



# The Law, Rule, and Ethics of Child Protection Decisions in Oregon



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# Slido!





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# Setting Expectations

The law is limited and (at least somewhat) ambiguous.

The Safety Framework is **NOT** a replacement for the ODHS Oregon Safety Model.

The Safety Framework provides a process to analyze; it does not provide a “right” answer about child safety.

# CROSSWALK COMPARISON

## ODHS Oregon Safety Model

### Five Safety Threshold Criteria:

- Severity
- Imminence
- Out of control
- Vulnerable child
- Observable

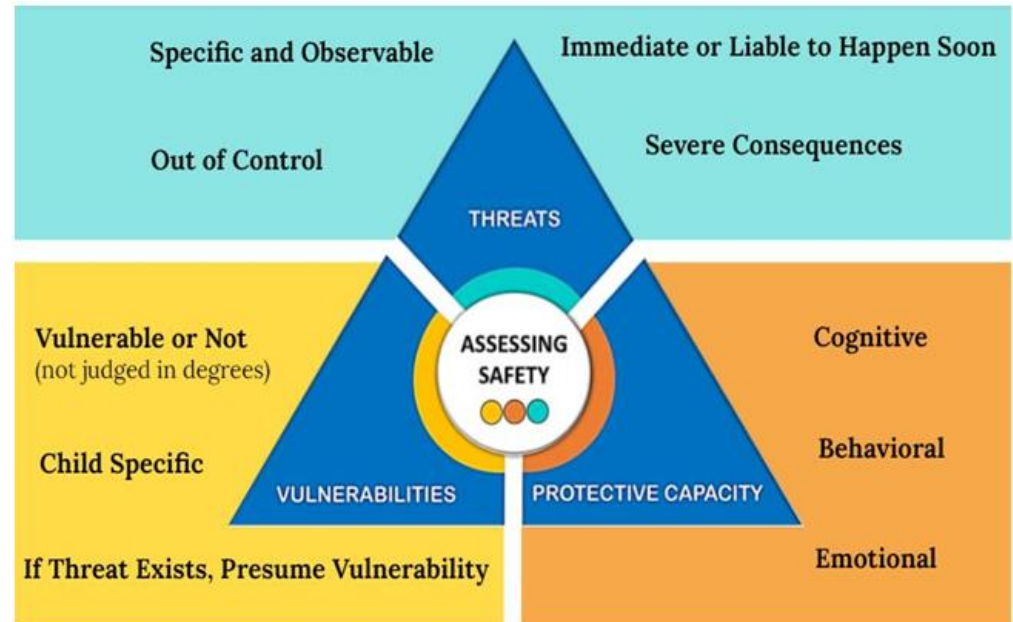
## DEPENDENCY SAFETY FRAMEWORK

### SAFE

No threats exist OR  
Child is not vulnerable to threat OR  
There is sufficient protective capacity to control threats

### UNSAFE

Threats exist to which child is vulnerable AND  
Parents have insufficient protective capacity to control threats



Are there sufficient **protective capacities** to protect from **threats** to which the child is **vulnerable**?

# Key Safety Decisions

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Removal

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Jurisdiction

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Family Time

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Dismissal



# ORS 419B.090

It is the policy  
of the State of  
Oregon to...

...recognize that children are individuals who have legal rights.

...**safeguard and promote each child's right to safety**, stability and well-being and to safeguard and promote each child's relationships with parents, siblings, grandparents, other relatives and adults with whom a child develops healthy emotional attachments.

... **guard the liberty interest of parents** protected by the Fourteenth Amendment to the United States Constitution and **to protect the rights and interests of children**.

...offer **appropriate reunification services** to parents and guardians to allow them the opportunity to adjust their circumstances, conduct or conditions **to make it possible for the child to safely return home** within a reasonable time.

...in a case involving an Indian child, **to safeguard and promote the Indian child's connections with the Indian child's family, culture and tribe**.



# Removal of a Child

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What's the legal standard courts should apply when deciding whether to remove (or return) a child?





# Protective Custody ORS 419B.150

## **ORS 419B.150(4) – Protective Custody Without Court Order**

A child may be taken into protective custody without a court order only when there is reasonable cause to believe that:

- (A) There is an imminent threat of severe harm to the child;
- (B) The child poses an imminent threat of severe harm to self or others; or
- (C) There is an imminent threat that the child's parent or guardian will cause the child to be beyond the reach of the juvenile court before the court can order that the child be taken into protective custody under subsection (7) of this section.

If ICWA, the child may be taken into protective custody without a court order only when it is necessary to prevent imminent physical damage or harm to the child.

# Protective Custody ORS 419B.150

## **ORS 419B.150(7) – Protective Custody With Court Order**

The juvenile court may order that a child be taken into protective custody if the court:

- (a) Determines that the person complied with the inquiry requirements under ORS 419B.636;
- (b) Makes a finding regarding whether there is reason to know that the child is an Indian child;
- (c) If there is reason to know that the child is an Indian child, determines that the person complied with the notice requirements under ORS 419B.639;
- (d) Determines that protective custody is necessary and the least restrictive means available to:
  - (A) Protect the child from abuse;
  - (B) Prevent the child from inflicting harm on self or others;
  - (C) Ensure that the child remains within the reach of the juvenile court to protect the child from abuse or prevent the child from inflicting harm on self or others;
  - (D) Ensure the safety of a child who has run away from home; or
  - (E) If the court finds that there is reason to know that the child is an Indian child, prevent imminent physical damage or harm to the child; **and**
- (e) Determines that protective custody is in the **best interests** of the child.

# Shelter Hearing ORS 419B.185

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When a child is taken, or is about to be taken, into protective custody, there must be a shelter hearing at which the parent/child are given the **opportunity to present evidence** that “the child or ward can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process prior to adjudication.”

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The court must make findings about **reasonable/active efforts** to prevent the need for removal.

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(3) (d) The court shall make a written finding in every order of removal that describes:

(A) Why it is in the **best interests of the child** or ward that the child or ward be removed from the home or continued in care; and

(B) If the child or ward is an **Indian child**, why the Indian child's removal or continuation in care is **necessary to prevent imminent physical damage or harm** to the Indian child.

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# Best Interests of a Child

What factors should a court consider to decide if it is in the child's best interest to be removed from their home?



# Jurisdiction

## ORS 419B.100

**ORS 419B.100** provides the bases under which the juvenile court can take jurisdiction of a child in Oregon.

**ORS 419B.627** provides additional requirements around jurisdiction in ICWA cases.

### Caselaw:

- A juvenile court may assert jurisdiction over a child under ORS 419B.100(1)(c) when it finds that, considering the totality of the circumstances, the child's conditions or circumstances endanger the child's welfare. *Dept. of Human Services v. C. J. T.*, 258 Or App 57, 61, 308 P3d 307 (2013).
- DHS must show that the child's conditions or circumstances present a current threat of serious loss or injury that is reasonably likely to be realized and not merely speculative. *Id.* at 61-62.
- When a parent's alleged risk-causing conduct is at issue, DHS has the burden of demonstrating a nexus between the parent's conduct and the threatened harm to the child. *Dept. of Human Services v. L.E.F.*, 307 Or App 254, 258, 476 P3d 119 (2020), rev den, 367 Or 559 (2021). *DHS v. TNM*, 315 Or App 160.

# Jurisdiction

## Additional Caselaw:

- [Dept. of Human Services v. T.N.M., 315 Or App 160 \(2021\)](#)
  - Evidence not sufficient to show a risk of harm to the child. Must show the nexus between parental behavior and alleged threat of harm.
- [Dept. of Human Services v. L.E.F., 307 Or App 254 \(2020\)](#)
  - Analysis of parents' use of reasonable physical force and when it may rise to level of jurisdiction.
- [Dept. of Human Services v. S.R.L., 334 Or App 375 \(2024\)](#)
  - Good discussion of when risk of harm is speculative rather than current.

# Custody (Removal) vs. Jurisdiction

Should continue to assess if the child can be home pending jurisdiction.

The goal of a Safety Plan is to allow the child to be in the home.

The goal of a Case Plan is for the family to provide safety themselves.

If basis of jurisdiction = why child is unsafe, *then* completion of the case plan = basis ameliorated (i.e., dismissal).



# Family Time

## **ORS 419B.337(3)**

The court may make an order regarding visitation by the ward's parents or siblings. DHS is responsible for developing and implementing a visitation plan consistent with the court's order.

## ***DHS v. H.K.*, 321 Or App 733 (2022)**

No reasonable efforts when DHS did not provide therapeutic visits after recommended by mental health professionals and court ordered 6 months prior to permanency order.

## ***DHS v. M.K.*, 285 Or App 448 (2017)**

The court noted "...the juvenile court could properly consider evidence of any harm that the children would suffer from forcing them into therapeutic visitation with mother."



# Family Time

## **OAR 413-070-0860**

(1)(a) The caseworker must create a visit and contact plan that **ensures child or young adult safety**.

(1)(j) The visits must occur in the **least restrictive manner** in which the child or young adult's safety can be managed and must support the best interests of the child or young adult and any orders of the court regarding visitation.

(1)(o)(G) The caseworker must ensure the visit and contact plan considers the **safety needs of any non-offending parent** or guardian in cases involving domestic violence...

## **OAR 413-070-0830**

(2) The Department will prohibit or cancel visits, unless otherwise ordered by the court, when:

- (a) There is reason to believe acts or omissions of a parent or guardian would result in child abuse during the visit;
- (b) The safety of the child or young adult cannot be managed by supervision;
- (c) The visit does not meet the best interests of the child or young adult; or
- (d) A court order prohibits visits.

[DHS 4050 Form](#)—Used to determine the appropriate level of supervision in family time; starts with presumption of unsupervised.

# Dismissal

## Caselaw:

- Whether the adjudicated bases for jurisdiction continue to pose a threat of ***serious loss or injury to the child***, and ***the likelihood that the risk of loss or injury will be realized*** in the absence of juvenile court jurisdiction and wardship. DHS v. N.L.B., 306 Or App 93, 99 (2020) (emphasis added).
- DHS bears the burden of proving that a risk of serious loss or injury is present and nonspeculative at the time of the hearing and that there is a causal link between the parent's risk causing conduct and potential harm to the child. DHS v. DL, 308 Or App 295 (citing DHS v. CJT, 258 Or App 57, 62 (2013)).
- Without evidence that one parent is unable to protect the child from the other parent, or that the child will suffer some risk of actual harm because one parent lacks sole legal custody, lack of a custody order alone is an insufficient basis for jurisdiction. DHS v. J.R., 274 Or App 107 (2015).
- Court appropriately denied motions to dismiss in an unexplained injury case because the original bases for jurisdiction continued to pose a threat of serious loss or injury. Parents never provided an explanation for the serious injury from years before and did not participate in services specifically tailored toward preventing the injury from happening again. DHS v. N.L.B., 306 Or App 93 (2020).

# Oregon Rules of Professional Conduct

## **RULE 1.4 COMMUNICATION**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

## **RULE 1.6 CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

## **RULE 2.1 ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

# Oregon Rules of Professional Conduct

## **RULE 1.14 CLIENT WITH DIMINISHED CAPACITY**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

# OSB Standards-Role of the Child's Attorney

## STANDARD 1 – ROLE OF THE LAWYER FOR THE CHILD

A. The role of the child-client's lawyer is to ensure that the child client is afforded due process and other rights and that the child client's interests are protected. For a child client with full decision-making capacity, the child-client's lawyer must maintain a normal lawyer-client relationship with the child client, including taking direction from the child client on matters normally within the child client's control.

- Action: Once the child client has settled on positions and goals, the lawyer must vigorously advocate for the child client.

B. For a child client with diminished capacity, the child-client's lawyer should maintain a normal lawyer-client relationship with the child as far as reasonably possible and take direction from the child client as the child develops capacity. A child client may have the capacity to make some decisions but not others.

- Commentary: Lawyers should be careful not to conclude that a child client suffers diminished capacity from a child client's insistence upon a course of action that the child-client's lawyer considers unwise or at variance with their views. For example, the decision of a 13-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child client may well be competent to make that decision.

# OSB Standards-Role of the Child's Attorney

## STANDARD 1 – ROLE OF THE LAWYER FOR THE CHILD

D. When the child-client's lawyer reasonably believes the child client has diminished capacity, is at risk of physical, sexual, psychological or financial harm, and cannot adequately act in their own interest, the child-client's lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the child client.

- Action: When a child with diminished capacity is unable to protect themselves from substantial harm, Oregon RPC 1.14 allows the child-client's lawyer to take action to protect the child client. Oregon RPC 1.6 and Oregon RPC 1.14(c) implicitly authorize the child-client's lawyer to reveal information about the child client, but only to the extent reasonably necessary to protect the child client's interests.
- Action: The child-client's lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the child client.



# OSB Standards-Role of the Child's Attorney

## STANDARD 2 – RELATIONSHIP WITH THE CHILD CLIENT

B. The child-client's lawyer should communicate with the child client in a developmentally and culturally appropriate manner.

- Action: The child-client's lawyer should explain to the child client in a developmentally appropriate way all information and ascertain the child client's position on the information. This includes the result of all court hearings and administrative proceedings, which will assist the child client in having maximum input in determining the client's position. Interviews should be conducted in private.
- Action: The child-client's lawyer should be aware of the child client's cultural background and how that background affects effective communication with the child client.

# Questions? Comments?



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[www.courts.oregon.gov/programs/jcip](http://www.courts.oregon.gov/programs/jcip)