REASONABLE EFFORTS/ACTIVE EFFORTS FINDINGS AFTER JURISDICTION TAKEN

LEGAL STANDARDS IN GENERAL

ACTIVE EFFORTS STANDARD

"Active efforts" are more than "reasonable efforts." It is "an obligation greater than simply creating a reunification plan and requiring the client to execute it independently." *State ex rel Juv. Dept. v. T.N.*, 226 Or App 121, 124, *rev den* 346 Or 257 (2009).

DHS must assist the client through the steps of reunification and whether active efforts have been made is evaluated by whether appropriate services have been provided in view of the parent's problems. *D.H.S. v. D.L.H.*, 251 Or App 787 *modified on recons*, 253 Or App 600 (2012).

ANALYTICAL FRAMEWORK

The juvenile court must evaluate the efforts of DHS "through the lens of the adjudicated basis for jurisdiction." *D.H.S. v. J.E.R.*, 293 Or App 387, 393 (2018).

"When the permanency plan at the time of a permanency hearing is reunification, the juvenile court is authorized to change the plan away from reunification only if DHS proves that (1) it made reasonable efforts to make it possible for the child to be reunified with his or her parent and (2) notwithstanding those efforts, the parent's progress was insufficient to make reunification possible." ORS 419B.476(2)(a); *DHS v. R.B.*, 263 Or App 735 (2014). DHS has the burden of proving both prongs by a preponderance of the evidence. In deciding whether to change the permanency plan away from reunification, the juvenile court must treat the child's 'health and safety [as] paramount concerns.' ORS 419B.476(2)(a)." *D.H.S. v. S.M.H.*, 283 Or App 295, 305 (2017).

"The juvenile court's determinations whether DHS's efforts were reasonable and the parent's progress was sufficient are legal conclusions that we review for errors of law." *D.H.S. v. G.N.*, 263 Or App 287, 291 *rev den* 356 Or 638 (2014).

DHS BURDEN TO PROVE EFFORTS

NO REASONABLE EFFORTS. A parent's resistance to DHS's efforts does not categorically excuse DHS from making meaningful efforts toward that parent. *D.H.S. v. S.M.H.*, 283 Or App 295 (2017).

NO REASONABLE EFFORTS. The reasonable efforts inquiry is to DHS's conduct not the parent's conduct. A parent's refusal to sign a release does not excuse DHS of making referrals to services or to make reunification efforts. D.H.S. v. R.W., 277 Or App 37 (2016)

NO REASONABLE EFFORTS. Court must evaluate reasonable efforts over the entire length of the case – not just from last review period to current permanency hearing. *D.H.S. v. T.S.*, 267 Or App 301 (2014).

EVIDENTIARY STANDARDS

In making permanency hearing findings, the court can take judicial notice of facts not subject to reasonable dispute and are capable of accurate and ready determination by a source whose accuracy cannot be reasonably questioned. ORS 419A.253 and OEC 201(b). However, the court must so state on the record so that parties have an opportunity to object. *D.H.S. v. A.A.*, 276 Or App 223 (2016)

What evidence rules apply if the court holds a contested permanency hearing simultaneously with a motion to dismiss jurisdiction? Pursuant to ORS 419B.476(1), the court may receive testimony and reports as provided in ORS 419B.325. ORS 419B.325(2) allows admission of "testimony, reports or other material relating to the ward's mental, physical and social history and prognosis" without regard to competency or relevancy under the rules of evidence.

This exception to the evidence code does not apply to a motion to dismiss dependency jurisdiction. As stated in *D.H.S. v. J.B.V.*, 262 Or App 745, 748 (2014):

> "[T]he legislature has imposed a significant evidentiary threshold that those who would seek to make a child a ward of the court must cross by using only competent evidence. In the absence of an explicit indication to the contrary, it is not persuasive to suggest that the legislature intended for the juvenile court's jurisdiction, once established with competent evidence, to be perpetuated with less-than-

> competent evidence. We therefore conclude that ORS 419B.325(2) cannot serve as the basis for the court to receive or consider evidence for the purpose of making a jurisdictional determination."

In contrast, such evidence is allowed with regard to the findings required by ORS 419B.476(2)(a) at a permanency hearing. *D.H.S. v. J.B.V.*, 262 Or App 745 (2014)

STANDARD WHEN PLAN IS NO LONGER FROM REUNIFICATION

If the permanency plan is no longer reunification, DHS no longer must work to reunify the family or monitor parents' progress. D.H.S. v. T.L, 279 Or App 673 (2016).

A motion to dismiss jurisdiction after a change in plan is treated differently.

> "The question for us, then, is how to ensure that the procedure for motions to dismiss juvenile court jurisdiction does not undermine the process for permanency contemplated by the legislature at the time that it adopted the provisions to implement ASFA. The legislature has not spoken directly on that point—it has not spoken about motions to dismiss jurisdiction at all. That leaves it to us to devise a way to best effectuate the legislature's intent. *T.L.*, 279 Or App at 688.
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> The *** answer – and the one that we think is most consistent with the permanency process adopted by the legislature - is to place, on parents who seek to dismiss dependency jurisdiction, the burden of proving that jurisdiction does not continue. That is, once a permanency plan has been changed away from reunification, a parent seeking dismissal of dependency jurisdiction must prove that the bases for jurisdiction no longer pose a current threat of loss or harm to the child that is reasonably likely to be realized, thereby overcoming the presumption created by the permanency plan that the child cannot return safely to parents." *T.L.*, 279 Or App at 690.

Once the court changes the permanency plan away from reunification, the inquiry in subsequent permanency hearings is no longer whether DHS has made reasonable efforts to reunify family, or whether parents have made sufficient progress to permit child to return safely home. The pertinent inquiry focuses on whether DHS has made reasonable efforts to timely implement the permanency plan. *D.H.S. v. C.L.*, 254 Or App 203 (2012) *rev den*, 353 Or 445 (2013).

SPECIFIC CASE ISSUES

DOMESTIC VIOLENCE

YES REASONABLE EFFORTS. DHS delayed a referral to batter's intervention treatment by seven months because psychological evaluation concluded father needed to demonstrate at least one year of sobriety before ensuring that batterer's intervention would be effective. *D.H.S. v. D.M.D.*, 301 Or App 148 (2019).

NO REASONABLE EFFORTS. Jurisdiction based upon "chaotic lifestyle and chaotic relationship with mother." Father referred to "Womanspace" program and he did not participate. DHS failed to present evidence that this service could help father ameliorate the jurisdictional basis. Court also stated, "the state has no authority to assert itself into every flawed human relationship – chaotic though it may be." *D.H.S. v. D.M.R.*, 301 Or App 436, 444 (2019).

FOCUS BY DHS ON ONLY ONE PARENT

NO REASONABLE EFFORTS. DHS worked extensively with mother but ignored father on theory reunification with mother was likely. Need to ensure both parents get equal services - in particular visitation. Once father incarcerated DHS very little effort with father until child removed from mother. *D.H.S. v. T.S.,* 267 Or App 301 (2014).

GUARDIANSHIP

ACTIVE EFFORTS FINDING UNNECESSARY. Court only needs to make active effort findings (and presumably reasonable efforts findings) at the permanency hearing when the plan is charged to guardianship. Juvenile court does not have to made active efforts finding again when implementing the guardianship. *D.H.S. v. K.S.W.*, 299 Or App 668 (2019) and *D.H.S. v. J.G.,* 260 Or App 500 (2014).

HOUSING

YES AE. DHS did not provide services around housing assistance, house-cleaning assistance and job placement assistance. Court found beyond a reasonable doubt, that given the nature of the parents' problems, it made sense to address the parents' inability to safely parent before offering services on housing. Parents had not

made sufficient progress regarding being able to safely parents at the time of the permanency hearing. *D.H.S. v. M.L.M*., 283 Or App 353 (2017).

INCARCERATED PARENTS

Caseworker Contact and Visitation of Children

YES REASONABLE EFFORTS. DHS arranged phone visitation, paid money to prison account to facilitate video visits and made efforts to get father transferred to prison closer to child. Parent's incarceration may place the services that DHS provided to father in perspective. There was little evidence that father would have benefited from additional services. *D.H.S. v. C.S.C.,* 303 Or App 399 (2020).

NO REASONABLE EFFORTS. DHS failed to maintain contact with father in prison. DHS provided minimal to no efforts to a parent serving a lengthy prison and therefore did not provide reasonable efforts. *D.H.S, v. L.L.S.,* 290 Or App 132 (2018).

NO REASONABLE EFFORTS. DHS failed to make face to face contact for six months and delayed contacting prison counselor. ("[T]here is no evidence in this case that DHS's inaction for lengthy periods of time was the product of a reasoned decision to cease certain efforts—instead, the record reveals that DHS failed to adequately engage with mother because it did not allocate sufficient resources to the family's case.") *D.H.S. v. S.M.H.*, 283 Or App 295, 310 (2017).

NO REASONABLE EFFORTS. DHS did not contact father at all for approximately one year, did not look into arranging visitation or telephone calls for 7-8 months and made no effort to assist father in developing his relationship with child other than forwarding letters. *D.H.S. v. T.S*, 267 Or App 301 (2014).

YES REASONABLE EFFORTS. DHS not required to provide in person visitation to incarcerated parent due to six-hour round trip drive, the stress of the prison environment in light of child's physical, behavioral and emotional problems, lack of relationship with child and parent's psychological evaluation. The length and circumstances of a parent's incarceration are factors that the juvenile court may consider in relationship to child's stage of development and particular needs in determining reasonable efforts. *D.H.S. v. S.W.*, 267 Or App 277 (2014).

YES REASONABLE EFFORTS. DHS neither arranged for visitation with the children where mother was incarcerated, nor offered treatment services to her. However, caseworker visited mother in prison, offered her a substance abuse evaluation (which she refused), called mother in prison, communicated with prison counselor about what services were available to her while she was incarcerated and evaluated whether it would be appropriate for her children to visit mother while in prison. *D.H.S. v. D.L.H.*, 251 Or App 787 (2012) *rev den* 353 Or 445 (2013).

NO REASONABLE EFFORTS. *State ex rel Juvenile Department of Coos County v. Williams*, 204 Or App 496 (2006).

> "Because the reasonableness of DHS's efforts is dependent on the unique circumstances of a particular case, we decline to delineate exactly what types of actions would make DHS's efforts reasonable when a parent is incarcerated." State ex rel Juvenile Department of Coos County v. Williams, 204 Or App 496, 501 (2006).
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> "[I]n this case, DHS could have engaged in any number of activities that it did not attempt and that might constitute reasonable efforts under some circumstances involving incarcerated parents. For example, DHS could have contacted father and investigated the history and extent of father's relationship with child. It could have assessed father's parental strengths and deficiencies. It could have explored services available to father during his incarceration, incorporated those services into a service agreement, and documented whether father participated in those services. It could have monitored father's progress through his corrections counselor or another employee of the jail. It could have looked into whether visitation at the jail was possible and appropriate. It could have compared father's release date with the dependency case time lines and child's particular needs to determine whether reunification was possible within a reasonable time and, if so, it could have inquired into father's probable post-release situation and plan. In general, DHS could have attempted to engage and work with father. It completely failed to do so in this case." *Williams*, 204 Or App at 502.

Reunification Does Not Mean Physical Custody

NO REASONABLE EFFORTS. Reunification does not mean physical reunification it means "restoration of the parents' right to make decisions about the child's care, custody and control without state supervision." DHS must ask incarcerated parent if they have any ideas about how to satisfy the conditions from prison with assistance of DHS. *D.H.S. v. L.L.S.,* 290 Or App 132, 138 (2018).

NO REASONABLE EFFORTS. DHS must inquire as to incarcerated parent's placement preferences – even if resource is out of state. *D.H.S. v. M.C.C.*, 303 Or App 372 (2020).

Cost Benefit Analysis

NO REASONABLE EFFORTS. In this case jurisdiction was based on father being incarceration and an untreated sex offender. DHS determined that visitation between father and child would be key to reunification, but visitation could not occur without father first getting a psycho-sexual evaluation. The cost to obtain the evaluation was five times the cost as the same evaluation outside of prison. DHS delayed in getting the evaluation.

The court of appeals concluded no reasonable efforts were made as DHS did not provide father with psycho-sexual evaluation when that service was identified as a key to reunification. The analysis did not hinge on the probability that the service would actually facilitate reunification, but rather that the importance of the service to the case plan and the potential magnitude that the service could ameliorate the jurisdictional basis in the case. *D.H.S. v. M.K.,* 257 Or App 409 (2013).

NO REASONABLE EFFORTS. This case involved a special needs infant with MRSA and a father who did not engage in the case for the first six months until he became incarcerated. Once incarcerated, father received a sentence of approximately two more years in prison. DHS had five phone calls with father but no face to face contact and provided very little information to father.

The juvenile court found that DHS's efforts were "hardly vigorous" and the failure to assess the available programing in prison was "disappointing." However, the juvenile court found that even if DHS had made all of the efforts that father argued DHS should have made, those efforts nevertheless would not have made reunification between father and child possible in the near future.

Court of appeals reversed concluding that DHS may not withhold a potentially beneficial service to a parent simply because reunification with a parent is ultimately unlikely even if the parent successfully engages in the services and programs that DHS should provide. The juvenile court may consider the length and circumstances of a parent's incarceration in assessing DHS's efforts. However, the reasonable efforts inquiry focuses on whether DHS provided the parent with an opportunity to demonstrate improvements regarding the jurisdictional bases. The court of appeals distinguished this case from the decision in *D.H.S. v. S.W.,* 267 Or App 277 (2014) explaining:

> "Thus, our cases support the proposition, that, in assessing the 'benefit' portion of the required cost-benefit analysis, the juvenile court must consider the importance of the service that was not provided to the case plan and the extent to which that service was capable of ameliorating the jurisdictional bases. *See, e.g., M.K.* 257 Or App at 418; *see also N.T.,* 247 Or App at 715 ("[B]oth DHS's efforts and a parent's progress are evaluated by reference to the facts that formed the bases for juvenile court jurisdiction."). Further, when available, the juvenile court also properly considers evidence tied to a parent's willingness and ability to participate in and benefit from the particular service that was not provided. . . ."
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> "[O]ur cases do not stand for the proposition that DHS may withhold a potentially beneficial service to an incarcerated parent (or any parent) simply because, in DHS's estimation, reunification with the child is ultimately unlikely even if the parent successfully engages in the services and programs that DHS provides. Such a proposition is inconsistent with ORS 419B.476(2)(a), which treats evaluation of the agency's efforts as a distinct inquiry from whether the parent has made 'sufficient progress' to make reunification possible."

D.H.S., v. C.L.H., 283 Or App 313, 329 (2017) .

MENTAL HEALTH

NO REASONABLE EFFORTS. Court can evaluate reasonable efforts only from time of disposition judgment to permanency hearing when parent declines to participate in services prior to entry of dispositional judgment. In this case it took nine months from filing a dependency petition to dispositional judgment. Mom

only in DBT services for one month prior to permanency hearing – too short to assess reasonable efforts. *D.H.S. v. J.E.R.,* 293 Or App 387 (2018).

YES REASONABLE EFFORTS. Mother argued there was a total lack of effort to assist her in "addressing the effects of her mental health." Court looked at DHS efforts over a 20-month span and not just the three months DHS did not offer services. *D.H.S. v. M.A.H.*, 284 Or App 215 (2017).

YES RE – BUT. Even if DHS makes reasonable efforts and a parent meets the expectation of the service agreement it is still possible for Court to find that it is not safe to return child home and therefore find the parent's progress legally insufficient. D*.H.S. v. C.M.E.*, 278 Or App 297 (2016).

YES RE – BUT. The court changed the permanency plan and also found the parent had made "sufficient progress." The court's finding that the parent has not made sufficient progress **to make it possible for the ward to safely return home** is not necessarily inconsistent with a determination that the parent has made "sufficient progress" **towards meeting expectations**. That result is consistent with the statutory mandate that of "reasonable efforts" and "sufficient progress" required under ORS 419.476(2). *D.H.S. v. R.S.*, 270 Or App 522 (2015).

LACK OF PARENTAL RELATIONSHIP

NO REASONABLE EFFORTS. DHS made no effort toward reunification for a six-month period while mother incarcerated, but did made efforts during the four months prior to the permanency hearing. Overall no reasonable efforts. Good discussion of incarcerated parent, young children that have suffered trauma and therapist employed by DHS that appears not to support reunification. *D.H.S. v. S.S.*, 278 Or App 725 (2016).

PHYSICAL ABUSE

NO REASONABLE EFFORTS. Mother threw stool at child and injured her. Child did not want to return to mother. DHS made little effort to provide services to mother to make the adjustments needed to achieve reunification. Court of appeals commented that these factors may have provided DHS grounds for seeking to be excused from making reasonable efforts under ORS 419B.340(5)(if serious

physical injury), but without being relieved of such efforts DHS must provide services directed toward reunification. *D.H.S. v. D.L.*, 303 Or App 286 (2020).

Father used corporal punishment on child resulting in criminal charges and jurisdiction. Father agreed he would not use corporal punishment because he now understood the law - even if he did not agree with it. The question is not what a parent believes, but what a parent is likely to do at the time of the hearing. *D.H.S. v. J.M.,* 260 Or App 261 (2013)

PSYCHOLOGICAL EVALUATIONS

NO REASONABLE EFFORTS. Mother's psychological evaluation indicated that services needed to be provided in a certain manner (i.e. hands-on training with an in-person parent trainer working with mother and child together). DHS began providing such services 15 months later – three months before the permanency hearing. The efforts of DHS did not afford mother a reasonable opportunity to become a minimally adequate parent. *D.H.S. v. V.A.R.*, 301 Or App 565 (2019).

YES REASONABLE EFFORTS. Father's psychological recommended batterer's intervention treatment be delayed until father had one-year of sobriety. One month prior to the permanency hearing, and with father sober for about 8 months, DHS paid for his BIP intake evaluation. Court agreed that referring him to this service earlier would not have been reasonable. *D.H.S. v. D.M.D.*, 301 Or App 148 (2019).

YES ACTIVE EFFORTS. DHS consulted with different professionals to schedule an evaluation. It took five months after removal to get a psychological evaluation partly due to trying to determine if psychological or neuropsychological evaluation was necessary and partly due to availability of evaluator. Court found active efforts, in part, concluding that an earlier evaluation would not have ameliorated mother's condition to allow child to return home. *D.H.S. v. M.D.*, 266 Or App 789 (2014).

YES REASONABLE EFFORTS. Psychological evaluation diagnosed father with schizoid and suspected antisocial tendencies and concluded that "mental health intervention would invariably be low yield and thus is not recommended." Father was engaged in the case, visits went well, and he completed a parenting class. Court accepted that father's personality disorder is untreatable as evidenced

by father's angry and threatening behaviors towards caseworkers. *D.H.S. v. S.N.*, 250 Or App 708 (2012).

SEXUAL OFFENDER TREATMENT

NO REASONABLE EFFORTS. Infant born to two parents convicted of sexual offenses. DHS failed to make reasonable efforts to provide necessary services to mother because DHS failed to secure a provider for mother's sex offender treatment for 16 months. *D.H.S. v. R.D.,* 257 Or App 427 (2013).

SPECIAL NEEDS OF CHILD

YES REASONABLE EFFORTS. DHS delayed in getting services for parents in place to address/educate/train them about child's special needs. However, the record supported that when the services were later offered parents made little progress in gaining skills. Court found that providing those services earlier would not have made a difference. *D.H.S. v. J.M.,* 275 Or App 429 (2015) *rev den* 358 Or 833 (2016).

VISITATION

YES REASONABLE EFFORTS. DHS case plan called for therapeutic visitation between mother and children, but children adamantly refused to participate. Therapeutic visitation never occurred. In determining reasonable efforts court can consider that children would suffer from forced therapeutic visitation and children refused to cooperate with visits. *D.H.S. v. M.K.*, 285 Or App 448 (2017)

YES REASONABLE EFFORTS. Prior to permanency hearing, DHS moved child from Grants Pass to Keizer to be placed with relative who had custody of child's siblings. Before the move parents regularly attended twice weekly visits. After the move, parents attended visits monthly in Salem and DHS provided gas vouchers and motel in Salem. DHS did not provide consistent transportation services from bus station in Salem to DHS office which required parents to walk six miles each way to attend visits. Considering the record as a whole, the court of appeals found DHS made reasonable efforts. *D.H.S. v. M.H.*, 258 Or App 83 (2

*****Many thanks to Megan Hassen, JCIP Legal Analyst, for her work in reviewing, analyzing, compiling and updating juvenile appellate cases.*****