

# APPELLATE UPDATE

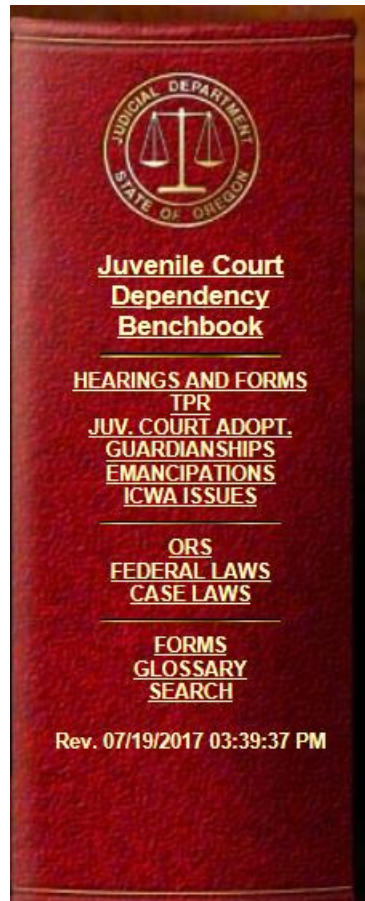
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Through the Eyes of a Child

August 6, 2017

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# Case Law Outlines



<https://web.courts.oregon.gov/JuvenileBenchBook.nsf?OpenDatabase>

# JURISDICTION

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Failure to Appear

Conditions and Circumstances Jurisdiction

ICWA – Expert Testimony

# Parent's Failure to Appear – Role of the Attorney

- A parent who has initially answered the petition and summons and who has been ordered to appear at subsequent proceedings, and who fails to appear personally, may be found in default under ORS 419B.815(7).
- A parent may not appear through an attorney if:
  - The summons requires the person to appear personally; or
  - The court orders the person to appear personally at a hearing in the manner provided by ORS 419B.816. ORS 419B.815(8)
- The attorney:
  - May not make evidentiary objections.
  - May explain a parent's reason for not being present and may make a motion to continue the hearing.



*Dept. of Human Services v. S.C.T.*, [281 Or App 246 \(2016\)](#) (p. 9)

## Conditions and Circumstances: ORS 419C.100(1)(c)

- Basic test:

- Child's conditions or circumstances expose the child to a ***current threat of serious loss or injury*** that is likely to be realized.
- When a petition is based on a parent's conduct, DHS must prove a ***nexus*** between ***the conduct*** and ***a current threat of serious loss or injury***.



## Conditions and Circumstances: Domestic Violence

- Single act of domestic violence near child while he was asleep.
  - Court found sufficient when evidence showed father attacked mother without regard for the emotional or psychological impacts that his behavior might have on D; and although mother agreed to keep D away from father, by the time of the jurisdictional hearing she was avoiding DHS; there was at least one instance in which she allowed contact and the parents were not engaged in services.

*Dept. of Human Services v. C.M.*, [284 Or App 521 \(2017\)](#) (p. 10)

- Threats of violence but no physical violence.
  - Court found not sufficient; emotional abuse and conflict not enough to show present risk of serious harm.

*Dept. of Human Services v. K.C.F.*, [282 Or App 12 \(2016\)](#) (p. 12)

# Conditions and Circumstances: ICPC

- Amended petition on out of state father alleging Arizona had declined to approve father as a placement through ICPC. Juvenile court rejected father's argument that ICPC doesn't apply until jurisdiction is established.
- Held:
  - Lack of ICPC approval does not, in itself, provide a basis for asserting jurisdiction over the children.

*Dept. of Human Services v. Z.E.W.*, [281 Or App 394 \(2016\)](#) (p.13)



# Conditions and Circumstances: Admitted Allegations



- Standard of review when parent admits to an allegation and waives the right to a hearing:
  - The court liberally construes the allegation and reviews to determine whether, pursuant to the allegations, DHS would have been allowed to offer evidence that would establish jurisdiction.
  - In this case:
    - “The mother's physical health, mental health, and disabilities interfere with her ability to parent in the safest way possible and creates risks that are unacceptable to mother. Mother and child will benefit from the services of the court, DHS, and caseworker Traci Noonan.”
    - If proved, would be sufficient because it would show that C’s condition or circumstances expose her to a current threat of serious loss or injury that is reasonably likely to be realized absent juvenile court intervention.



# Conditions and Circumstances: Refugee example

- 17 year old petitioned for jurisdiction so that he could qualify for federal special immigrant status.
  - Court can establish jurisdiction after child turns 18 when petition filed prior to 18<sup>th</sup> birthday.
  - UCCJEA: Temporary emergency jurisdiction under ORS 109.751(1) was appropriate because it was undisputed that petitioner was at risk of abuse if he were returned to El Salvador, and that return could happen at any time.
  - Court found the following circumstances sufficient to establish 419B.100(1)(c) jurisdiction: deceased mother; physical abuse by father; threats from criminal gangs; no legal guardian in U.S.; possible return at any time.

# Expert Testimony - ICWA

- Expert testimony not required at second jurisdictional hearing.
  - Not “foster care placement” within meaning of ICWA because child had already been removed in earlier proceeding.
  - The “significant shift in legal rights” that occurs when the court first takes jurisdiction was not present in this case.



*Dept. of Human Services v. J.C.S.*, [282 Or App 624 \(2016\)](#) (p. 5)

# PLACEMENT WITH THIRD PARTIES

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Foster Parent Certification

Intervenor

Motion to Dismiss: Third Party Availability

# Foster Home Certification and “Founded Dispositions”

- The Oregon Administrative Procedures Act is the exclusive means for reviewing the validity of agency actions related to disposition of assessments and foster home certification.
- Juvenile court order in permanency judgment requiring DHS to reverse the founded disposition and reinstate foster parents’ certification was error – those decisions were not before the juvenile court.

*Dept. of Human Services v. P.A.*, [281 Or App 476 \(2016\)](#) (p. 4)

# When Child in DHS Custody

- If the court places a child in DHS custody, it can not direct that DHS place the child directly with intervenor.
  - ORS 419B.337(2): court may specify “*type* of care, supervision or services to be provided” by DHS to children and parents, but actual planning and care is the responsibility of DHS.
  - 419B.349: court may determine that a placement is not in the child’s best interest and direct DHS to place the child with parents, in foster care (with non-relative, relative, current caretaker), residential care, group care or other specific type of care.
  - Court may direct DHS to *consider* placing child with intervenor.
- Court may place child under protective supervision with intervenor. ORS 419B.331

# Motion to Dismiss based on availability of third party to care for child

- If plan *is* reunification:

- DHS has burden of proving by a preponderance of evidence that the factual bases for jurisdiction persist and continue to pose a risk of harm that is likely to be realized.

- If the plan *is not* reunification:

- Presumption that the jurisdictional bases continue to make it unsafe for the child to return home.
  - Parents bear the burden of proof if the proponent of continuing jurisdiction invokes that presumption.
- Evidence that grandfather had difficulty setting boundaries with the parents was particularly important given that parents' inability to safely parent was undisputed.
  - *Dept. of Human Services v. C.P.*, [281 Or App 10 \(2016\)](#) (p. 18)

# PERMANENCY HEARINGS

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Reasonable Efforts

Parental Progress

Compelling Reasons

# Reasonable Efforts: ORS 419B.476(2)(a)

- DHS is not excused from making reasonable efforts because a parent is incarcerated. A parent's resistance to DHS's efforts does not categorically excuse DHS from making meaningful efforts toward that parent.
  - When mother was willing to engage in services and desired contact with her children and DHS, there was insufficient evidence of reasonable efforts in the record when DHS failed to help mother pay for video and telephone visits, documented no face-to-face contact with mother, and did not contact mother's prison counselor or maintain regular contact with mother until several months before the permanency hearing.

*Dept. of Human Services v. S.M.H.*, [283 Or App 295 \(2017\)](#) (p. 27)



# Reasonable Efforts

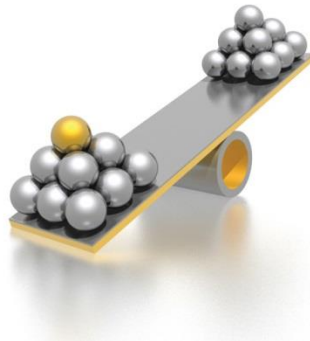
- Efforts are reasonable only if they provide the parent with a fair opportunity to demonstrate the ability to become a minimally adequate parent.
  - Failure of DHS to stay in touch with the parent provides the court with little evidence regarding parent's ability and willingness to participate and benefit from services.
  - DHS may not withhold a potentially beneficial service simply because reunification is unlikely even if the parent engages. DHS must make RE so that the juvenile court can evaluate the parent's progress. The circumstances and duration of a parent's incarceration may then be considered when the court determines whether the parent has made sufficient progress.

*Dept. of Human Services v. C.L.H.*, [283 Or App 313 \(2017\)](#) (p. 29)

# Reasonable Efforts

- Specific programming: cost, benefit analysis
  - Even though DHS would have to develop specific programming for father based on his child's medical needs, DHS did not present evidence that doing so would be burdensome, and the potential benefit of father gaining those skills to safely care for the child is substantial. The juvenile court erred in failing to consider all of the circumstances relevant to the cost-benefit analysis.

*Dept. of Human Services v. C.L.H.*, [283 Or App 313 \(2017\)](#) (p. 29)



# Sufficient Progress

- Even though parent completed DHS services, court's determination that he had not made sufficient progress supported by the record when:
  - The juvenile court inferred father lacked the ability to regulate his emotions and temper based on his outbursts in the courthouse.
  - Father was hesitant to acknowledge his treatment of the child constituted abuse.

*Dept. of Human Services v. S.J.M.*, [283 Or App 367 \(2017\)](#), *rev allowed*, 361 Or \_\_\_ (2017). (p. 25)

# Sufficient Progress

- Jurisdictional bases – domestic discord, residential instability, chaotic lifestyle.
  - By the time of the second permanency hearing, parents were parenting a new baby, were employed and were subletting two rooms in a house.
  - Juvenile court found they made insufficient progress and changed plan to guardianship.
- Affirmed:
  - A parent's engagement in services is not dispositive that the parent has satisfied DHS's expectations.
  - Neither parent had followed through with the recommendations of psychological evaluations.
  - Although parents had housing, they had not demonstrated an ability to maintain stable housing because of their pattern of frequent and sudden moves throughout the case.
  - There was evidence in the record the parents didn't have the skills to parent three children at once.

# Compelling Reasons Generally

- 20 days after the permanency hearing, the court shall enter an order. It must include the court's determinations under ORS 419B.476(5).
  - If the court determines the plan should be adoption, the order shall include a determination of whether the circumstances in ORS 419B.498(2) are applicable. ORS 419B.476(5)(d).
- ORS 419B.498(2): DHS shall file TPR (15/22 m.) unless:
  - Child is being cared for by a relative (permanent)
  - There is a compelling reason that TPR not in child's BI:
    - *The parent is successfully participating in services that will make it possible for the child to safely return home within a reasonable time;*
    - *Another permanent plan is better suited to meet the child's health and safety needs, including preserving attachments;* or
    - There was a prior no reasonable efforts finding.
  - DHS has not provided services DHS deems necessary to return ward home in reasonable time.

# Reasonable Time – Required Finding

- Before the court changes the plan to adoption, there must be evidence in the record supporting the court's finding that the child can not be returned home within a reasonable time.
  - In this case, the court checked the correct box on the permanency judgment, however, there was insufficient evidence supporting the compelling reasons determination regarding A's unique permanency needs, or how long mother would need to remain in services to become a safe parent.

*Dept. of Human Services v. S.J.M.*, [283 Or App 367 \(2017\)](#), *rev allowed*, 361 Or \_\_ (2017). (p. 25)

# Reasonable Time - Evidence

- The court considers the child's particular needs and circumstances and any barriers the parents might face:
  - whether the child's placement in substitute care would be unacceptably long given her age;
  - the amount of time the child had 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 drug or alcohol addiction, or that the parent 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.

*Dept. of Human Services v. D.I.R.*, [285 Or App 60 \(2017\)](#) (p.21)

# Compelling Reasons – BOP

- The proponent of a change in permanency plan bears the burden of proof.
- If the child argues for the plan of adoption, the child must show, among other things, that she can't be returned home within a reasonable time given the child's particular needs and circumstances and any barriers mother might face.

*Dept. of Human Services v. M.S.*, [284 Or App 604 \(2017\)](#) (p. 22)



# Child's Health and Safety Needs

- Is there another permanent plan that is better suited to meet the health and safety needs of the child, including the need to preserve the child's relationships? ORS 419B.498(2)(b)(B).
  - This is a “child-centered” determination based on evaluation of the child's circumstances.
  - In this case, the juvenile court failed to evaluate, in light of M's specific circumstances (including her bonds with mother, grandmother and foster parent) whether the plan of guardianship would better meet the child's health and safety needs than the plan of adoption.
    - Retaining a relationship between a parent and child may or may not be a compelling reason under the statute.

# TERMINATION OF PARENTAL RIGHTS

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Best interest determination

Unfitness

# Best Interest Determination - Evidence

- When a parent opposes termination on the ground that it is not in the child's best interest because severing the parent's legal connection to the child will be detrimental to the child, evidence of an alternative to termination that will preserve the connection is relevant to whether TPR is in the child's best interests.
  - In this case, in light of father's argument that he and his children were bonded and severing the relationship would be to the children's detriment, evidence regarding grandfather's ability to care for the children was relevant to the issue of whether termination was in the best interest of the children.

*Dept. of Human Services v. C. P.*, [285 Or App 371 \(2017\)](#) (p. 34)

# Unfitness (ORS 419B.504)

- General test:
  - Parent has engaged in *conduct or is characterized by a condition* that is *seriously detrimental to the child*;
  - Integration of the child into the parent's care is improbable within a *reasonable time due to conduct or conditions not likely to change*;
  - Termination is in the *best interests* of the child.
- In this case, DHS was required to prove the requisite nexus to father's parenting – i.e, that his mental or emotional problems rendered him incapable of providing care for his children for extended periods of time, or have been seriously detrimental to the children – ***through child specific evidence.***
  - *Reversed:*
    - The only incidents of violence in father's past involved other adults; little evidence regarding frequency or that father was modeling the behavior for his children.
    - No evidence on how father's behavior affected the children.
    - Insufficient evidence of how father's use of physical discipline would affect them differently than the thousands of children being raised in similar circumstances.

# INADEQUATE ASSISTANCE OF COUNSEL

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# Failure to Request Removal of GAL

- Mother argued her counsel was constitutionally inadequate for failing to seek removal of the GAL after she was deemed able to aid and assist in her criminal case.
  - Parent must show:
    - Counsel inadequate, and
    - Inadequate representation prejudiced the parent.
  - In termination cases, the standard is whether the proceeding was fundamentally fair – heard at a meaningful time and in a meaningful manner.
- Court held mother raised a colorable claim that her counsel was inadequate, but the record was insufficient to resolve the merits. Remanded to juvenile court for evidentiary hearing pursuant to ORS 419B.923.

# When Parent Fails to Appear

- Since mother's attorney was prohibited by ORS 419B.819(8) from appearing on her behalf and defending her, he was not inadequate for failing to do so.
  - If mother had a reasonable excuse for failing to appear and her attorney failed to request a continuance, that would present a different question.



*Dept. of Human Services v. M.L.B.*, [282 Or App 203 \(2016\)](#) adhered to as corrected and clarified, [283 Or App 911 \(2017\)](#). (p. 6)