

Hon. Darleen Ortega,
Oregon Court of Appeals

Hon. Jodie Mooney,
Oregon Court of Appeals

Hon. Megan Jacquot,
Coos County Circuit Court

Appellate Update
Through the Eyes of a Child
Conference
August 3, 2020

Procedural and Evidentiary Issues

Parentage
Motion *in Limine*

Parentage determination - timing

- *Dept of Human Services v. C.M.H.*, [301 Or App 487 \(2019\)](#) (p. 21) (affirmed)
 - Because the juvenile court had subject matter jurisdiction when child was taken into protective custody, it had subject matter jurisdiction to adjudicate the parentage dispute before making a determination on whether to assert dependency jurisdiction.

Motion *in limine*

- *Dept. of Human Services v. M.T.J.*, [304 Or App 148 \(2020\)](#) (p. 8) (reversed)
 - Previous cases have recognized the possibility that evidence of extrinsic facts may come in during a dependency proceeding even though, absent an amendment to the underlying petition, those facts may not be used to establish or maintain jurisdiction, or to change the permanency plan away from reunification.
 - The court found that father's lack of an offer of proof did not preclude him from raising the issue on appeal, finding the nature of the juvenile court's ruling was akin to a situation in which the court did not allow an offer of proof to be made.

Notice of Permanency Hearing

- **ORS 419B.473(2):**
 - The court shall notify the parties listed in ORS 419B.470 and any other interested parties of the hearing.
- ***Dept. of Human Services v. G.S.*, [304 Or App 542 \(2020\)](#) (p. 24) **(reversed)****
- The juvenile court erred in changing the child's permanency plan when mother wasn't present at the permanency hearing, the court had failed to provide the required notice of the hearing and there was no basis to conclude mother had received notice of the hearing in some other form.

Reasonable time (Motion to Set Aside)

- **ORS 419B.923:**
 - A motion to modify or set aside an order or judgment must be made within a “reasonable time”.
- ***Dept. of Human Services v. K.H.H.*, [304 Or App 530 \(2020\)](#) (p. 21) (affirmed)**
 - Reasonable time considerations:
 - the emotional and developmental needs of the child;
 - circumstances surrounding the filing, including the length of the delay and any reasons for it.
 - In this case, the court found the juvenile court did not abuse its discretion when it denied father’s motion to set aside a jurisdictional judgment that was filed 20 months after its entry, and alleged no facts describing the circumstances surrounding his motion.

Indian Child Welfare Act

Jurisdiction
Termination of
Parental Rights –
Best Interest

Jurisdiction

- *Dept of Human Services v. T. J.* , [302 Or App 531 \(2020\)](#) (p. 12) (**reversed**)
 - Out of home placement
 - At issue: whether DHS proved by clear and convincing evidence that continued custody of T by mother was likely to result in serious emotional or physical damage to T.
 - By the time of the jurisdictional trial, father was out of the home and both parents were abiding by a no-contact order.
 - Although mother expressed interest in having father return home, that was five days after the incident and 40 days before the hearing. No evidence that DHS talked to her between those times about her view of father.
 - Mother testified she had no contact with father since the incident, that their relationship was over, and that father poses a risk to the children when he drinks.
 - Tribal expert offered only conclusory assertions rather than evidence regarding specifics.

Termination of Parental Rights

- *Department of Human Services v. M. A. N.*, [303 Or App 600 \(2020\)](#) (p. 27) (reversed)
 - Best interest determination. ORS 419B.500
 - Juvenile court's judgment terminating parental rights reversed when DHS failed to prove TPR was in J's best interests:
 - The juvenile code requires that the court decide whether TPR is in the child's best interests ***based on the particular needs and circumstances of the child.***
 - In this case, J's brother was already in a guardianship with grandmother, J's permanent resource.
 - There was evidence that J needed permanency, but no evidence that mother had sought, or threatened to, interfere with J's or T's (J's sibling) living arrangement with grandmother, nor could mother move to vacate a permanent guardianship under the juvenile code.
 - Since J's older sibling T was already living with grandmother under a guardianship, an adoption would alter J's legal relationship with T in a way that may not be beneficial to J in the event of unexpected death or disability of mother or grandmother.

Jurisdiction

Admissions

UCCJEA

Domestic Violence

Mental Health

Parent Delegates

Care to Third

Party

Basic Test

- ORS 419B.100(1)(c) Conditions and Circumstances:
 - DHS must present evidence sufficient to support a conclusion that the child's condition or circumstances expose the child to a current threat of serious loss or injury that is likely to be realized.
 - DHS must establish the type, degree and duration of the harm
 - When the risk is caused by a parent's behavior, DHS must establish a nexus between the parent's allegedly risk-causing conduct and the harm to the child.
 - The risk of harm must be "nonspeculative"; there must be a reasonable likelihood that the threat will be realized.



Admissions

- *Dept. of Human Services v. T.S.J.*, [300 Or App 36 \(2019\)](#) (p. 10) (affirmed)
 - When a parent waives the right to have DHS prove its allegations, the appeals court considers whether DHS would have been allowed to offer evidence that would establish juvenile court jurisdiction.

The key inquiry is whether the allegations would permit the introduction of evidence of danger to the child's welfare.

UCCJEA

- *Department of Human Services v. J. S.*, [303 Or App 324 \(2020\)](#) (p. 17) **(affirmed)**
 - Temporary emergency jurisdiction. ORS 109.751(2)
 - Juvenile court may continue to exercise TEJ at a jurisdictional hearing when there are no prior custody determinations from another state and no custody proceedings that have been commenced in another state.
 - The court is limited to issuing a judgment that meets the requirements for TEJ (child present in Oregon and has been abandoned or subjected to or threatened with mistreatment or abuse).



Domestic Violence

- *Dept of Human Services v. T. J.* , [302 Or App 531 \(2020\)](#) (p. 12)
- Jurisdictional finding [affirmed](#)
 - Infant asleep in another room during physical domestic violence incident
 - Father continued to deny behavior and resisted treatment for domestic violence
 - Parents had no additional contact after the incident
- *Dept. of Human Services v. A. J. G.*, [304 Or App 221 \(2020\)](#) (p. 14)
- Jurisdictional finding [affirmed](#)
 - Mother granted RO, alleging father strangled her, left bruises on her and used his palm and knee to push mother down. Child also disclosed that dv had occurred to caseworker, and demonstrated choking on himself.
 - Father violated RO twice.
 - Mother moved to dismiss RO – DHS came by and children disclosed they had been having contact with father.
 - At time of trial, father still living with mother and mother testified she wanted to continue living with him.

Mental Health

- *Dept. of Human Services v. A. J. G.*, [304 Or App 221 \(2020\)](#) (p. 14)
- **Jurisdictional finding reversed**
 - Father had resumed taking his medication after the domestic violence incidents and DHS did not present any evidence that his prior three-week episode of missing of his medications and appointments was indicative of a pattern of behavior.

Parent delegates care to 3P

- *Dept. of Human Services v. F.Y.D., Jr.*, [302 Or App 9 \(2020\)](#) (p. 16)
 - Jurisdictional finding **affirmed**:

Father entrusted child to his sister for the time he would be in prison for 4-5 mos.

Juvenile court found it was likely father would assume his parental responsibilities when released and that posed a risk to the child given father's poor judgment and decision making.
- *Dept of Human Services v. M. E.*, [302 Or App 571 \(2020\)](#) (p. 16)
 - Jurisdictional finding **reversed**:

Mother arranged for aunt to care for children while she completed inpatient treatment and argued children not presently at risk because she had made arrangements for their care.

Juvenile court rejected mother's argument on ground that 3P care arrangement did not predate DHS involvement.

The fact that a parent has not established 3P caregiving before DHS involvement does not preclude a juvenile court from taking it into account in assessing whether a child faces the type of current risk of injury or harm that allows for dependency jurisdiction.

Less than ideal parenting?

- *Dept. of Human Services v. C. W.*, [305 Or App 75 \(2020\)](#) (p. 11)
 - Jurisdictional finding **affirmed**:
 - The home was unsanitary and unsafe
 - The children's routine school absences and lateness were detrimental to their education
 - The children were regularly hungry
 - Mother has substance abuse disorders and bipolar disorder
 - Father has PTSD, which leads to threatening and aggressive encounters with authority figures, causing frequent incarceration
 - The above conditions and deficits caused the children to be:
 - Anxious
 - Tired
 - Have trouble focusing and learning
 - Court distinguished this from other 3P care cases: parents did not completely cede custody or entrust the primary care of the children with live in grandmother

Motion to Dismiss

Basic Test

- On a motion to dismiss dependency jurisdiction, a juvenile court must determine:
 - whether the jurisdictional bases pose a current threat of serious loss or injury to the ward, and if so,
 - whether that threat is reasonably likely to be realized.
- *Dept of Human Services v. T.L.*, [279 Or App 673 \(2016\)](#)

Case examples

- *Department of Human Services v. T. N.*, [303 Or App 183 \(2020\)](#) (p. 18) (reversed)
 - General testimony about mother's mental health issues did not establish a nexus between mother's mental health and a serious risk of loss or injury that is likely to be realized. Child being scared, upset, confused and emotional is not the type of significant psychological harm that justifies juvenile court jurisdiction.
- *Dept. of Human Services v. L.S.*, [300 Or App 594 \(2019\)](#) (p. 18) (affirmed)
 - Father's plan for grandmother or friend to care for child while he was in prison did not ameliorate the threat of harm to Z posed by the jurisdictional bases when he was not working with either caregiver on a plan to obtain stability and permanency for his child, and was focused on his own circumstances, continuing to deny his parenting deficits and crimes.
- *Dept. of Human Services v. C.L.M.*, [300 Or App 603 \(2019\)](#) (p. 20) (reversed)
 - When original bases of jurisdiction ceased to exist and no amended petition has been adjudicated based on new allegations, the court may not hold a case open to allow an amended petition to be filed at a later date.

Case examples (cont)

- *Dept. of Human Services v. T.D.G.*, [301 Or App 465 \(2019\)](#) (p. 20) (**reversed**)
 - The trial court erred in denying father's motion to dismiss when DHS presented no evidence regarding father's current driving behavior or marijuana use, nor any evidence that father continued to use physical discipline or is likely to do so in the future.
 - Father's refusal to admit to past acts of physical abuse or discipline can only be a basis for continued jurisdiction if there is also evidence that the parent's failure to do so makes it likely the parent will do so again.
 - Father's hostility towards DHS, blaming of grandparents for poor parenting, his failure to obtain DHS approval for services he received, and his failure to sign releases of information to DHS do not allow the court to continue jurisdiction without additional evidence that the conditions that give rise to jurisdiction continue to pose a serious risk of injury or loss to N that is likely to be realized.

Disposition

Order for
Psychological
Evaluation

Authority

- *Dept. of Human Services v. L.J.W.*, [302 Or App 126 \(2020\)](#) (p. 6) (affirmed)
 - Although, under ORS 419B.387, DHS must establish at an evidentiary hearing the need for the psychological evaluation as part of "treatment or training," that statute is not the only basis for the juvenile court's authority. Under ORS 419B.337(2), the court may also order a psychological evaluation when rationally related to a basis of the juvenile court's jurisdiction. Given the record, the jurisdictional bases, and two potential sources of authority for a psychological evaluation, any asserted error is not plain.
- *Dept. of Human Services v. P.W.*, [302 Or App 355 \(2020\)](#) (p. 5) (reversed)
 - When mother's parental rights had already been terminated and she was not preparing to resume care for her child, ORS 419B.387 does not provide authority for the court's order requiring mother to submit to a psychological evaluation.

Case examples

- *Dept. of Human Services v. T.L.H.*, [300 Or App 606 \(2019\)](#) (p. 7) (affirmed)
 - Court's order for an evaluation affirmed when father had only recently started engaging in services; father had PTSD; needed treatment for his use of methamphetamine; was difficult to track and immature for his age; and child had high needs.
- *Dept. of Human Services v. D.R.D.*, [298 Or App 788 \(2019\)](#) (p. 6) (affirmed)
 - The juvenile court was within its authority under ORS 419B.387 to order father to submit to a psychological evaluation when evidence was presented that father continued to use methamphetamine after jurisdiction was established, failed to engage in services, and that a psychological evaluation could help provide insight into why father was not engaging in substance abuse treatment.

Permanency Hearing

Reasonable Efforts

Compelling
Reasons

Reasonable Efforts Documentation

- **ORS 419B.476(5)(a)**: the court's order must contain a brief description of the efforts DHS has made with regard to the case plan in effect at the time of the hearing.
- *Dept. of Human Services v. R.A.H.*, [299 Or App 215 \(2019\)](#) (p. 22) (**reversed**)
 - Juvenile court's permanency judgment reversed because it did not contain a description of DHS efforts with regard to the case plan when it referred to an attached Exhibit 1, but no exhibit was attached. Although the record contained three exhibits labeled "Exhibit 1", it was unclear which exhibit the juvenile court intended to reference.

Incarcerated Parents

- *Department of Human Services v. C. S. C.*, [303 Or App 399 \(2020\)](#) (p. 24) (affirmed)
 - Over a seven month period, DHS only arranged for phone visits, paid for video calls, and made efforts toward having father transferred to a closer prison. The court distinguished this case from other recent cases where the court found efforts were insufficient in that *father was not asking to be a physical caretaker or a decision maker about the child's care, custody and control*. Juvenile court finding that reasonable efforts were made affirmed.
- *Department of Human Services v. M. C. C.*, [303 Or App 372 \(2020\)](#) (p. 25) (reversed)
 - The court found that at a minimum, once father identified his sister as a potential resource to ameliorate the risk of harm to S from the jurisdictional basis, which in this case was father's unavailability to parent, DHS was required to allow father a reasonable amount of time to enlist his sister's help. At the time of the permanency hearing, contact between the aunt and S still had not occurred.

Insufficient Efforts

- *Dept. of Human Services v. D.M.R.*, [301 Or App 436 \(2019\)](#) (p. 26) (reversed)
 - In this case, there was no evidence in the record indicating which programs were available to father through Womenspace, or how any programming available “...served to ameliorate father’s ‘chaotic relationship’ or prevented that chaotic relationship from endangering the child.” In other words, the evidence did not show that DHS efforts were specifically tailored to the problems identified in the jurisdictional basis for father.
- *Dept. of Human Services v. V. A. R.*, [301 Or App 565 \(2019\)](#) (p. 26) (reversed)
 - The psychological evaluation indicated in July 2017 that mother required hands-on, in-person parent training, where the parent trainer works with mother and the child together. Instead of providing the recommended training, DHS offered parenting training through Skype visits. DHS didn’t offer the recommended training until the court ordered it to do so (approximately a year after the evaluation). As a result, mother only received five sessions of the hands-on parenting training before the permanency hearing. The Court of Appeals found this was not sufficient for mother to be able to demonstrate she could be a minimally adequate parent for W.

Termination of Parental Rights

Failure to Appear

Failure to Appear

- *Dept. of Human Services v. M.C.D.B.*, [301 Or App 52 \(2019\)](#) (p. 28) (affirmed)
 - With regard to mother's arguments that the court erred by proceeding to termination in her absence under ORS 419B.819 without first issuing an order in compliance with ORS 419B.820, the Court of Appeals declined to exercise its discretion to correct those unpreserved claims of error. Mother previously had a colloquy with the juvenile court about the consequences of her failure to appear at the termination hearing, and mother demonstrated that she understood the gravity of such a failure to appear. Moreover, many of the same reasons justifying the court's denial of mother's motions for a continuance also militated against the exercise of discretion in this case: Her son had been in the state's care for more than three and a half years; she chose to move a month before the termination hearing, knowing both that she was required to appear personally and the consequences if she did not; and she thereafter ignored DHS's efforts to arrange for travel to the termination hearing.