juvenile department, the court's findings under subsection (3) of this section must specifically state:**
  - **(a) Whether the county juvenile department has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to make it possible for the youth offender to safely return home. In making this finding, the court shall consider the youth offender's health and safety the paramount concerns.**
  - **(b) The appropriateness of the youth offender's placement.**
  - **(c) The extent of compliance with the youth offender's case plan.**
  - **(d) The extent of progress that has been made toward alleviating or mitigating the causes necessitating the youth offender's placement in substitute care.**

System of Care:

SENATE BILL

1

January 1, 2020

Creates a statewide system of care advisory council and dashboard

- Objective to improve the effectiveness of state and local systems of care which provide services to youth by creating a long-range plan which will make recommendations to improve the current system.
- Create dashboard intended to be a central area where data relating to services provided to youth can be monitored and gathered.
- Must conduct joint studies with other agencies, make recommendations to the directors of the Oregon Youth Authority and Department of Human Services, and continually monitor the Children's System Data Dashboard.
- Creates Interdisciplinary Assessment Teams to provide for the timely offering of evaluations directly to youth and other functions such as supporting statewide education for providers.

Mandatory Reporters

HOUSE BILL

2227

January 1, 2020

SENATE BILL

415

January 1, 2020

HB 2227:

- Amends 419B.005
- Adds Animal Control Officers as mandatory reporters of child abuse.

SB 415:

- Amends 419B.005
- Adds Department of Education employees, school district board members, and public charter school governing body members as mandatory reporters of child abuse.

Reduced School Day

SENATE BILL

475

January 1, 2020

- Requires that a student's foster parent is provided with an opportunity to participate in decision to create an abbreviated school day for a child placed in foster care
- Extends to educational surrogate
- Unless ordered by the court, an abbreviated school day can only be implemented if the student's IEP team has provided the opportunity for the student's foster parent to meaningfully participate in a meeting to discuss the placement, including the reasonable opportunity to physically attend the meeting
- Meeting notice is in writing and informs the foster parent of the student's presumptive right to receive the same numbers of hours of instruction or educational services as other students, and the right to request a meeting of the IEP team.
- Notice must inform foster parent that the school district may not unilaterally place a student on an abbreviated school day program

Persons with disabilities

SENATE BILL

492

June 27, 2019

- Codifies state policy regarding family reunification in dependency cases.
- Parents or guardians of children involved in the dependency process through the juvenile court must be provided reunification services and opportunities equal to those parents and guardians without disabilities.

Child Abuse Hotline

SENATE BILL

804

May 24, 2019

Amends 419B.015 and 419B.017

- Updates law to reflect the centralized DHS hotline
- Abuse to be reported to county where abuse occurred, or if unknown, where the child resides, or where the reporter came into contact with child or alleged perpetrator of abuse.

CIRTs

SENATE BILL

832

July 15, 2019

Modifies provisions related to Critical Incident Review Teams (CIRTs)

- Declares the purpose of CIRTs
- Directs DHS to assign a CIRT upon becoming aware of a critical incident as defined in the measure.
- Modifies the composition of CIRTs to allow a local citizen review board member as well as a legislator to be included.
- Requires every CIRT to submit a final written report to DHS and requires reports to contain specified information.
- Directs DHS to publish certain information regarding the CIRT, as well as its report, on its website.
- Allows DHS to redact the final report only to the extent necessary to comply with state and federal laws governing confidential information.

School District

SENATE BILL

905

July 1, 2019

(Voluntary) Foster Child will be considered resident of school district where foster home is located:

- For purposes of school district residency, a child voluntarily placed the child outside of the child's home, shall be considered a resident of the school district in which they now reside because of the placement.
- In cases where the voluntary placement is within 20 miles from the school the child attended prior to placement, and it is in the best interest of the child to attend the school attended prior to the placement, the child can continue to be a resident in the school district the child's parent or guardian resides in.
- Transportation for a child voluntarily placed is the responsibility of the child's resident school district.

Placement of Children

SENATE BILL

924

June 13, 2019

Limits Use of Detention Facilities:

- *A.R., et al v. State of Oregon et al.*, was filed in the United States District Court for the District of Oregon. In a final settlement agreement of that case, DHS agreed to stop this practice and work to rehome the children who were placed in such facilities.
- prohibits the placement of a child or ward taken into protective custody from being placed into a detention facility.
  - There are exceptions as required by the Interstate Compact for Juveniles
    - A child or ward may be detained if that child or ward is under a material witness order or if the court determines that he or she is an out-of-state runaway.
    - The placement in the least restrictive setting and may include a detention facility if it is necessary to ensure the child or ward is not a danger to self or others pending the return of that child or ward to the home state.

Criminal Background Check

SENATE BILL

994

January 1, 2020

DHS to run criminal background check on non custodial parent

- Prior to releasing a child into the custody of a noncustodial parent, a person who has taken a child into protective custody shall request that DHS conduct a criminal records check.
- Includes all adults in the residence.

DHS-educational requirements

House Bill

2033

January 1, 2020

Removes BA/BS degree requirements for individuals who conduct child abuse investigations or make determination regarding protective custody of children

- An associates degree with additional training or certification in human services or related field as determined by rule.
- Maintains requirement for BA/BS degree for all other positions.

DHS-Budget

House Bill

5026

July 1, 2019

- DHS' Legislatively Approved Budget for 2019-2021 includes a 20% increase from 2017-2019… CW Highlights include:
  - Adds 356 Positions in Child Welfare Program:
    - 268 Case Workers
    - 46 Child Abuse Hotline
    - 17 Foster Parent Recruitment and Retention
    - 16 MAPS (Mentoring, Assisting & Promoting Success)
    - 9 CCWIS
  - Expands KEEP Program Statewide
  - Reduces SPRF budget by 50%
  - Restores LIFE funding & FTE at 17-19 levels
  - Strengthening Therapeutic Foster Care, Specialized Recruitment & Training to serve 69 youth
  - Aligns AG Budget to fund legal representation for CW
  - Homeless & Runaway Youth Program moved from CW to Self Sufficiency

HOT BILL: SENATE BILL 1008

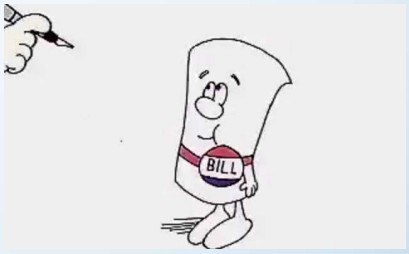
- Effective September 29, 2019; applies to sentences after January 1, 2020
- Prohibits juvenile receiving life in prison without possibility of release
- Requires all juvenile offenses to be filed in juvenile court
  - Includes "Measure 11" offenses and multiple acts
  - State must request waiver to adult court
- Waiver hearing
  - Juvenile court must find by a *preponderance* that retaining jurisdiction will not serve the best interests of the youth and of society.
  - When a person waived under ORS 419C.349 is convicted of a Measure 11 offense, the court can impose at least the presumptive term of imprisonment provided for the offense however that person will eligible for a hearing and conditional release under ORS 420A.203 and 420A.206 (second look hearings).
  - May consider: the amenability of the youth to treatment and rehabilitation given the techniques, facilities and personnel for rehabilitation available to the juvenile court and to the criminal court that would have jurisdiction after a transfer, the protection required by the community, given the seriousness of the offense alleged, and whether the youth can be safely rehabilitated under the jurisdiction of the juvenile court.

HOT BILL: SENATE BILL 1008 continued

- Sentencing Factors:
  - The person's age, intellectual capacity and impetuousness at the time of the offense.
  - The person's family and community environment, history of trauma and prior involvement in the juvenile dependency system at the time of the offense.
  - The person's ability at the time of the offense to appreciate the risks and consequences of the conduct constituting the offense.
  - The person's community involvement prior to the offense.
  - Any peer or familial pressure to which the person was subjected at the time of the offense
  - Whether and to what extent an adult was involved in the commission of the offense.
  - The person's capacity for rehabilitation.
  - The person's school records and special education evaluations.
  - Any other mitigating factors or circumstances presented by the person.
  - The court is prohibited from considering the person's age at the time of committing the offense as an aggravating factor.

HOT BILL: SENATE BILL 1008 continued

- Second Look Hearing/Conditional Release:
  - Sentences after January 1, 2020
  - A person in the custody of the Oregon Youth Authority (OYA) for an offense committed while the person was under 18 years of age, for which the person was sentenced to term of imprisonment with a projected release date that falls after the person attains 25 years of age but before the person attains 27 years of age, will be eligible for a second look hearing and conditional release hearing.
  - When a person has served one-half of the sentence imposed, or when the person attains 24 years and 6 months of age, the sentencing court shall determine what further commitment or disposition is appropriate.



Thank you

Dependency Cases

Application for Protective Custody Order (419B.150):

The Declaration:

1) The court may receive a declaration[1] from a person authorized to take a child into protective custody.
2) The declaration must be based on information and belief and must set forth with particularity
   - ✓ Why protective custody is the least restrictive means to
     - Protect the child from abuse[2];
     - Prevent the child from inflicting harm on self or others;
     - Ensure that the child remains within the reach of the juvenile court to protect the child from abuse or to prevent the child from inflicting harm on self or others; or
     - If the department knows or has reason to know that the child is an Indian Child, prevent *imminent physical damage or harm* to the child.
   - ✓ Why protective custody is in the best interest of the child

Findings

1) If, after reviewing the declaration, the court determines that protective custody is
   a. Necessary and the least restrictive means to:
      1) Protect the child from abuse;
      2) Prevent the child from inflicting harm on self or others;
      3) Ensure the child remains within the reach of the court to protect the child from abuse or prevent the child from inflicting harm on self or others;
      4) Ensure the safety of a child who has run away from home; or
      5) Prevent imminent physical damage or harm to the child if there is reason to believe the child is an Indian Child under the ICWA; and
   b. Is in the best interest of the child

Order:

1) The court may issue a protective custody order and may transmit the signed order to the applicant by a form of electronic communication approved by the court. The court must then file the original order in the record of the case.

[1] Declaration is in writing however at the applicant's request the judge may take an oral statement under oath. If that oral statement is out of court, the applicant must record the statement and retain a copy of the recording.
[2] Abuse has the meaning given that term in ORS 419B.005

Program Agenda Through the Eyes of a Child
Sunday August 11, 2019

4:15 pm
Visions, Initiatives and Barriers (VIBS)
Break Out Sessions

These documents have been posted on the JCIP website:

N/A