



Juvenile Appellate Update

Through the Eyes of a Child Conference

August 9, 2021

Hon. Darleen Ortega, Oregon Court of Appeals
Hon. Megan Jacquot, Coos County Circuit Court



Indian Child Welfare Act (ICWA)

- Applicability
 - Applies to “Indian child”: any unmarried person under 18 + (1) member of Indian tribe or (2) eligible for membership in an Indian tribe and bio child of member of Indian tribe. 25 USC §1903(4)
 - ***Dept. of Human Services v. H. C. W., [311 Or App 102 \(2021\)](#) (p. 5)***
 - Mother is descendant member of the Karuk tribe, which has two types of membership: descendancy and fully enrolled membership. The child is eligible for descendant membership but not fully enrolled membership.
 - Does ICWA apply? YES

Interstate Compact for the Placement of Children (ICPC)

Issue: is ICPC approval needed when child is placed with parent in another state?

No. “Placement in foster care” as that phrase is used in ORS 417.200, Article III, refers to substitutes for parental care and does not apply when a child is residing with a parent in another state.

Dept. of Human Services v. D. C. B.,
[310 Or App 729 \(2021\)](#) (p. 5)

Pre-Jurisdiction Parentage Decisions

Issue: does the court have subject matter jurisdiction to consider parentage prior to establishing jurisdiction under ORS 419B.100(1)(c)?

Yes, the court's subject matter jurisdiction under ORS 419B.100(1) is not limited to cases in which the court has determined the merits of a dependency petition. *Dept. of Human Services v. C. M. H.*, [368 Or 96 \(2021\)](#) (p. 13)



Jurisdiction

Amended allegations

Claim and issue preclusion

Sufficiency of evidence

Claim and Issue Preclusion

- General rule: when a petition alleges jurisdictional facts that are substantially similar to allegations that have been previously litigated, and the evidence in proof of those allegations is no different from evidence the court has previously considered, then issue and claim preclusion preclude re-litigation.
 - However, when there are ***new jurisdictional allegations*** or ***similar allegations based on “new substantial material facts”*** (that were either not available or not presented and would likely have been material to the court’s determination), then the welfare of the child must prevail over the policy underpinnings that would otherwise bar re-litigation. ***Dept. of Human Services v. T. G. H., [305 Or App 783 \(2020\)](#) (p. 7)***

Amended Allegations

Facts:

- Motion to amend petition at the jurisdictional trial
- Court made a finding in the judgment that the requested allegation was found
- Nobody objected

Held:

- Court did not commit plain error, because it is not obvious and beyond reasonable dispute that the court could not amend the petition using the procedure it did. ORS 419B.809(6) does not require a continuance after the amendment where the amended allegation was based on the same evidence presented to prove the other allegations. ***Dept. of Human Services v. S. S., 307 Or App 37 (2020) (p. 7)***





Proceeding without a Parent; ORS 419B.816 Notice


- Required notice prior to proceeding without a parent. ORS 419B.816.
- Father had appeared at shelter and then a settlement conference and was ordered to appear for a subsequent hearing (June 3), failed to appear, and the court set it over to give him another chance to appear. When father failed to appear at the second set, the court allowed DHS to proceed with a prima facie case and entered judgment. COA found no plain error. Court distinguished with TPR case law based on ORS 419B.815(7).
 - *Dept. of Human Services v. C. C.*, [310 Or App 389 \(2021\)](#) (p. 11)

Continuance beyond 60 days

- Upon written order supported by factual findings of good cause, the court may continue a petition beyond 60 days. ORS 419B.305(1)
 - A matter continued shall be given the highest priority on the docket. ORS 419B.305(5).
- Trial court did not err by finding good cause to reschedule jurisdictional trial beyond 60 days, given that the court was in the middle of a different trial and rescheduling the witnesses to testify would require time and notice. Also, the trial was rescheduled to only several judicial days later. ***Dept. of Human Services v. L.E.F., [307 Or App 254 \(2020\)](#) (p.10)***

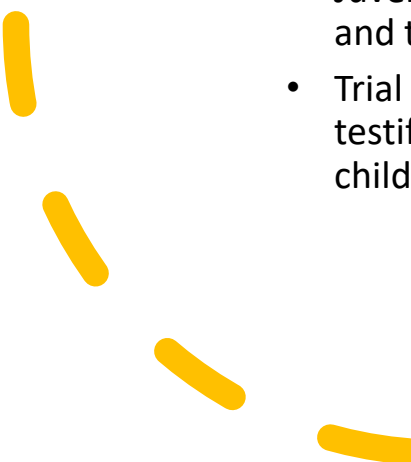


Conditions and Circumstances Jurisdiction

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- General test: 419B.100(1)(c)
 - The juvenile court has jurisdiction over a child whose conditions or circumstances are such as to endanger the welfare of the child or of others.
 - A child's welfare is endangered if:
 - There is a current threat of serious loss or injury; and
 - There is a reasonable likelihood that the threat will be realized.
 - DHS has the burden to establish:
 - A nexus between the allegedly risk-causing conduct or circumstances and the risk of harm to the child, and
 - The risk is present at the time of the hearing and not merely speculative.



Alcohol use; inappropriate discipline; anger control

- *Dept. of Human Services v. L.E.F., [307 Or App 254 \(2020\)](#) (Affirmed) (p. 10)*
 - Alcohol:
 - D testified about the effects of father's drinking in a way that was consistent with what she told DHS
 - The court noted that father had not been honest during his D and A assessment
 - The evaluator testified that father's abstention from alcohol for two months was not significant
 - The juvenile court's inference concerning the likelihood and imminence of father's further alcohol abuse during parenting time was supported by the record.
 - Inappropriate discipline and anger control:
 - Juvenile court could reasonably find that each child experienced substantial pain when dragged and slapped by father, and that such force in the course of "discipline" was not reasonable.
 - Trial court's finding regarding father's anger issues was supported by evidence in the record when the psychologist testified father may do something inappropriate or ineffective when things are pushed to far, and testimony from the children that they were afraid of their father because he drank and was mean on most days they spent with him.
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Residential Instability; Chaotic Lifestyle

- *Dept. of Human Services v. C. C.*, [310 Or App 389 \(2021\)](#) (**Reversed**) (p. 11)
 - Insufficient evidence that mother’s residential instability poses a risk of harm where mother had an active lease for at least another six months in an evidently suitable home.
 - No evidence of “chaotic lifestyle” when mother moved impulsively to WA out of concern of possible drug use in the home, relocating to a place of safety with a friend and reaching out to supportive services.
 - Lack of relationship does not pose a nonspeculative risk of harm to a child standing alone.

Sex abuse – credibility determinations

- Allegation of sex abuse against father
 - Father denies - conflicting testimony between child and father
 - Trial court made credibility findings about the testimony of both parents and the child – suggested child’s lack of motive versus what would be a motive for father to lie tipped the scales in favor of believing child. Court found jurisdiction.
- Affirmed. *Dept. of Human Services v. T. H.*, [313 Or App 560 \(2021\)](#) (p. 8)

Substance abuse

- ***Dept. of Human Services v. L. T.*, [313 Or App 641 \(2021\)](#) (p. 9)**
 - Underage mother admits to using marijuana multiple times per day
 - D and A counselor recommended mother participate in level one rehabilitation services and expressed concern about her being underage, her need for the substance and that the high volume of consumption could increase her risk of inattentiveness and decrease her ability to identify dangers around her infant.
 - Testimony regarding volume and frequency of use combined with testimony about the effects of high amounts of marijuana consumption was sufficient to establish a nexus between mother's behavior and a risk of harm to L.



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

- The court was entitled to rely on mother's courtroom conduct in its assessment of her credibility and on her continued minimization of the original assault and the new incident in determining the current likelihood that A will suffer serious loss or harm if wardship is terminated. *Dept. of Human Services v. D. L.*, [308 Or App 295 \(2020\)](#) (Affirmed) (p. 15)
- Without parents' understanding as to how the injury occurred to an infant in their sole custody and care, and the lack of any participation in services specifically tailored toward preventing the injury from happening again, the bases for jurisdiction have not been addressed or ameliorated. During the entirety of the time since the injuries to E were discovered, the family has been under a DHS safety plan which alone could explain the fact that the child has not suffered additional injuries. *Dept. of Human Services v. N. L. B.*, [306 Or App 93 \(2020\)](#) (Affirmed) (p. 14)

Case examples

- *T.W. v. C.L.K.*, [310 Or App 80 \(2021\)](#) (p. 16)
 - Basis of jurisdiction: “the father is out of state and is currently unable to be a resource due to his criminal convictions and attendant consequences.” (the underlying conviction was for DUII)
 - Father filed a motion to dismiss and argued the jurisdictional bases have been ameliorated because he now lives in Oregon and his last criminal conviction was 2014. Evidence was presented that he continues to drink alcohol.
- Issue: was father on notice that he could not drink alcohol?
- No, the basis of jurisdiction did not provide adequate notice that facts relating to his current alcohol consumption were part of the jurisdictional basis.

Order for Psychological Evaluation

- Two sources of statutory authority:
 - ORS 419B.387: if the court finds *in an evidentiary hearing* that treatment or training *is needed* by a parent *to correct the circumstances that resulted in wardship or to prepare the parent to resume care of the child*, it may order the parent to participate in the treatment or training *if it is in the child's best interest*.
 - ORS 419B.337(2): when the court asserts jurisdiction over the child and places the child in the legal custody of DHS, the court may specify the particular type of service to be provided by DHS to the parents of the ward. The juvenile court may only order DHS to provide *those services* that bear a *rational relationship* to the *jurisdictional findings*.

Case examples

- ***Dept. of Human Services v. F. J. M.*, [312 Or App 301 \(2021\)](#) (p. 17)**
 - Juvenile court's order for a psychological evaluation under ORS 419B.387 affirmed when the court focused on father's long-term failure to protect the children from mother and found the evaluation would be helpful in determining what else needs to be done to assure that father can keep the children safe and away from mother.
- ***Dept. of Human Services v. M. O. B.*, [312 Or App 472 \(2021\)](#) (p. 18)**
 - Although juvenile court did not specify which statute it was relying on, there was legally sufficient evidence to support the juvenile court's determination that a psychological evaluation was a component of the treatment or training needed by father to address his pattern of assaultive and impulsive behavior and resume care of R.
 - ORS 419B.387 does not authorize a psych eval every time a parent has a problem.
 - In this case, R had been out of his parents' care for over six months (since birth) and the efforts previously undertaken by DHS had not worked.

Discussion

Is a psychological evaluation really needed, or would some other type of assessment be more well suited to the situation?

How do we get buy in from parents?

What's behind the objections from parents?

What is the local capacity for psych evals and is there a risk of adding delay to the case?

Order for Psychological Evaluation

- ***Dept. of Human Services v. F.T.R.*, [306 Or App 697 \(2020\)](#) (p. 18)**
 - Mother objected to the order for the psychological evaluation, arguing that submitting to the exam may require her to incriminate herself in a related criminal case in violation of the Fifth Amendment of the US Constitution. She argued that right prevents a court from ordering her to participate in the absence of a grant of “use immunity.”
- **Held**: The Fifth Amendment does not provide a right to refuse to honor a subpoena or take the witness stand. Barring exceptional circumstances, the only way a person can assert the privilege is on a question-by-question basis.



Permanency Hearing

Reasonable Efforts

Sufficient Progress

Compelling Reasons

Plan of Guardianship

Reasonable Efforts (Relationship to Jurisdiction)

- ***Dept. of Human Services v. L. A. K.*, [306 Or App 706 \(2020\)](#) (p. 24)**
 - Basis of jurisdiction: “Despite prior services offered to the father (by DHS and) other agencies, the father has been unable and/or unwilling to overcome the impediments to his ability to provide safe, adequate care to the child.”
 - DHS argues the term “impediments” is a euphemism for father’s addiction and criminal activity.
- Held: Reversed.
 - DHS failed to meet burden to establish it provided father services sufficiently related to the basis of jurisdiction. The term “impediments” is not interchangeable for addiction or criminal activity.
 - The alleged and proven jurisdictional basis delineates the authority of the court and sets the expectation of services provided by DHS.

Reasonable Efforts (Insufficient)

- ***Dept. of Human Services v. W. M.*, [310 Or App 594 \(2021\)](#) (p. 20)**
 - Jurisdictional basis: parents lack the stability and parenting skills to meet the child's needs (Child with feeding disorder)
 - DHS efforts: Except for one session, the child's therapy was provided via telehealth due to the pandemic. The occupational therapist did not recommend parents be responsible for A's feeding until they could demonstrate their understanding of how to feed A.
 - Held: DHS efforts leading up to the permanency hearing did not give parents a reasonable opportunity to address the jurisdictional basis. DHS efforts must extend long enough to allow for parents to obtain the type of training the pandemic has prevented them from having and long enough to allow for meaningful assessment of whether that training will permit them to become minimally adequate parents.

Reasonable Efforts (Incarcerated Parent)

- ***Dept. of Human Services v. K. G. T.*, [306 Or App 368 \(2020\)](#) (p. 21)**
 - DHS relied on DOC to provide father with the services he needed even though DHS knew that virtually no services were available through DOC.
 - DHS failed to meet burden to show it provided RE.
- Takeaway:
 - If providing a needed (key to reunification) service is possible, the court must engage in cost-benefit analysis.
 - DHS must establish the cost.
 - The juvenile court must consider the importance of the service that and the extent to which that service can ameliorate the jurisdictional basis.
 - The question of whether reunification is unlikely is not relevant to the analysis but should be considered in relation to the determination regarding parental progress.

Reasonable Efforts (Parent Out of Country)

- ***Dept. of Human Services v. R. A. C. -R.*, [306 Or App 360 \(2020\)](#) (p. 23)**
 - Father lives in Mexico and is barred from coming to the US.
 - DHS efforts:
 - Twice weekly video visits
 - Numerous attempts to get information from DIF and online search for services.
 - Caseworker came to understand that the only DV programs in Mexico were for victims, and not perpetrators.
- Efforts were sufficient. When there is no feasible way to provide a service to a parent, DHS cannot be required to provide that service as a condition to proving reasonable efforts, as that would have the effect of leaving the child stuck in limbo.

Reasonable Efforts (Parent with Autism)

- ***Dept. of Human Services v. J. D. R.*, [312 Or App 510 \(2021\)](#) (p. 19)**
 - The jurisdictional basis for father was that he was recently diagnosed with Autism Spectrum Disorder with accompanying intellectual impairment, which impacts his ability to parent.
 - DHS concentrated its efforts on mother and failed to provide father with services that were tailored to his autism diagnosis.
 - Juvenile court found DHS made RE and ordered DHS to make additional efforts related to father's autism.
- Held:
 - Reversed. DHS did not make efforts that addressed the jurisdictional basis in its entirety. Even if it were going to offer standard services in the beginning, it should have added tailored services when it was obvious that father wasn't responding well.



Sufficient Progress (Notice of Requirements)

- ***Dept. of Human Services v. K. S. S.*, [310 Or App 498 \(2021\)](#) (p. 25)**
 - To change a plan from reunification to adoption, the proponent of the change must prove that, despite DHS's reasonable efforts to reunify the child with the parent, the parent has not made sufficient progress for the child to safely return home.
 - The court *may not* change the plan based on conditions or circumstances that are not explicitly stated or fairly implied by the jurisdictional judgment.
 - When evaluating whether a parent is on notice, the court looks to the petition, jurisdictional judgment, and documentation attached to the jurisdictional judgment providing the parent notice as to the conditions for reunification.
- In this case, father wasn't on notice he needed to complete sex offender treatment when the sole basis for jurisdiction was his mental health.

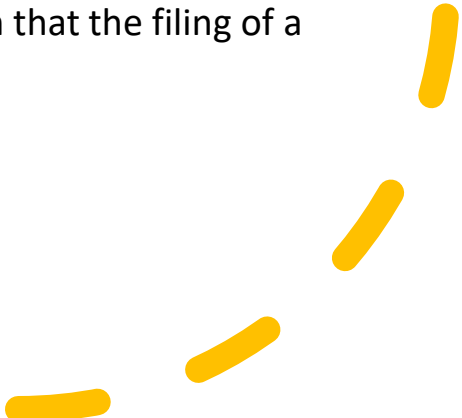


Sufficient Progress (child's health and safety)

- DHS did not meet its burden to prove that mother's progress toward ameliorating the effects of her substance abuse qualified as insufficient for purposes of ORS 419B.476(2)(a) on the sole basis that mother wasn't participating in recommended treatment.
 - Though mother's participation in the services recommended by DHS bears on the progress she has made toward reunification, the paramount concern in ORS 419B.476 is the health and safety of the child.
 - The caseworker confirmed that when mother relapsed, she was still meeting B's needs. The evidence from the foster provider and therapist was that mother was able to provide B with support and care and recognize his needs and that there were no indicators of any current safety concerns. Also, B has a strong bond with mother and has expressed a desire to return to her care. Finally, B's therapist expressed concern that B would experience distress the longer the separation from mother continued. *Dept. of Human Services v. C. W.*, [312 Or App 572 \(2021\)](#) (p. 24)



Sufficient Progress and Compelling Reasons

- ***Dept. of Human Services v. D. M.*, [310 Or App 171 \(2021\)](#) (p. 26)**
 - Bases of jurisdiction: volatile relationship; failure to protect from physical abuse and maltreatment; failure to maintain a safe environment; substance abuse
 - Stepmother failed to admit to abusing the children, and juvenile court found she had. The court also found father failed to protect E.
 - The record supports the juvenile court's findings that E suffered harm from father's and stepmother's past conduct and that acknowledging that E suffered trauma as a result of that conduct is necessary for E to return safely home.
 - Juvenile court's findings that E could not safely return home without father acknowledging the previous harm to E, that father and stepmother were not engaging with E's counselor and that father had inconsistent engagement in the Batterer's Intervention Program were sufficient to support the juvenile court's legal conclusion there was no compelling reason that the filing of a TPR petition would not be in the best interests of E.
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Guardianship

- Is it permissible to establish a probate guardianship for a child involved in a dependency case?
 - Generally, no. The guardianship statutes in ORS Chapter 419B establish the exclusive means by which a juvenile court may establish a guardianship for a ward who is under the exclusive jurisdiction of the juvenile court.
***Keffer v. A.R.M.*, [313 Or App 503 \(2021\)](#) (p. 28)**



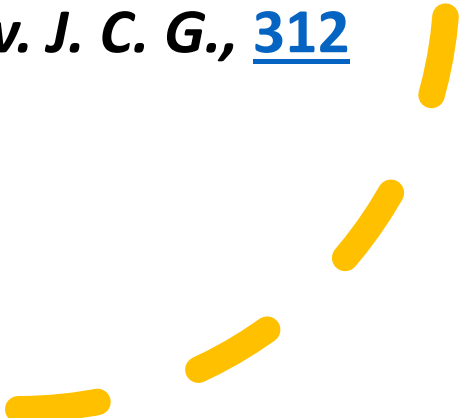
Termination of Parental Rights


Notice (ORS 419B.820)

Best Interest Determination

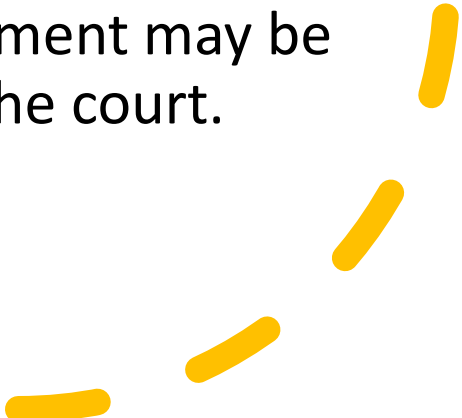


ORS 419B.820 Notice

- If the parent appears and contests the petition, the court must provide notice as outlined in ORS 419B.820:
 - In writing provided to the parent in person or mailed to the address provided by the parent, or
 - By oral order on the record.
 - A written order served by publication is not sufficient to meet the requirements of ORS 419B.820. *Dept. of Human Services v. J. C. G.*, [312 Or App 461 \(2021\)](#) (p. 30)
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Best Interest Determination – ORS 419B.500

- ***Dept. of Human Services v. M. H.*, [306 Or App 150 \(2020\)](#) (p. 29)**
 - Under ORS 419B.500, the court must find freeing the child for adoption is in the child's best interest.
 - If a child's likely adoptive placement informs whether freeing that child for adoption is in the child's best interest due to the child's particular needs and circumstances, then evidence of where, and with whom, that placement may be is a permissible consideration for the court.
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Miscellaneous Topics


Disposition of Child Abuse Assessment

Motion to Suppress (Delinquency)

Restitution (Delinquency)




Disposition of Child Abuse Assessment

- ***Bruce Querbach v. Dept. of Human Services*, [308 Or App 131 \(2020\)](#) (p. 4)**
 - The standard for founded dispositions of abuse is “reasonable cause to believe”, which has been interpreted by the court as akin to the “reasonable suspicion” standard in criminal law.
 - DHS evaluates whether there is reasonable cause to believe the child is at risk of harm from abuse or neglect by a particular individual.
 - The role of the circuit court in reviewing the DHS determination is to determine whether a reasonable person could reach the same determination that DHS made.
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Motion to Suppress

- ***State of Oregon v. T. T.* , [308 Or App 408 \(2021\)](#) (p. 2)**
 - Youth was a backseat passenger and an adult was driving when they were stopped. The trooper smelled marijuana and eventually searched the car and found large bags of marijuana in the trunk.
 - Issues:
 - (1) whether the traffic stop unlawfully turned into a drug investigation when the trooper asked where they were coming from and how long they had been there;
 - (2) if not, whether the trooper, at a later point in the traffic stop, had reasonable suspicion to ask the driver and youth to get out of the vehicle for a drug investigation; and
 - (3) if the traffic stop was lawfully converted into a drug investigation, whether the trooper developed probable cause to search the car under the automobile exception to the warrant requirement.
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Restitution

- ***State v. L. G. S.-S.*, [307 Or App 208 \(2020\)](#) (p. 3)**
 - The court erred in awarding restitution to Safeco Insurance, because the state did not meet the timing requirement in the juvenile restitution statute, ORS 419C.450, which requires the state to present restitution evidence "prior to or at the time of adjudication."
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Questions?