

*Summaries of Oregon Appellate Court Decisions in  
Juvenile Court Cases*

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Oregon Judicial Department  
Juvenile Court Improvement Program

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# Juvenile Delinquency

## ► *State v. D.J.*, 281 Or App 630 (2016)

Youth was found to be under the court's jurisdiction based on an act that, if he were an adult, would constitute sexual abuse in the first degree, and was committed to OYA custody. The court ordered youth be placed in a program other than a youth correctional facility and that he complete sex offender treatment. Youth had a series of three out-of-home placements, and was removed from each based on allegations that he engaged in sexual conduct with other youth, and that he failed to complete treatment. Subsequently, after considering and rejecting youth's proposal to live with his grandmother, OYA placed youth in a correctional facility and planned to place him in a residential treatment program in Portland. Youth requested a review hearing pursuant to ORS 419C.626.

At the hearing, youth called his grandmother as a witness, who testified she would provide full time supervision and would transport the youth to treatment appointments. The court also heard testimony from a sex offender therapist and juvenile department program manager that the youth may not have access to treatment in the community where his grandmother lives. After the hearing, the court issued a written order approving the OYA placement, and including findings of fact required under ORS 419C.626(3). The youth challenged the sufficiency of the court's findings under ORS 419C.626(3)(a), arguing the findings did not specify "why" continued out-of-home placement is "necessary," as opposed to another placement.

Held Affirmed.

The trial court's findings satisfied the specificity requirement of ORS 419C.626(3)(a). The trial court found that placing youth in an at-home placement would be a risk to community safety, that youth would not be appropriate for community supervision through the local probation department, and that youth would not be able to access the sex offender treatment that he was required to complete in his proposed community placement. Those findings demonstrated that the trial court met its obligation under ORS 419C.626(3)(a) to state "why" it ordered that youth continue in the out-of-home placement and that the placement was "necessary."

## ► *State v. J.J.-M.*, 282 Or App 459 (2016)

After a hearing, the juvenile court found youth to be within its jurisdiction under ORS 419C.005 for committing acts that, if committed by an adult, would constitute unlawful possession of marijuana, unlawful delivery of marijuana, and four counts of identity theft. Pursuant to ORS 419C.615, youth petitioned the juvenile court to set aside the judgment finding him within its jurisdiction. Youth contended that he was denied his constitutional right to adequate assistance of counsel in the underlying juvenile delinquency proceeding because his attorney had failed to conduct an adequate and effective investigation into the facts and circumstances of his case. Specifically, youth asserted that the attorney was inadequate for failure to conduct a polygraph of

youth, hire a handwriting expert to identify writing on a birth certificate relating to the identity theft charge, interview and call witnesses, and request the disclosure of exculpatory evidence from the deputy district attorney. The juvenile court denied youth's amended petition to set aside the judgment. Youth appealed, contending the court erred in determining he had not been denied adequate assistance of counsel, and that the deficient performance found by the court to have occurred was not prejudicial to youth.

Held:

Affirmed. In order to prevail on his claim regarding inadequacy of counsel, youth had to prove that his counsel failed to exercise reasonable professional skill and judgment and that youth suffered prejudice as a result. The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error and in light of all of the circumstances. Prejudice is established by showing that counsel's advice, acts or omissions had a tendency to affect the result of the prosecution. In this case, the juvenile court did not err in denying youth's amended petition because youth's attorney's actions in representing youth were individually either constitutionally adequate or not prejudicial to youth's defense.

## Juvenile Dependency

### *Appealability*

► *Dept. of Human Services v. A. B. B.*, [285 Or App 409 \(2017\)](#)

Children appealed review judgments assigning error to the juvenile court's determination that the Department of Human Services (DHS) made "active efforts" to reunify the family. In response, DHS argued, among other things, that the review judgments were not appealable.

Held:

A review judgment or an order issued under ORS 419B.449 is appealable if the rights or duties of the appealing party are adversely affected. ORS 419B.449(7); 419A.200(1). A judgment that merely continues the status quo of the wardship, and that does not deny a request for affirmative relief raised by the appealing party at the review hearing, does not adversely affect the rights or duties of the appealing party. *State ex rel Juv. Dept. v. Vockrodt*, 147 Or App 4, 934 P2d 620 (1997). Rather, to be appealable, the judgment must have substantially changed the conditions of the wardship or adversely affected a right or duty of the appealing party by ruling on a motion. In *Vockrodt*, the court concluded the juvenile court's "reasonable efforts" finding in a review judgment did not sufficiently affect a mother's rights to render the judgment appealable. The court found this case was difficult to distinguish from *Vockrodt*, in that the children did not make any motions for affirmative relief that were denied at the hearing.

Appeal dismissed.

## *Child Abuse Assessment Dispositions and Foster Home Certification*

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

The Department of Human Services (DHS) appeals a permanency judgment, challenging provisions in the judgment that ordered DHS to reverse a "founded disposition" for child abuse and reinstate the foster home certification of child's former foster parents. Foster parents cared for child for almost two years--from the time the juvenile court took jurisdiction over child when she was eight months old until January 2015. In January 2015, DHS removed child from foster parents' home after foster father was reported for slapping his six-year-old daughter in the face. DHS performed a child abuse assessment under its administrative rules which resulted in a "founded disposition" for child abuse. DHS informed foster parents that their foster home certification was likely to be terminated, and they voluntarily withdrew their certification. DHS further decided that it was not in child's best interests to pursue adoption by foster parents. In a subsequent permanency judgment, the juvenile court concluded that DHS had incorrectly coded its child abuse assessment as "founded" and ordered DHS to reverse the "founded disposition" and reinstate foster parents' certification.

#### Held:

The disposition of a child abuse assessment and the process for foster home certifications are administrative actions subject to review under Oregon's Administrative Procedures Act (APA). When the APA provides for review of an agency action, the APA is the exclusive means of reviewing the validity of that action. Because neither foster parents nor any other party sought review of DHS's administrative actions under the APA, it follows that, in a separate juvenile dependency proceeding, those administrative decisions were not before the juvenile court, and the court erred by ordering DHS to undo those actions in a permanency judgment. Portion of permanency judgment ordering the Department of Human Services to undo founded disposition and restore foster parents' certification reversed; otherwise affirmed.

### *Disposition*

### ► *Dept. of Human Services v. S.E.K.H./J.K.H.*, [283 Or App 703 \(2017\)](#)

The juvenile court took ORS 419B.100(1)(c) dependency jurisdiction over the children. Under ORS 419B.116, great-grandmother intervened in the proceeding. The children requested the court, in its dispositional determination, order DHS to place them with great-grandmother. (In a footnote, the appeals court explained that great-grandmother was not eligible for certification under DHS rules.) The juvenile court denied the request, concluding it lacked the authority to direct DHS to make a specific placement. Parents and children appealed.

#### Held: Affirmed.

The court clarified that the parties were not disputing the juvenile court's decision to award custody to DHS under ORS 419B.337(1), instead of placing the children under court protective

custody and granting great-grandmother legal custody under ORS 419B.331. Instead, the question on appeal was whether the juvenile court had the authority to order DHS to place the children with great-grandmother once it placed the children in DHS custody.

The court examined the text and context of ORS 419B.337. ORS 419B.337(2) allows the court to make orders about the type of care that a ward should receive, but assigns DHS the responsibility to make the decision regarding the actual care provided to the ward. The court read this to suggest that the legislature intended DHS, not the juvenile court, to make decisions regarding a ward's actual placement. ORS 419B.337(5) reinforces this by prohibiting a juvenile court from directly placing a ward committed to DHS custody in a residential facility, requiring the court to deliver the ward to DHS instead. Finally, ORS 419B.349 provides the juvenile court authority to review DHS's placement decisions, while providing that the actual planning and placement of the child is the responsibility of DHS. In addition, ORS 419B.349 prohibits the court from directing a specific placement for a ward in DHS custody, absent a legal requirement that the court do so.

The court rejected the argument that ORS 419B.116 (intervenor statute) provides the juvenile court authority to order DHS to place a ward with a person who has been granted intervenor status in a dependency case. Instead, the court stated, if an intervenor moves to be considered as a placement, the juvenile court may either: (1) place the child directly with the movant under ORS 419B.331, or (2) direct DHS to consider placing the child committed to its custody with the intervenor.

## ***ICWA***

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

The juvenile court asserted jurisdiction over S in July, 2015. Shortly thereafter, DHS filed a new dependency petition. In April 2016, the court asserted jurisdiction over S based on the new allegation. Father appealed the 2016 judgment, arguing the court erred by asserting jurisdiction over S without expert testimony that custody of S by father was likely to result in serious emotional or physical damage, as required by the Indian Child Welfare Act (ICWA).

#### Held:

Affirmed. The 2016 jurisdictional proceeding was not a "foster care placement" within the meaning of ICWA because S had already been removed in the earlier proceeding. The court found the "significant shift in legal rights" that occurs when the court first takes jurisdiction was not present in this case. Therefore, it was not error for the court to establish jurisdiction without expert testimony.

## *Inadequate Assistance of Counsel*

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

Mother failed to appear at a termination trial and appealed from the judgment terminating her rights, arguing that her attorney failed to mount a defense on her behalf, which rendered his assistance inadequate. On appeal, the court held that because mother did not appear at the trial, ORS 419B.815(8)\* prohibited her attorney from participating in the trial on her behalf. Because he was statutorily prohibited from presenting a defense at the trial, he was not inadequate for failing to do so. The court noted that if mother had a reasonable excuse for failing to appear and her attorney failed to request a continuance, that would present a different question. On request for reconsideration, the court corrected the statutory reference to ORS 419B.819(8).

- ▶ *Dept. of Human Services v. M.U.L.*, [281 Or App 120 \(2016\)](#)

### Facts:

This case was back before the Court of Appeals after the Supreme Court vacated the Court of Appeals' earlier decision in *Dept. of Human Services v. M.U.L.*, 270 Or App 343 (2015)(M.U.L. I) *vac'd and rem'd*, 359 Or 777 (2016) and ordered reconsideration in light of *Dept. of Human Services v. T.L.*, 358 OR 679 (2016). In *MUL I*, the Court of Appeals affirmed the trial court's judgment terminating mother's rights, and declined to consider mother's claim that she received inadequate assistance of counsel, reasoning that the claim was unpreserved and could not be raised for the first time on appeal.

Mother's inadequate-assistance claim relates to the appointment of a guardian ad litem (GAL) for mother in her termination case. After the TPR petition was filed, the circuit court found mother was unfit to proceed in her criminal cases and ordered her committed to the Oregon State Hospital (OSH). She was diagnosed with schizophrenia and prescribed antipsychotic and mood-stabilizing medications. Two months later, mother had stabilized to the point that she was able to hold conversations. The juvenile court held a hearing on whether to continue the GAL appointment. DHS requested the appointment continue, and mother's attorney did not object. The juvenile court ruled the GAL appointment would continue. The trial was held two months later. Mother's treating psychiatrist and an OSH nurse testified that they had determined mother was able to aid and assist her attorney and had discharged her three days earlier. A DHS caseworker also acknowledged mother was "stable". Mother testified at the trial and appeared to understand the questions she was asked. Neither mother nor her attorney raised an objection to the continuing appointment of the GAL during the TPR trial. Mother's parental rights were terminated.

Held: Vacated and remanded.

Mother argued the juvenile court erred in continuing the GAL appointment after OSH staff determined that mother was competent to aid and assist in her criminal proceedings. In *M.U.L. I*, the Court of Appeals rejected that argument, because mother's challenge was not preserved and

no error was plain. The court found the relevant statute, ORS 419B.237(2) did not create any *sua sponte* obligation for the juvenile court to determine whether the GAL appointment should be terminated.

Mother also argued that her counsel was constitutionally inadequate for failing to seek removal of the GAL. A parent asserting inadequacy of counsel has the burden of proving both that counsel was inadequate and that the inadequate representation prejudiced the parent. In termination cases, the standard by which counsel's performance is measured is whether a termination proceeding was fundamentally fair, as that term has been used in federal due process cases. The essence of fundamental fairness is the opportunity to be heard at a meaningful time and in a meaningful manner. In support of her claim that counsel was inadequate, mother cited two statutes: (1) ORS 419B.245(5) (the parent's attorney shall inquire at every critical stage in the proceeding as to whether the parent's competence has changed and, if appropriate, shall request removal of the guardian ad litem), and (2) ORS 419B.237(2)(a) (the juvenile court shall remove the GAL upon request by the parent or the parent's attorney if the court determines the parent no longer lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney).

The Court of Appeals agreed with mother's statutory analysis that if mother's attorney had made the request to remove the GAL, the juvenile court would have been required to remove the GAL because the court lacks discretion under ORS 419B.237(2)(a) to continue the GAL appointment if the parent no longer lacks substantial capacity. The court reasoned that if mother's attorney should have, in the reasonable exercise of professional skill and judgment, requested removal of the GAL, and if the failure to do so led to the continuation of the GAL against mother's wishes, then that failure has implications for the fundamental fairness of the termination proceeding. It could have impaired mother's ability to meaningfully defend against the termination petition.

The Court of Appeals held mother raised a colorable claim that her counsel was inadequate, but the existing record did not contain sufficient information for the Court of Appeals to resolve the merits of the claim. The case was remanded to the juvenile court for an evidentiary hearing pursuant to ORS 419B.923.

## *Jurisdiction*

### **Admitted Allegations**

#### ► *Dept. of Human Services v. L.S.H.*, [286 Or App 477 \(2017\)](#)

The juvenile court took jurisdiction over C after mother and DHS entered into an agreement in which mother waived her right to an evidentiary hearing on jurisdiction and admitted to an amended petition allegation in exchange for the dismissal of two other jurisdictional allegations. The parties agreed to the following amended allegation:

"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."



At the jurisdictional hearing, DHS moved to dismiss the other jurisdictional allegations, and the court confirmed with mother that she was admitting to the amended allegation above and waiving her right to an evidentiary hearing and the other procedures to which she would otherwise be entitled, including the right to make the State prove its case by a preponderance of the evidence. The court then heard from other participants in the case and the caseworker, who explained that mother loved C and wanted to do what was in C's best interests but that mother has some issues around believing her child is ill when the child is not ill. Following mother's admission and the court's colloquy with the case participants, the court determined that C was within the jurisdiction of the court under ORS 419B.100 and made her a ward of the court.

Mother appealed, contending that her admission was insufficient to permit that determination.

Held: Affirmed.

The court determined that ORS 19.245(2) (prohibiting a party from appealing a judgment when a party consents to the entry of judgment) did not bar the appeal under the circumstance of this case because: (1) mother was never asked whether she consented to entry of the judgment, and (2) there were no other indications that mother consented to the entry of judgment. Instead, the court found the juvenile court entered judgment because it determined on its own that mother's admission demonstrated that jurisdiction was warranted.

The court considered whether the amended jurisdictional allegation was sufficient to support the juvenile court's exercise of jurisdiction. In cases where a parent admits to a jurisdictional allegation and waives the right to offer evidence, 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 juvenile court jurisdiction. If an admitted allegation is ambiguous and susceptible to multiple interpretations, at least one of which would permit DHS to offer evidence sufficient to establish jurisdiction, then a juvenile court does not err by finding a child to be within the court's jurisdiction.

Applying that standard, the court found the allegation could be read to mean that mother's health issues and disabilities pose a present risk of harm to C that is reasonably likely to be realized unless mother receives assistance, and that mother would benefit from the services offered by gaining the ability to reduce or eliminate that risk of harm. So pleaded and proved, the allegation would support the juvenile court's jurisdiction 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. In addition, the discussion on the record regarding the underlying factual basis for mother's admission - that mother's health issues and disabilities were resulting in C receiving unneeded medical treatment and that mother needed some assistance to avoid making those mistakes indicates that DHS was prepared to introduce evidence to prove that C faced a current risk of harm if mother had not waived her right to an evidentiary hearing.

## Appearance through Counsel

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

#### Facts:

DHS served mother and father with a summons and a petition to establish juvenile court jurisdiction. The summons directed each parent to appear in person before the court on January 22, 2105 at 2:30 p.m. to admit or deny the allegations in the petition and at any subsequent court-ordered hearing. The summons instructed, "You must appear personally.. an attorney may not attend the hearing in your place. If you do not appear at the hearing... or at any subsequent court-ordered hearing, the Court may proceed in your absence, without further notice to you..." The parents personally appeared as directed on the summons. At a subsequent hearing in September, the juvenile court issued an order that directed parents to appear again in person on December 3, 2015, and December 7 through 9, 2015 for a prospective trial. The order stated, "The parent shall appear in person at the call proceeding. The parent's attorney may not attend the call hearing in place of the parent. If the parent fails to appear in person at call, the court, without further notice and in the parent's absence, may immediately make the child(ren) ward(s) of the court." The order repeated the warning for the trial appearance.

Parents failed to appear on December 3. DHS proceeded to present a prima facie case before a juvenile court referee. Based on the testimony of two witnesses, the referee found all of the allegations proven. Through counsel, mother requested a rehearing. The court conducted a rehearing on December 17, 2015, however, the parents failed to appear again. DHS presented its prima facie case, and the court allowed the attorneys for mother and father to make evidentiary objections. The court concluded the state had proven the allegations in the petition. Parents appealed. DHS argued that by failing to appear at the hearing, parents waived their ability to appeal.

Held: Affirmed.

ORS 19.245(2) provides that a party to a judgment given for want of an answer may not appeal from the judgment. The court noted this provision applies to juvenile cases. However, in this case, ORS 19.245(2) does not preclude the appeal, because the parents had responded to their summons in the manner it directed - by personal appearance at the initial hearing at which they contested the allegations. After they had answered, they failed to appear at a subsequent hearing date.

Parents argued that they should have been allowed to participate in the hearing through their attorneys. The court examined the text and legislative history of ORS 419B.815(8), which requires a parent to appear personally and states that the parent may not appear through his or her attorney. The court concluded that after a parent has initially answered the petition and summons, and the court has ordered the parent to appear at subsequent proceedings, a parent who later violates the court's order to appear personally may be found to be in "default" under the provisions of ORS 419B.816(7). When a parent is ordered by the court to appear in person, ORS 419B.815(8) does not permit a parent to appear through counsel. The court went on to

explain that although a parent's attorney may appear when the parent is absent, the attorney may not make evidentiary objections. The court noted, however, that an attorney may appear to explain a parent's reason for not being present, and may make a motion to continue the hearing. In addition, ORS 419B.923 provides a parent the right to move to set aside a judgment on grounds such as excusable neglect.

### **Conditions and Circumstances: 419B.100(1)(c)**

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

Mother and father had a physical altercation in which father tackled mother to the floor and choked her. Meanwhile, mother's 14 year old daughter K tried to call police, but father knocked her cell phone away and subsequently hit her and pushed her into a chair where 4 year old D was sleeping. Later that evening, a caseworker worked with mother on a safety plan for her and D to stay at a motel. Mother verbally agreed to keep D away from father. Mother eventually returned home with D and father, however, represented to DHS that she and D were at grandparents' house. Six weeks after the initial physical altercation, the court held a jurisdictional hearing. At the conclusion of the hearing, the court took jurisdiction over D on the domestic violence-related allegations of the petition stating, "I will take jurisdiction on 8(B), the mom and domestic violence; (C), mom failed to engage in services; and (E) father and domestic violence."

Father appealed.

Held: Affirmed.

Under ORS 419B.100(1)(c), jurisdiction is appropriate when a child's condition or circumstances endanger the welfare of the child. A child's welfare is endangered when he or she is exposed to conditions or circumstances that pose a threat of serious loss or injury. The key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child. DHS has the burden to prove there is a nexus between the parent's allegedly risk causing conduct and the harm to the child and that the risk is present at the time of the hearing, and not merely speculative.

The court rejected father's argument that since D was asleep when the physical altercation took place, he was not exposed to domestic violence and therefore, there was no current risk of harm to D. The court interpreted "exposed" as used in the petition, to mean "not shielded or protected: so situated as to as to invite or make likely an attack, injury, or other adverse development." The court found DHS presented sufficient evidence from which the juvenile court could find that D was exposed to domestic violence and that the exposure endangered him, and that those findings supported the court's ultimate determination that there was a current risk of harm to D. In addition, the court rejected father's argument that the juvenile court could not find a current threat of harm based on a single episode of domestic violence. There was evidence that father attacked mother without regard for the emotional or psychological impacts that his behavior might have on D, and that he engaged in violent behavior toward K, who is also a child. In addition, the court found sufficient evidence in the record to support the court's implicit determination that the risk to D was current. Although mother had agreed to keep D away from father, she appeared to avoid DHS in subsequent weeks, returned home with D even though

father was there, and there was no evidence the parents had engaged in services prior to the jurisdictional hearing.

► *Dept. of Human Services v. K.C.*, [282 Or App 448 \(2016\)](#)

Parents had two children, G and K. At the time of K's birth, G was already in foster care, and DHS had received information that the parents' conditions had not been ameliorated. Based on this, two caseworkers went to the hospital and informed the parents that K was going to be taken into protective custody. The parents informed the caseworkers that they had relinquished their parental rights to grandfather. However, the caseworkers continued to have concerns that mother, who was living in grandfather's home, would still be parenting on her own and could take K whenever she wanted. Grandfather was also not certified as a placement resource.

In December, 2015, the court asserted temporary jurisdiction over K after a shelter hearing. In April 2016, at the jurisdictional hearing, DHS asked the court to take judicial notice of the shelter hearing as well other hearings and "updates" that had taken place in G's case. During the hearing, the court heard testimony from Dr. Sweet, a psychologist, that the parents had significant mental health issues that impaired their ability to parent. Several DHS witnesses also testified that the parents, although minimally engaged, functioned adequately during visits and had made some progress, although not enough to eliminate their safety concerns. The DHS certifier testified that grandfather's request for certification was denied because, among other things, mother was living in the home. No additional testimony was presented as to grandfather's fitness to care for the child.

The juvenile court took jurisdiction over K based on the testimony presented, and based on testimony at previous hearings (acknowledging that circumstances may have changed), that grandfather might be likely to leave the child unattended with the mom. Parents appealed, arguing that DHS failed to establish that K would have been at risk of harm if grandfather was entrusted with his care.

Held: Reversed.

In order to establish jurisdiction over a child, DHS must present evidence that the child's current circumstances pose the requisite nonspeculative risk to the child, absent juvenile court jurisdiction. The parents are not required to be able to parent independently. If DHS seeks to establish jurisdiction based on the parents' inability to parent independently, DHS must prove the parents will actually be parenting on their own, or that the parents' deficits pose a current risk of harm to the child under the child's actual circumstances.

DHS presented insufficient evidence regarding the parents' circumstances at the time of the hearing necessary to establish or infer that K faced a current risk of harm. Although evidence was presented about mother's mental health issues and father's substance abuse, there was insufficient evidence in the record to indicate the extent to which those problems posed a risk to K at the time of the jurisdictional hearing. In addition, DHS did not present evidence about how the parents' deficits would pose a risk to K under K's circumstances, in the grandfather's home. DHS's concern that grandfather would not put in place necessary limitations on the parents was

not supported by any evidence in the record. There was also no evidence to support DHS's concern that grandfather did not understand the severity of mother's illness or that he was likely to leave K with mother unattended. Finally, there was no evidence to infer that the parents were reasonably likely to remove K from grandfather's care.

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

DHS filed a dependency petition in November, 2014 alleging that the children were at risk of harm because father exposed them to domestic violence, and that father's substance abuse and mental health condition interfere with his ability to safely parent. It also alleged mother needed the assistance of the court and DHS to protect herself and the children from the violence and control of father and that she lacked legal custody to protect the children. After the petition was filed, mother reported to DHS that father was remorseful, that he had quit drinking and smoking marijuana, moved out of the house, and promised he would never threaten mother again. However, he continued to monitor the home with security cameras. She subsequently reported to DHS father had gone back on his promise not to be cruel and manipulate. Four days later she expressed concern to the caseworker that the forced separation was harming the family and she urged a prompt resolution. DHS filed an amended petition, adding an allegation that mother fails to understand the emotional damage and safety risk posed by father, and failed to take protective action.

At the jurisdictional hearing, a caseworker testified that the allegation of domestic violence was based on father's threats of violence and the impact of father's behavior on the children's emotional well-being. DHS conceded that there was no physical abuse, but nevertheless, that father's behavior constituted domestic abuse that was harmful to the children. Father testified that since the filing of the petition, he had not consumed alcohol or marijuana, had regularly been attending substance abuse counseling, has submitted to weekly Urinalysis, and had been sober for 65 days and had abstained from marijuana for 75 days. He testified that the statements he made to mother about suicide and homicide were stupid, and that he didn't intend those statements as actual threats and did not believe that mother took them seriously. He said he was not suicidal and would not hurt himself, mother or the children. Mother confirmed father's statements. A testified that she had once heard father threaten suicide but had not heard him threaten homicide and she did not believe father would commit suicide or harm mother or herself.

The juvenile court concluded DHS had met its burden of proof. The court expressed about father's need to control mother, citing an incident eight or nine years earlier where father pinned mother down in bed, father's threats of physical harm, and an incident where he threw water in mother's face. In relation to the mental health allegation, the court found father's conduct (anger and need for control) demonstrated there was an underlying problem. Finally, the court found that father's abstention from marijuana and alcohol was relatively brief. As to mother, the court found she was in denial and lacked appreciation for the risk of harm posed by father to the children. Finally, the court noted that although A seemed to be close to the parents, she was sufficiently concerned that she developed a "safety plan" and had sought out community resources in the event she needed to leave home because of parental conflict.

Held: Reversed.

To establish jurisdiction under ORS 419B.100(1)(c), the state must prove that a child's welfare is endangered because, under the totality of the circumstances, there is a current threat of serious loss or injury that is likely to be realized. There must be a nexus between the parent's conduct or condition and harm to the child. A current threat of harm cannot be found based on speculation that conditions or circumstances persist at the time of the hearing. There must be evidence that such threats in fact persist.

Domestic violence between parents poses a threat to children when it creates a harmful environment for the children and the offending parent has not participated in remedial services or changed his or her threatening behavior. The court found the evidence in the record was insufficient to support the court's finding of a risk of serious harm to the children. Although there was evidence that father was emotionally abusive to mother and that the parents' conflict affected the children, there was no evidence of a present risk of serious harm that was likely to occur.

► *Dept. of Human Services v. P.R.H.*, [282 Or App 201 \(2016\)](#)

Father appealed a judgment asserting jurisdiction over his daughter, arguing that DHS failed to prove by clear and convincing evidence under the Indian Child Welfare Act, that any risk of harm to the child was current at the time of the jurisdictional hearing. The juvenile court concluded that DHS failed to prove an allegation against mother related to a serious nonaccidental injury while in father's care, but took jurisdiction based on evidence of parents' past involvement in the production or manufacture of byproducts of marijuana. On appeal, DHS conceded the record was insufficient to prove that, at the time of the hearing, parents' past involvement in the production or manufacture of byproducts of marijuana created a current risk of harm to the child's welfare. The Court of Appeals agreed and reversed the jurisdictional judgment.

### ICPC

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

#### Facts:

The juvenile court asserted jurisdiction over the children based on allegations that mother, who had physical custody of the children in Oregon, had substance abuse and mental health issues that threatened the children's welfare and that father, who lived out of state, did not have legal custody of the children and had not taken steps to obtain it. A year later, father moved to dismiss jurisdiction, asserting that the adjudicated bases for jurisdiction did not provide grounds for continuing jurisdiction. The juvenile court denied the motion in part because Arizona had declined to approve father as a placement for the children through the Interstate Compact for the Placement of Children (ICPC). Father appealed, arguing that his lack of a custody order did not expose the children to a particularized and nonspeculative risk of serious loss or injury. DHS conceded the juvenile court erred, and the Court of Appeals agreed, reversing the permanency

judgments denying father's motion to dismiss. While the appeal was pending, the juvenile court held a hearing on amended petitions alleging that Arizona had again declined to approve father as a placement through ICPC. The juvenile court rejected father's argument that ICPC doesn't apply until jurisdiction is established, or in this case, unless the state has proven that the grounds that brought the children within the court's jurisdiction continue to exist, and entered jurisdictional judgments based in part on the lack of ICPC approval. Father appealed.

Held: Reversed and remanded.

The court held that father's lack of ICPC approval does not, in itself, provide a basis for asserting jurisdiction over the children. The court cited to ORS 419B.334 that allows the court to place the *ward* in protective supervision out of state, if there is an interstate compact or agreement or an informal arrangement with another state permitting the ward to reside in another state. The court found DHS failed to present legally sufficient evidence to establish that the children were endangered by their conditions and circumstances.

### **Failure To Appear**

► *Dept. of Human Services v. J.R.D.*, [286 Or App 55 \(2017\)](#)

Mother failed to appear at a pretrial conference under ORS 419B.815(2)(b) before a juvenile court referee. The referee allowed DHS to proceed with its prima facie case, and entered an order taking jurisdiction of mother's child, D. Mother made a timely request for a rehearing before a juvenile court judge under ORS 419A.150, seeking to present additional evidence to rebut DHS's previously proven case. The court "affirmed" the referee's order without allowing mother the opportunity to present additional evidence and entered a judgment taking jurisdiction of D. Mother appealed, arguing that she was entitled to present additional evidence at the rehearing.

Held:

Reversed. The court found the text and context of ORS 419A.150 do not support the conclusion that a litigant who fails to appear before a referee is barred from presenting evidence at a subsequent rehearing. The court found that ORS 419A.150(3) plainly grants litigants permission to offer additional evidence at a rehearing. Accordingly, the court found the juvenile court erred in denying mother the opportunity to present additional evidence.

► *Dept. of Human Services v. C.M.R.*, [281 Or App 886 \(2016\)](#)

The juvenile court entered a jurisdictional judgment following a hearing at which mother was not present and had not been served with the petition and summons. On appeal, mother asserted that the juvenile court erred in proceeding with the hearing in her absence under ORS 419B.914, which allows the court to proceed with the case without service if diligent efforts have failed to reveal the identity or whereabouts of the person. DHS conceded that it failed to satisfy the

requirements of ORS 419B.914, and therefore, the court erred. The Court of Appeals agreed and reversed the jurisdictional judgment.

### **Multiple Petitions**

#### **► *Dept of Human Services v. B.P.*, 281 Or App 218 (2016)**

##### Facts:

In March 2014, DHS removed M from father and disallowed contact between father and M based on allegations of sexual abuse, drug abuse and neglect. Mother admitted to petition allegations related to mental health. The court held a jurisdictional hearing as to father in October 2014, and found DHS failed to prove the petition allegations. However, at the conclusion of the hearing and upon consent of both parties, the court amended the petition and asserted jurisdiction over M based on findings that father was neglectful by not enrolling the child in school for three months and by regularly failing to bring the child to school on time; the child's educational and social needs were not being met and the child suffered harm by falling behind and needing to repeat her kindergarten year in school. Father appealed the judgment, arguing the court's findings that father neglected M's educational and grooming needs and allowed M to have contact with her mother despite a contrary visitation order were insufficient to support jurisdiction. While the appeal was pending, the court changed the permanency plan to adoption in May 2015. In June, DHS filed a petition to terminate father's parental rights. In July, 2015, DHS filed a second dependency petition with allegations as to father only. In October, 2015, after a hearing on the 2015 petition, the juvenile court asserted jurisdiction over M on several grounds: (1) M's PTSD and other emotional, psychological and behavioral problems, and father's unwillingness to meet those special needs; (2) father's failure to visit M, and (3) father's failure to participate in court-ordered therapeutic services. In November, 2015, the juvenile court conducted a permanency hearing and continued the permanency plan of adoption from the May, 2015 permanency judgment. On the same day, DHS amended the petition to terminate father's parental rights to include the findings of both jurisdictional judgments. Father failed to appear at the TPR trial in December, and the juvenile court, after receiving evidence from DHS, terminated father's parental rights. Father appealed both the 2015 jurisdictional judgment and the TPR judgment.

On March 16, 2016, the Court of Appeals reversed the 2014 jurisdictional judgment, accepting DHS's and M's concessions that the allegations found to be proved by the juvenile court were insufficient to support jurisdiction.

Held: Affirmed.

2015 Jurisdictional Judgment. The reversal of the 2014 judgment did not render the 2015 judgment invalid as a matter of law, and the juvenile court did not err in asserting jurisdiction over M based on the 2015 petition. The court found the issues that were adjudicated in the 2015 petition were distinct from those adjudicated in 2014. The court rejected father's argument that the juvenile court committed plain error by failing to consider mother's fitness to parent in making the 2015 jurisdictional determination. At the time of the 2015 jurisdictional hearing, the 2014



jurisdictional judgment was still valid. The juvenile court took judicial notice of the 2014 case file, which included admissions by mother of her inability to parent M. Father did not object to consideration of the 2014 file, acknowledged it contained mother's admission, and presented no evidence to challenge mother's admission. The court found the record did not plainly demonstrate that the juvenile court did not consider mother's previous admission when it asserted jurisdiction over M.

TPR Judgment. Father argued the juvenile court lacked authority to terminate father's parental rights because the termination petition was predicated on the reversed 2014 jurisdictional judgment and the May 2015, permanency judgment (which was also based on the 2014 jurisdictional judgment). The court found the allegations in the TPR petition were based on both the 2014 and 2015 jurisdictional judgments, the majority of which were related to findings the court made during the 2015 dependency proceeding. In addition, the May 2015 permanency judgment that changed M's plan to adoption after the 2014 jurisdictional judgment was continued in a separate order after the 2015 jurisdictional judgment. The court held father's argument did not provide a basis for the court to reverse the TPR judgment on appeal.

## UCCJEA

### ► *Dept. of Human Services v. R.M.S.*, [280 Or App 807 \(2016\)](#)

#### Facts:

Prior to the jurisdictional hearing, mother moved to dismiss DHS's petition, arguing that Oregon lacked jurisdiction under the UCCJEA because she and N had resided in the state of Washington for the entirety of N's life. DHS argued that mother had been effectively living in Oregon since 2014, but had been maintaining an address in Washington to prevent child welfare authorities and father's parole officer from discovering that the family was living together in Oregon. The juvenile court denied mother's motion to dismiss, finding that the evidence that the child was spending a substantial amount of time in Washington County was sufficient for purposes of determining that venue was appropriate under ORS 419B.118(1).

Mother appealed, and challenged the court's determination that Oregon has jurisdiction to make mother's child a ward of the court.

Held: Vacated and remanded.

The juvenile court failed to apply the UCCJEA criteria in resolving mother's jurisdictional challenge and, instead, applied the analysis applicable to determining venue. The UCCJEA sets forth the rules for determining jurisdiction in custody cases involving multiple jurisdictions, and applies to dependency proceedings in Oregon. ORS 419B.803(2).

► *State v. L.P.L.O.*, [280 Or App 292 \(2016\)](#)

Facts:

A 17 year old child petitioned the juvenile court to take dependency jurisdiction over him so he could qualify for federal special immigrant status. Petitioner was born in El Salvador, where he lived with his father until he fled in 2013. Father would hit petitioner with a belt, cord or rope, sometimes daily. Petitioner was also being pressured to be in gangs that were threatening to kill him if he didn't do bad things to people. His mother was deceased. At the time he filed the petition, he was in the custody of the federal Office of Refugee Resettlement.

The juvenile court held a preliminary hearing to determine if the court had jurisdiction under the UCCJEA, and concluded it had temporary emergency jurisdiction under ORS 109.751(1). At the jurisdictional hearing, father failed to appear after receiving proper notice. Petitioner testified and presented an investigator's report that included confirmation from petitioner's sister of the abuse. The state argued petitioner had not met his burden to prove a risk of harm from father's abuse. The juvenile court found petitioner had proven the following allegations: the child's mother is deceased; the child's father repeatedly physically abused the child until he fled; the child ran away from father's home; the child has been threatened with physical harm by criminal gangs in El Salvador and is at risk of harm if he returns to El Salvador; the child has no legal guardian in the U.S.; the child is in the physical custody of ORR which has been unable to identify any relatives with whom the child could live. However, the juvenile court dismissed the petition. Subsequently, petitioner turned 18 years of age and filed a timely appeal.

Held: Motion to dismiss denied. Reversed and remanded.

1. Motion to dismiss.

The state argued the petitioner's appeal was moot because petitioner had turned 18 years old, and the juvenile court can take dependency jurisdiction only over a child who is under 18. The court held that a juvenile court's exclusive jurisdiction over a dependency case involving a person who is under 18 years of age attaches at the initiation of proceedings and is not lost merely because the child turns 18 before wardship is established.

2. UCCJEA emergency jurisdiction.

The court considered the question of whether a court can exercise temporary emergency jurisdiction under ORS 109.751(1) when it is unknown when a child might be returned to the abusive parent, but the return could occur at any time. The court concluded that the juvenile court properly exercised its temporary emergency jurisdiction because it was undisputed that petitioner was at risk of abuse if he were returned to his father in El Salvador, and that return could happen at any time.

3. Dependency jurisdiction.

Under ORS 419B.100(1)(c), the key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child. The court held the findings made by the juvenile court, as well as the underlying evidence and permissible inferences drawn from that evidence, required the juvenile court to take dependency jurisdiction over petitioner.

### *Motion to Dismiss*

► *Dept. of Human Services v. C.P.*, [281 Or App 10 \(2016\)](#)

Facts:

The children were removed from parents' home in 2012 due to domestic violence, substance abuse, parenting deficits, father's criminal activity, and mother's mental health. At a permanency hearing in 2014, father stipulated that he would be unavailable to parent the children within a reasonable time and agreed that a change in permanency plans to something other than reunification was warranted. DHS argued the plans should be changed to adoption, while father argued the plans should be changed to a guardianship plan with grandfather as guardian. The court changed the plans to adoption after finding that guardianship was not appropriate due to grandfather's lack of a relationship with the children, his long hours spent away from home as a truck driver, and the fact that he must rely on his aged mother for a substantial part of the child care. After the change in permanency plan, father moved to dismiss jurisdiction based on grandfather's ability to care for children. Father argued that because he had executed a delegation of parental authority to grandfather, under *Dept. of Human Services v. A.L.*, 268 Or App 391 (2015), there was not a current threat of harm to the children nor any continuing basis for jurisdiction. After a hearing, the court issued an order denying father's motions. Father appealed.

Held: Affirmed.

In *Dept. of Human Services v. T.L.*, 279 Or App 673 (2016), the court addressed whether evidence that another person is available and willing to help parents care for a child in a way that will mitigate the risks identified in the jurisdictional bases is relevant to the determination of whether dependency jurisdiction continues. The court held such evidence is governed by "principles of evidentiary relevance," and will generally be probative of whether there is a continued risk of harm posed by the jurisdictional bases. In addition, this may be raised by a parent after the plan has been changed from reunification, however, there is a presumption that the jurisdictional bases continue to make it unsafe for the child to return home, and the parents bear the burden of proof on the motion to dismiss, if the proponent of continuing jurisdiction invokes that presumption.

In this case, the parties litigated the motion to dismiss under their understanding of the law at the time of the hearing (prior to the decision in *T.L.*) that DHS had the burden of proving by a preponderance of the evidence that the factual bases for jurisdiction persisted and continued to pose a risk of harm that was likely to be realized. Although the burden of proof was not appropriately applied, the Court of Appeals found no error because the burden of proof was more

favorable to father. Viewing the evidence in the light most favorable to the court's decision to deny father's motions to dismiss jurisdiction and terminate the wardships, the court found the record was legally sufficient to support the court's determination. The court found evidence that grandfather had difficulty setting or maintaining boundaries with the parents was particularly important given that parents' inability to safely parent the children was undisputed.

► *Dept of Human Services v. T.L.*, [279 Or App 673 \(2016\)](#)

Facts:

Shortly after T's birth, the juvenile court made him a ward following his parents' admissions that his welfare was endangered within the meaning of ORS 419B.100(1)(c) by mother's substance abuse and mental health issues, and by father's incarceration and substance abuse. About a year later, the court changed the permanency plan from reunification to adoption. Eight months following the permanency hearing, the parents filed a motion to terminate wardship and dismiss dependency jurisdiction, arguing that the availability of an aunt to assist them in parenting T would mitigate any risk of the continuing conditions that led to the juvenile court exercising jurisdiction. The juvenile court determined the evidence about the aunt was not relevant to the legal issue presented: whether the identified bases for jurisdiction contained in the jurisdictional judgment continued. The court denied the motion and determined the original grounds for jurisdiction were still present.

Father appealed.

Held: Vacated and remanded.

On a motion to dismiss dependency jurisdiction, a juvenile court must determine: (a) whether the jurisdictional bases pose a current threat of serious loss or injury to the ward, and if so, (b) whether that threat is reasonably likely to be realized. Evidence that another person is able to assist in caring for a child in a way that would mitigate the risk posed by the jurisdictional bases is probative of the second element of that inquiry, and a juvenile court errs when it excludes that evidence or otherwise fails to take it into account in assessing whether dependency jurisdiction continues.

If the permanency plan for a child is something other than reunification, there is a presumption that the child cannot safely return home. DHS may invoke this presumption, requiring a parent seeking dismissal of dependency jurisdiction to prove the jurisdictional bases no longer endanger the child. If DHS chooses to invoke this presumption, a parent moving to dismiss will be required to prove that he or she has ameliorated the jurisdictional bases to the degree that she or he no longer poses a threat to the child that is reasonably likely to be realized.

The dissent argued that after jurisdiction is established, it is too late for the parent to propose an alternative living situation that would protect the child from the risk, and that the standard for analyzing a motion to terminate wardship should be whether the adjudicated conduct persists, or alternatively, whether that conduct has been ameliorated sufficiently that it no longer poses a risk to the child.

## ***Motion to Set Aside Voluntary Acknowledgment of Paternity***

### ► ***Dept. of Human Services v. A.I.W.*, [283 Or App 89 \(2016\)](#)**

DHS petitioned the juvenile court to change the designation of paternity to the child from the man (legal father) who signed a Voluntary Acknowledgment of Paternity (VAP) at the time of A's birth to appellant, A's biological father. Under ORS 109.070(5)(f), a VAP shall be set aside if the court finds that the acknowledgment was signed because of fraud, duress or material mistake of fact, unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable. At the hearing, uncontested evidence established that legal father believed he might be the biological father when he signed the VAP. However, later genetic testing confirmed that the appellant is the biological father. A had been living with legal father for over a year, and at the time of the hearing, mother was living with biological father.

After the hearing, the court issued a letter opinion denying DHS's petition to change the designation of paternity. In its opinion, the court determined that legal father had signed the VAP due to a material mistake of fact, however, after giving consideration to the interests of the parties and the child, setting aside the VAP would be substantially inequitable.

A's biological father, appealed and argued that the court erred because it failed to make a record sufficient to permit review of that decision.

Held: Reversed and remanded.

When a trial court exercises discretion it must describe the reasons for its decision so as to enable meaningful appellate review. On the record presented, the juvenile court's explanation was insufficient for the Court of Appeals to determine what factors the court relied on to conclude that it would be "substantially inequitable" to set aside the VAP. In this case, the juvenile court identified two factors that weighed positively for appellant - that he seemed to articulate an understanding of A's needs that exceeded that of legal father (who relied on his mother to assist him) and he has established a relationship with A, spending time camping with him. The juvenile court then observed that there were several factors about appellant that weighed against him, but did not identify specifically what those factors were.

## ***Permanency Hearings***

### ► ***Dept. of Human Services v. A. B.*, [286 Or App 578 \(2017\)](#)**

The juvenile court *sua sponte* set aside its earlier judgment terminating mother's parental rights, then entered judgments changing K's permanency plan away from adoption and appointing K's maternal grandfather, who resides in California, as K's guardian under ORS 419B.366. California had declined to approve of the placement under the Interstate Compact on the Placement of Children. DHS and K appealed, arguing that the juvenile court had no authority to set aside the termination judgment and that the court violated the ICPC by changing K's permanency plan to a durable guardianship and appointing grandfather as guardian.

## Held:

Permanency judgment and guardianship judgment reversed and remanded; otherwise affirmed. The court declined to consider whether the juvenile court lacked authority to set aside the judgment of termination, finding the issue was unreserved.

Regarding the violation of the ICPC, grandfather argued the ICPC did not apply, since a durable guardianship is not “foster care” as defined by the act. He argued that the use of “foster care” in the act indicates that the placement must be tied to federal funding, and if the guardianship does not involve public funding, it is not subject to the ICPC’s requirements.

The court found grandfather’s interpretation of the ICPC did not take into consideration the interest of the receiving state regarding the placement of a ward within its borders. If problems were to arise with grandfather’s guardianship of K, it is foreseeable that the California authorities would have to step in. The court found these concerns are what led to the adoption of the ICPC, and that if a court could avoid ICPC requirements by terminating DHS’s role in these circumstances, the purpose of the compact would be defeated. Accordingly, the court determined the juvenile court’s permanency and guardianship judgments violated the ICPC because those judgment have the effect of causing K to be placed in California without the approval of California officials.

### **Compelling Reasons**

#### ► *Dept. of Human Services v. D.I.R., 285 Or App 60 (2017)*

K came into care for the third time at age 5 due to parents' substance abuse, domestic violence and mental health issues. At the first permanency hearing, the child and the CASA requested a change of plan to adoption, while DHS and the parents requested an extension of the reunification plan to allow the parents to continue to engage in services. At the time of the permanency hearing, the parents were attending all court ordered services, and mother had been sober for a year. However, mother's psychological evaluation showed she had a personality disorder and was vulnerable to being involved with, and influenced by, dangerous individuals. The evaluator also noted her risk of relapse, and the impact that posed on her ability to parent. Father's psychological evaluation (conducted five months prior to the hearing) indicated he would not likely experience observable behavior change for six to nine months and sustainable and reliable change for nine months to a year. In addition, a parent trainer observed that father's handling of K when he was frustrated was concerning considering his history of abuse. She also was concerned about the mother's ability to stay sober if the parents continued their relationship. There was evidence the parents wanted to continue to be together. As for K, DHS presented evidence that she was excelling in foster care. She had been behind academically and socially and then excelled after being placed in foster care. She had expressed fear to her caseworker that her father would kill her mother, and that he would hurt the caseworker. She told the CASA she would like to live in the foster home forever and just have visits with her parents.

The juvenile court entered a permanency judgment changing K's permanency plan from reunification to adoption, finding DHS had made reasonable efforts toward reunification, and that parents had made insufficient progress for K to be safely returned home. In addition, the

court found that further efforts would not make it possible for K to return safely home within a reasonable time.

Held: Affirmed.

The Court of Appeals considered whether the court erred in determining that further efforts would not enable K to safely return home in a reasonable time under ORS 419B.476(4)(c) and (5)(c), and in determining that there were no compelling reasons under ORS 419B.498(2)(b)(A) to defer filing a petition to terminate parental rights. In order to determine whether the evidence was sufficient to support the court's findings that K could not be safely returned within a reasonable time, the court considers K's particular needs and circumstances and any barriers that the parents might face. The type of evidence the court has considered in deciding whether or not there is sufficient evidence in the record to support the juvenile court's determination regarding a child's ability to safely return home in a reasonable time was discussed in *Dept. of Human Services v. S.J.M.*, 283 Or App 367, 394, *rev allowed*, 361 Or 250 (2017) and included:

- (1) whether the child's placement in substitute care would be unacceptably long given her age;
- (2) the amount of time the child had already spent in foster care;
- (3) the child's unique permanency needs;
- (4) 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;
- (5) 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
- (6) the parent's participation and progress in services at the time of the permanency hearing.

In this case, the court found sufficient evidence in the record from which the juvenile court could find, based on K's particular needs for permanency and stability, the parents' history of relapse and domestic violence, and a history of DHS removing children from their care, that K could not safely return home in a reasonable time. The record indicated that both parents would need to engage in services for a considerable amount of time before K could safely return, or even if she could return sooner, there was a high risk that she would be removed again due to parents' history of relapse and discontinuing services.

► ***Dept. of Human Services v. M.S.*, 284 Or App 604 (2017)**

M was removed from mother within days of her birth in October, 2014. After a jurisdictional hearing, the juvenile court determined mother's mental health and substance abuse issues interfered with her ability to parent, and father was not available to parent. The court placed M in the custody of DHS. A year later, the court continued the permanency plan of reunification. Approximately nine months later, the court held a second permanency hearing at which M requested a change in plan to adoption. DHS and mother opposed the change in plan.

At the permanency hearing, evidence was presented that mother had made significant progress, had good parenting skills and regularly visited and loved M. However, she still needed to further engage in Dialectical Behavior Therapy. In addition, she was frustrated with DHS involvement in her case and had difficulty regulating her emotions at two supervised DHS visits. One of the incidents led to her arrest for assault. M was adversely affected by the two incidents, becoming

fearful of strangers and others. DHS temporarily suspended mother's visitation so that a plan could be worked to allow mother community visits supervised by someone outside of DHS.

Following the permanency hearing, the court entered a judgment continuing the plan of reunification, finding DHS had made reasonable efforts to reunify, but that mother had not yet made sufficient progress for M to be safely returned to her care. The court also found further efforts would make it possible for M to be safely returned to mother within a reasonable time. M appealed.

**Held:** Affirmed.

The proponent of a change in permanency plan bears the burden of proving that the statutory elements for a change in plan are present. One of the elements that M needed to prove was that there were no compelling reasons to forego the filing of a petition to terminate mother's parental rights. To make that showing M needed to prove, among other things, that M could not be returned within a reasonable time, given M's particular needs and circumstances and any barriers mother might face.

In this case, even if there was insufficient evidence for the juvenile court's finding that M could be returned to mother within a reasonable time, that finding would not require reversal of the juvenile court's decision. The court explained that reversal (of the juvenile court's denial of M's request to change the plan) would be indicated if the record permitted, if not compelled, the finding that M could not be returned to mother within a reasonable period of time, and there were no other compelling reasons to forego the filing of a petition to terminate mother's parental rights. The record in this case did not compel such a finding.

► *Dept. of Human Services v. S.S.*, [283 Or App 136 \(2016\)](#)

Facts:

M was placed in non-relative foster care (with White) in October 2012, shortly after being born drug-affected. Both parents failed to complete treatment and were inconsistently attending visits when they both were arrested in April 2013, eventually leading to terms of incarceration through August 2016 (mother) and September 2020 (father). While in Coffee Creek Correctional Facility, mother consistently participated in available programs and visitation with M. Grandmother also began visits in March 2013 and developed a positive relationship with M.

In late 2013, DHS asked the court to change the permanency plan from reunification to adoption, while mother argued for a plan of guardianship - preferably with grandmother. White was also willing to be a permanent resource. In February 2014, the court changed the plan to permanent guardianship, explaining that it was not appropriate to change the plan to adoption because there was evidence that M had bonded with grandmother and White and that mother had been participating in available services and visits. In September 2014, DHS moved M to a relative placement in Kansas. The relatives limited M's communication with grandmother, mother and White, and eventually indicated they did not want to serve as a permanent resource for M. M was placed back in White's home, and regular visits with grandmother and mother resumed.



In August 2015, DHS sought to change the permanency plan to adoption. At the permanency hearing, a DHS caseworker testified that M was very bonded with White and also had bonded with grandmother. The caseworker also testified that adoption is generally preferred over guardianship because of the primary attachment needs of the child and because guardianships can be vacated (and are less permanent). The court changed the permanency plan from guardianship to adoption, finding there was no "compelling reason" under ORS 419B.498(2)(b) to preclude DHS from filing a petition to terminate parents' rights. The juvenile court relied on *State ex rel Juv. Dept. v. Geist* for the proposition that statute provides a presumption that adoption is in the best interests of the child. In addition, the court stated that compelling reasons would be limited to issues created by the parents and not an issue with the child. Mother, father and child appealed.

Held: Reversed and remanded.

The court set out the general legal framework for the court's determination of the permanency plan. The juvenile dependency code requires permanency hearings to be held at regularly scheduled intervals and upon the request of a party. After a permanency hearing is held, the juvenile court is required by ORS 419B.476(5) to enter an order within 20 days, including specific findings. When the court determines the permanency plan for the child should be adoption, the court's order must include a determination of whether one of the circumstances in ORS 419B.498(2) is applicable. ORS 419B.498(2)(b) requires DHS to file a petition to terminate parental rights if the child has been in substitute care for 15 out of the most recent 22 months unless there is a compelling reason for determining that filing the petition would not be in the best interests of the child. Compelling reasons include, but are not limited to, circumstances where another permanent plan is better suited to meet the health and safety needs of the child, including the need to preserve the child's relationships. The Court of Appeals has interpreted this language to require a "child-centered" determination based on a current evaluation of the child's circumstances.

In this case, the court held the juvenile court did not evaluate, in light of M's specific circumstances (including her bonds with mother, grandmother and White), whether the plan of guardianship would better meet her health and safety needs than would the plan of adoption. The court went on to explain that retaining a relationship between a parent or a child may or may not be a compelling reason under the statute. The juvenile court must consider the best interests of the child given the particular circumstances of that child. In a footnote the court explained that the *Geist* opinion does not obviate the need for the court to conduct the analysis required by ORS 419B.476(5) and ORS 419B.498(2), statutes that were enacted after the *Geist* opinion was issued. Finally, the court rejected father's argument that issue preclusion prevented the court from changing the plan to adoption in August 2015 after refusing to do so in February of 2014, since the juvenile code requires periodic permanency hearings during which the court is required to evaluate the appropriate permanency plan for the child.

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

Facts:

L came into care after his father physically abused him, and the parents lied about it. His sister, A, was born a month later, and removed as well. The juvenile court took jurisdiction based on allegations that mother and father lacked the parenting skills to safely parent, father's abuse of L and mother's failure to protect, and father suffered from a mental health condition that interfered with his ability to parent. Mother and father were ordered to obtain psychological evaluations, to participate in counseling and parenting training and to maintain safe and stable housing. Approximately 15 months later, the court held a contested permanency hearing. Evidence was presented that mother had consistently engaged in services, DHS had noticed improvements in her parenting, she was responsive to feedback, had accepted responsibility for her part in the abuse and was bonded with her child. However, additional evidence showed that mother's focus on father hindered her progress as a parent and hindered her ability to protect the children. Father also received good reports from treatment providers, however, sometimes minimized or denied the abuse. He also had trouble regulating his emotions, including in the courtroom. Finally, mother and father secretly got married without informing DHS, service providers or the court, at a time when DHS thought they were having no contact with each other. Their relationship was volatile. At the end of the hearing, the juvenile court changed the permanency plan from reunification to adoption, finding that DHS had made reasonable efforts, the parents had made insufficient progress and that there was not a compelling reason for determining that filing a petition to terminate the parents' rights would not be in the child's best interests.

Mother and father appealed, arguing they had made sufficient progress for the child to return home, ORS 419B.476(2)(a). Mother additionally argued that there were two compelling reasons--specifically, her participation in services that would make it possible for her child to return home within a reasonable amount of time and the bond that she shared with her child--for the court to forgo a change of plan, ORS 419B.498(2)(b)(A), (B).

Held: Reversed and remanded.

Parental progress determination: The Court of Appeals held the juvenile court's finding that the parents' had made insufficient progress for the children to safely return home was supported by evidence in the record. The juvenile court's inference that father lacked the ability to regulate his emotions and temper was permissible based on father's exhibited behavior (which included outbursts in the courthouse). The juvenile court was not required to conclude father had made sufficient progress just because father had completed DHS services. Rather, ORS 419B.476(2)(a) requires the court to focus on the child's health and safety. Father's behavior, combined with evidence that father was hesitant to acknowledge his treatment of L constituted abuse provided a basis for the court to conclude that he had not ameliorated the related bases of jurisdiction. With respect to mother, the juvenile court's finding of insufficient progress was supported by evidence that she remained unable to recognize the danger that father posed to the child.

Compelling reasons: The court considered whether ORS 419B.476(5)(d) and ORS 419B.498(2)(b) require the juvenile court to determine whether there are compelling reasons not to proceed with termination before changing the plan to adoption. After considering the text, context and history of the statutory provisions, the court determined a juvenile court must make a compelling reasons determination before changing a plan from reunification to adoption. The statutory scheme requires the court to carefully evaluate DHS's decision to change a permanency plan for a child to ensure the decision is most likely to lead to a positive outcome for the child.

In this case, the juvenile court, in its narrative findings regarding mother's progress noted that "The Court finds that the child cannot be safely returned to Mother's care in a reasonable time." In addition, the juvenile court checked the appropriate boxes on the permanency judgment indicating that no compelling reasons exist. The Court of Appeals found there was insufficient evidence in the record to support these findings. For example, there was nothing to suggest that A's anticipated stay in care would be unacceptably long given her age, or her unique permanency needs. Also, there was no evidence of how long mother would have to remain in services before she could become a safe parent for A, or how such a delay would impair A's best interests. Given mother's participation and progress, there was no evidence that her continued participation would not enable her to become at least a minimally competent parent within a reasonable time given A's particular needs.

### **Reasonable Efforts**

#### **► *Dept. of Human Services v. M.A.H.*, 284 Or App 215 (2017)**

DHS removed mother's children in November 2014 and the court took jurisdiction in January, 2015 based on risk of harm created by mother's criminal activities, lack of parenting skills, substance abuse, and her practice of leaving the children with unsafe providers (2014 case). In June 2015, DHS filed a new petition based on mother's mental health, and the court took jurisdiction again in August 2015 (2015 case). Shortly thereafter, the court changed the permanency plan in the 2014 case to adoption, while the plan for the children in the 2015 case remained reunification pursuant to the August 2015 judgment. The permanency judgments were appealed, vacated and remanded due to the inconsistency of the permanency plans for the 2014 and 2015 cases. While the appeal was pending, the parents' rights were terminated, and DHS stopped providing services to mother. When the Court of Appeals vacated the permanency judgments, DHS began providing services to mother shortly thereafter. A month or so later, the juvenile court consolidated the cases, held a permanency hearing, and changed the plans to adoption. Mother appealed and argued the record contained insufficient evidence that DHS provided efforts that were tailored to help mother address her mental health issues, required from the 2015 jurisdictional judgment.

Held: Affirmed.

When the plan is reunification, under ORS 419B.476(2)(a), the juvenile court may change the plan if the proponent of the change proves by a preponderance of the evidence that DHS made reasonable efforts to make it possible for the child to be reunified with his or her parent, and the parent's progress was insufficient to make reunification possible. DHS efforts are reasonable if DHS has given a parent a fair opportunity to demonstrate the ability to adjust his or her behavior and act as a minimally adequate parent. The court considers the totality of the circumstances

including the particular circumstances of the case in assessing whether DHS efforts were reasonable. This may include the burdens that the state would shoulder in providing the services and the benefit that might reasonably be expected to flow, and whether the parent has demonstrated an unwillingness to participate in services. Finally, DHS efforts are evaluated over the duration of the case with an emphasis on the period before the hearing sufficient in length to afford a good opportunity to assess parental progress.

In this case, the court found sufficient evidence in the record to support the juvenile court's determination that DHS made reasonable efforts. DHS made extensive efforts aimed at the original jurisdictional bases. The record contains evidence that DHS made efforts relating to mother's mental health beginning in March 2015 (referral for psychological evaluation), continuing with multiple referrals for mental health assessments in late 2015 and early 2016 and ongoing contact with her mental health provider up to the time of the TPR trial. The court noted that even though DHS made no efforts for three months after the TPR judgment, mother was engaged in mental health counseling over that time period. The court stated that DHS is not excused from providing a service when a parent undertakes that service on their own, but the juvenile court could consider the fact of the intervening TPR trial as part of the totality of the circumstances in making the reasonable efforts determination. The court found DHS provided mother a fair opportunity to demonstrate the ability to adjust her behavior and act as a minimally adequate parent.

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

Facts:

Parents appealed the judgment of the juvenile court changing the permanency plans for three children from reunification to guardianship. Mother assigned error to the juvenile court's ruling that DHS made reasonable efforts to make reunification possible as required by ORS 419B.476(2)(a).

Jurisdiction as to mother was based on substance abuse, and later, her unavailability as a parenting resource due to incarceration. Initially after the first child was placed in care, DHS referred mother to drug and alcohol treatment, provided regular visits, and the caseworker had regular face to face contact with mother. However, about nine months after the initial out of home placement, mother was assigned a new caseworker, Moles, who worked only two days per week but handled a full time case load. A few months after the new caseworker was assigned, mother was incarcerated at Coffee Creek Correctional Facility. For the first eight months of mother's incarceration, despite mother's requests, DHS did not provide financial assistance for video and telephone visits between mother and the children, and for a six month period, the new caseworker documented no face-to-face contact with mother. DHS did not contact mother's prison counselor or maintain regular contact with mother until several months before the permanency hearing. Mother was incarcerated for most of the year leading up to the permanency hearing. During that time, mother maintained regular contact with her children, actively participated in programs that were available to her, and frequently tried to contact the family's caseworker.

At the permanency hearing, mother's prison counselor testified that DHS had contacted him four times inquiring about visitation and eligibility. He also reported that mother was eager and wanting to learn, and was making the best of her time in prison. She had successfully advocated for herself to gain entrance into an alternative incarceration program, parenting classes and substance abuse support groups. She was approved to enter an intensive, residential treatment program, which would allow her to be released as early as nine months after the permanency hearing.

The juvenile court adopted DHS's description of reasonable efforts provided in the uniform court report. The Court of Appeals noted that the DHS description of efforts primarily addressed those actions that were expected of the parents, and not the efforts that DHS actually made (the Court of Appeals later found that there was insufficient evidence in the record to support the DHS statement that it maintained monthly contact with the parents, as set forth in the court report). The juvenile court described DHS's efforts as follows: drug and alcohol evaluation(s), making referrals for counseling, making referrals for dealing with the parents' addiction issues, while noting that the parents had put themselves in a situation in which they ended up in custody where they can't have access to their child, and the only way services could be provided was through the Department of Corrections.

Held: Reversed and remanded. The record contained insufficient evidence to support the trial court's conclusion that DHS made reasonable efforts.

The reasonableness of DHS's efforts depends upon the particular circumstances of each case. DHS must make reunification efforts for each parent. DHS's efforts are reasonable only if DHS has given the parents a reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents. DHS efforts are judged over the life of the case with an emphasis on the period before the hearing sufficient in length to afford a good opportunity to assess parental progress. DHS is not excused from making reasonable efforts because a parent is incarcerated.

When assessing DHS's efforts, a juvenile court properly considers the length and circumstances of a parent's incarceration and evidence specifically tied to a parent's willingness and ability to participate in services, however the focus is on DHS conduct and a parent's resistance to DHS's efforts does not categorically excuse DHS from making meaningful efforts toward that parent. The court distinguished this case from *Dept. of Human Services v. S.W.*, 267 Or App 277 (2014), in which the juvenile court's reasonable efforts determination was affirmed despite an extended period of minimal efforts from DHS with respect to an incarcerated parent, noting that in this case, mother maintained regular contact with her children throughout the life of the case. She also acknowledged that her drug abuse harmed and endangered her children and independently maintained close contact with her children while incarcerated, despite DHS's failure to respond to her requests for assistance. While mother was willing to engage in services after her arrest and incarceration, DHS did not meet mother's efforts in kind, instead placing responsibility for the family's case in the hands of a part-time caseworker, who by her own admission, did not timely provide services to mother due to her full-time workload at DHS.

In this case, the juvenile court lacked sufficient evidence to support a conclusion that mother would not have benefited from additional services. Mother's conduct (her willingness to engage

in services and desire for contact with her children and DHS) demonstrates that additional efforts by DHS could have materially contributed to the goal of ameliorating the jurisdictional bases. In addition, the court noted there was no evidence that DHS's inaction for significant periods of time was due to a decision to cease efforts, but rather the record reflected that DHS failed to adequately engage with mother because it did not allocate sufficient resources to the family's case. Since there was insufficient evidence to support the juvenile court's determination that DHS made reasonable efforts with respect to mother, the court reversed the permanency judgments for the three children.

► *Dept. of Human Services v. C.L.H.*, 283 Or App 313 (2017)

Facts:

Father appealed the judgment of the juvenile court changing the permanency plan for his child ("M") from reunification to adoption. Father assigned error to the juvenile court's ruling that DHS made reasonable efforts on his behalf as required by ORS 419B.476(2)(a).

Early in the case, father did not visit his child or participate in services, and he was subsequently incarcerated. Although DHS promptly learned of his whereabouts, DHS did not contact father or his prison counselor for over six months, did not assess the adequacy of the programs in which father had participated while incarcerated, did not provide visits between father and child, and did not facilitate training for father related to his child's special medical needs (which was part of the jurisdictional bases). The juvenile court determined that even if DHS had made all of the efforts that father argued it should have made, those efforts would not have made reunification between father and M possible in the near future, considering father's length of incarceration. The court also noted the child would have been in substitute care for over three years (most of the child's life), and had significant bonds with the foster family. The juvenile court reasoned there was no evidence that additional efforts would have materially advanced father's ability to reunify with his child.

Held: Reversed and remanded.

The juvenile court is authorized to change a permanency plan away from reunification only if DHS proves by a preponderance of the evidence 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. Reunification efforts are reasonable only if DHS has given a parent a fair opportunity to demonstrate the ability to adjust his or her behavior and act as a minimally adequate parent. The juvenile court must evaluate DHS's efforts over the entire duration of the case, with an emphasis on a period before the hearing sufficient in length to afford a good opportunity to assess parental progress. When a parent argues that DHS's failure to make specific efforts rendered the agency's efforts unreasonable, the juvenile court must engage in something resembling a cost-benefit analysis considering both the burdens that the state would shoulder in providing that service and the benefit that might reasonably be expected to flow from that service.

The Court of Appeals distinguished this case from *Dept. of Human Services v. S.W.*, 267 Or App 277 (2014), in which the juvenile court's reasonable efforts determination was affirmed despite

an extended period of minimal efforts from DHS with respect to an incarcerated parent. The court explained that when the juvenile court assesses 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. When available, the juvenile court properly considers evidence tied to a parent's willingness and ability to participate in and benefit from the service that was not provided. This analysis does not turn upon whether that service will ultimately make reunification possible. While the court may consider the length and circumstances of a parent's incarceration in assessing DHS's efforts, the reasonable efforts inquiry focuses on whether DHS provided the parent with an opportunity to demonstrate improvement regarding the jurisdictional bases. The court went on to explain that DHS may not withhold a potentially beneficial service to a parent simply because reunification with the child is ultimately unlikely even if the parent successfully engages in the services and programs that DHS provides. DHS must make reasonable efforts so that the juvenile court is in a position to evaluate the parent's progress toward the goal of reunification. The circumstances and duration of a parent's incarceration may then be considered when the court determines whether the parent has made sufficient progress.

In this case, the Court of Appeals found the services that DHS failed to provide - evaluating the anger management and parenting programs available to father in prison and educating father on his child's special needs and day to day care - were directly related to the conditions that gave rise to jurisdiction. Because DHS did not meaningfully attempt to provide those services or stay in regular contact with father once his whereabouts became known, the juvenile court had little evidence regarding father's willingness and ability to participate in and benefit from those services. 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. In light of DHS's failure to contact father or his prison counselor for more than six months, to investigate the adequacy of the programs available to father in prison, or attempt to provide father with services focused on M's special needs, the court found the record was insufficient to support a conclusion that DHS made reasonable efforts toward father for a sufficient period of time in which the juvenile court could assess his progress. After DHS has made reasonable efforts, the juvenile court may ultimately conclude that he has not made sufficient progress to make reunification possible, even if he actively participates in services. The court must root its decision about whether to change the permanency plan away from reunification in considerations of M's health and safety. If M becomes bonded to her foster parents and father is unable to develop a relationship with her in a reasonable time, those facts will have a significant bearing on the sufficiency of father's progress. However, until DHS makes meaningful efforts to provide father with reunification services, the juvenile court is not authorized to change the plan away from reunification.

### **Sufficient Progress**

► *Dept. of Human Services v. M. D. P.*, [285 Or App 707 \(2017\)](#)

In October 2014, the juvenile court took jurisdiction over M and R based on parents' admissions regarding their chaotic lifestyle and residential instability, exposing the children to domestic discord (father), and failure to protect the children from domestic discord (mother). The juvenile

court ordered parents to: (1) complete domestic violence counseling and demonstrate a violence free lifestyle; (2) complete psychological evaluations and follow service evaluations; (3) complete a parent training program and demonstrate skills learned; and (4) maintain safe and stable housing.

In October 2015, the court conducted a permanency hearing and granted parents a 120-day extension pursuant to ORS 419B.476(4)(c) to allow them to engage in necessary services. At the time of the second permanency hearing in March 2016, parents were parenting a new baby. They were employed and moving into two sublet bedrooms in a house. Finding the parents had made insufficient progress toward reunification, the court changed the plans for M and R from reunification to guardianship. Parents appealed, arguing their participation in all of the required programs and their efforts to maintain sobriety and obtain employment and housing conclusively establish that they had made sufficient progress. Mother also argued that the parents' success in caring for an infant without state intervention should be conclusive evidence that they made sufficient progress in ameliorating the concerns underlying the jurisdictional basis.

Held: Affirmed.

To change a child's permanency plan away from reunification, the proponent must prove by a preponderance of the evidence both that (1) DHS made reasonable efforts to make it possible for the child to safely return home, and (2) notwithstanding those efforts, the parent's progress was insufficient to make reunification possible. A parent's engagement in services is not dispositive that a parent has satisfied DHS's expectations; what matters is whether the parent has made sufficient progress as a result of those services or otherwise, to overcome the concerns that gave rise to juvenile court jurisdiction.

In this case, the Court of Appeals found the record contained legally sufficient evidence to support the juvenile court's conclusion that the parents had not made sufficient progress because they had not remediated the risks of harm from their domestic discord and residential instability at the time of the permanency hearing. First, mother had not followed the order that she comply with the recommendations from her psychological evaluation, which related to her ability to protect the children. In February 2015, Dr. Sorensen observed that mother displayed a tremendous lack of empathy for her children when discussing allegations that father had been abusive to her and the children. Dr. Sorensen had observed that mother displayed traits consistent with antisocial personality features of a personality disorder including a lack of emotional attachment to her children and difficulty accepting that her substance abuse problems affected her children. Dr. Sorensen considered substance abuse treatment essential to mother's ability to safely parent the children. Although mother had been sober for over six months, she failed to complete the substance abuse program, and her counselor noted her lack of engagement, lack of honest disclosure and possibly a lack of desire to really follow through with strategies necessary to remain clean and sober and make decisions in the best interests of her children. Second, father failed to follow the recommendations from his psychological evaluation by failing to complete domestic violence counseling or treatment. Third, although parents had housing at the time of the permanency hearing, they had not demonstrated an ability to maintain stable housing because of their pattern of frequent and sudden moves between residences throughout the case. Finally, there was evidence in the record that although parents were successfully parenting an infant, they did not have the skills to parent three children at once. A letter from the



parenting trainer indicated they had difficulty during visits parenting all three children at the same time. The sufficient progress inquiry is centered on whether the *ward* may safely return home, and the court must make that determination with the ward's health and safety as the paramount concern.

► *Dept. of Human Services v. M. K.*, 285 Or App 448 (2017)

E and J came into care in July of 2015 after incidents of domestic violence involving their parents. The juvenile court subsequently assumed jurisdiction based on the domestic violence issues creating harm to the children. Mother signed an action agreement agreeing that she would maintain contact with her caseworker, attend therapeutic counseling visits, complete a mental health assessment, complete a substance abuse assessment and attend domestic violence treatment classes.

In October 2015, DHS reported that the home remained dangerous because the parents continued to engage in domestic violence. The children were fearful of returning, and wished to remain with their grandparents because they felt they had a stable family life there. Mother engaged in services and requested therapeutic visitation with the children, however, the children refused to see her. At the permanency hearing in September, 2016, the children and CASA requested the plan be changed to guardianship. After reviewing the reports and hearing testimony, the juvenile court ordered the permanency plan be changed from reunification to guardianship. Mother appealed, arguing that DHS should have done more to effect therapeutic visitation. In addition, she argued the children's desire to stay with grandparents and their refusal to participate in visitation were not adequate grounds for concluding mother had made insufficient progress for the children to return home.

Held:

The proponent of a change in permanency plan must prove by a preponderance of the evidence that DHS made reasonable efforts to make it possible for the child to be reunified with his or her parent, and the parent has made insufficient progress to make it possible for the child to be safely returned home. Regarding the reasonable efforts determination, mother argued that because DHS identified therapeutic visitation as a key service necessary for reunification and failed to provide that service, DHS efforts were not reasonable. She argued the plan should not be changed until DHS tried to effect therapeutic visitation one more time.

The court considers the totality of the circumstances with reference to the jurisdictional basis, the particular circumstances of each case and the child's health and safety in determining whether DHS efforts were reasonable. The focus of the analysis is on whether DHS efforts gave mother a reasonable opportunity to demonstrate her ability to adjust her behavior and become a minimally adequate parent. In this case, the caseworker asked the children on multiple occasions if they wanted to visit with mother, and the counselor asked if they wanted to return to mother. The children adamantly refused to meet with mother, and expressed fear and anger that they would be returned to the same situation with their parents that they had experienced before. Both the caseworker and the counselor opined that forcing the children to meet with mother would be detrimental to them. Mother offered no evidence to the contrary. The juvenile court could properly consider that the children would suffer from forcing them into therapeutic visitation

with mother, as well as the children's refusal to cooperate with visits in determining whether DHS efforts were reasonable. In this case, the juvenile court's finding that mother continued to minimize the effects of the domestic violence on the children supported the juvenile court's finding of reasonable efforts even though mother was not allowed to write letters to the children.

In determining whether the parent has made sufficient progress, the juvenile court gives the highest priority to the child's health and welfare. Regardless of mother's completion of required programs, if she was still engaging in behaviors that would be harmful to her children, the court could conclude that her progress was not sufficient for them to safely return home. The court found evidence in the record that the children suffered harm from the domestic violence in their home, and that mother continued to engage in behavior that would create a risk of the same types of harm if the children were returned. This included mother repeatedly allowing father back into the home even after obtaining restraining orders against him, and her continued minimization of the impact of the domestic violence on the children.

### ***Reviewability***

► ***Dept. of Human Services v. S.M.S., [281 Or App 720 \(2016\)](#)***

Father appealed a juvenile court judgment taking jurisdiction over his daughter K. The juvenile court had declined to place K with father, finding that K had mental health difficulties that required supervision and treatment that father was unable to provide, and that father's attitude, behavior and perception result in the refusal or failure to meet the child's exceptional needs that affect her safety. While his appeal was pending, the juvenile court terminated the wardship, and DHS moved to dismiss father's appeal as moot. Father argued that his appeal was not moot because it may impact his ability to volunteer at his children's schools and as a youth-sports coach.

Held:

Appeal dismissed as moot. An appeal is moot when resolution of the main issue in controversy will no longer have a practical impact on the rights of the parties. A party appealing the jurisdictional judgment must establish the existence of collateral consequences that prevent the controversy from being moot. The asserted consequence must have a significant probability of actually occurring. In this case, the court found that father did not establish a significant probability the judgment would produce adverse collateral consequences primarily because DHS and juvenile court records are confidential and unavailable to the public. Father did not identify any applicable custom, policy, statute, rule, or practice that presented a significant likelihood that the jurisdictional judgment would be disclosed.

### ***Temporary Custody***

► ***Dept. of Human Services v. S.R.R., [281 Or App 619 \(2016\)](#)***

The child was a ward of the court in this juvenile dependency proceeding, and also was charged with conduct that, if committed by an adult, would constitute third degree assault in a juvenile delinquency proceeding. After finding the child unfit to proceed in the delinquency proceeding,

the court entered judgment in both cases placing the ward/youth in the temporary custody of the Oregon Youth Authority. The child appealed, arguing that because she had not been adjudicated as delinquent under ORS 419C.005, the court lacked authority to order her into OYA's custody. DHS conceded that there is no statutory authority that grants OYA authority to take custody over the child in this case. The Court of Appeals agreed and reversed. A related appeal in the delinquency case was dismissed as moot. *State v. S.R.R.*, [281 Or App 621 \(2016\)](#).

## Termination of Parental Rights

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

The juvenile court asserted dependency jurisdiction over daughter and son several times beginning when daughter was nine months old and son was a few weeks old. In 2012, the court asserted jurisdiction based on parents' substance abuse and domestic violence, father's criminal activity, and mother's mental health. In February 2015, father moved to dismiss jurisdiction arguing that grandfather was available to care for the children. At the hearing, a therapist who had assessed grandfather's potential parenting capacity testified that he presented as an adequate caregiver, however, expressed concern that grandfather did not have strong enough boundaries to keep the children safe around father. The juvenile court denied father's motion to dismiss, a decision that was affirmed on appeal.

At the time of the termination trial in August 2015, daughter was five years old and son was four years old. Both had significant behavioral issues. Father was incarcerated and expected to be released in January 2016, to a 90-day transitional housing program. At the termination trial, father offered evidence from the motion to dismiss hearing of grandfather's availability and suitability as a guardian, arguing evidence of grandfather's fitness as a guardian or potential adoptive placement was relevant as to whether termination of his parental rights was in the children's best interests. The trial court excluded the evidence but allowed parts of the record to be admitted as an offer a proof. The juvenile court terminated parents' parental rights. Father appealed.

Held: Affirmed.

As a general matter, when a parent opposes termination on the ground that it is not in a 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 that legal connection is relevant to whether termination is in the child's best interests. In this case, the court found that in light of father's argument that he and his children were bonded and that termination would sever that relationship to the children's detriment, the 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. The juvenile court's exclusion of the evidence was legal error.

On *de novo* review, the court found DHS established the requirements for terminating father's parental rights based on unfitness under ORS 419B.504. The court found the evidence in the record proved by clear and convincing evidence that father's personality disorder, in combination with other long-standing conditions, was seriously detrimental to the children. At trial, Dr.

Morrell, who conducted a psychological evaluation on father, testified that father has a tendency to take care of himself rather than prioritize the welfare of his children due to his personality traits, which included high levels of attention neediness, egocentrism, criminality, aggression and some instability in his personal structure. The court found the evidence presented at trial demonstrated that father's combination of conditions have been detrimental to the children by driving behaviors that have exposed the children to domestic violence and neglect, contributing to their behavioral issues. The court found the children could not be integrated into father's home within a reasonable time based on testimony that it wasn't likely that father would be able to rise to the level of caregiving needed for his children, who have special needs, and who have an immediate need for permanency. Finally, the court determined termination was in the children's best interest. The children had spent most of their lives out of father's care and were not strongly bonded to him.

► *Dept. of Human Services v. M.L.M.*, [283 Or App 353 \(2017\)](#)

Facts:

In this case governed by the Indian Child Welfare Act (ICWA) mother and father appeal from a judgment terminating their parental rights. On appeal, parents challenge DHS's proof as to nearly every requirement for termination. In particular, father argues that DHS has not demonstrated that it has made "active efforts" to provide services to prevent the break-up of the family as required by ICWA because the services that DHS provided were not sufficiently current to the termination of parental rights trial.

Held:

Affirmed. A determination as to whether DHS has made "active efforts" under ICWA depends on the particular circumstances of the case, which includes the nature of the parents' problems. Although an early cessation of services could indicate that DHS has not made "active efforts," timing is not the only relevant consideration to this determination. DHS demonstrated beyond a reasonable doubt that the services that it provided to parents constituted "active efforts."

► *Dept. of Human Services v. L. D. K.*, [282 Or App 510 \(2016\)](#)

Mother appealed judgments terminating her parental rights to six children. The case against mother rested, in large part, on mother's relationship with the father of the three youngest children, BJ. The Department of Human Services (DHS) sought to terminate mother's rights on the ground, among others, that mother suffered from a personality disorder that causes mother to be overly dependent on her partner--in this case, BJ, whom DHS alleged was himself unfit to parent the children. After a consolidated trial, the trial court terminated both mother's and BJ's parental rights.

Held: Reversed and remanded.

In *Dept. of Human Services v. B. J. J.*, [282 Or App 488 \(2016\)](#), the Court of Appeals concluded that DHS failed to prove that the father, BJ, was an unfit parent at the time of the termination trial. In light of that decision, and DHS's lack of clear and convincing evidence to support the

other alleged bases for mother's unfitness, the termination judgments with respect to mother were reversed. By the time of trial, mother's substance abuse problems had been treated successfully, and she had been clean for two years. She consistently engaged in visitation, and although she was often late, there is no basis to conclude that she was unfit by reason of physical or emotional neglect at the time of trial. Since DHS failed to prove that father's use of physical discipline or lack of parenting skills were seriously detrimental to his children, there is insufficient evidence to establish mother's dependence on the father was seriously detrimental to the children. Finally, although there was some evidence that the older children were fearful of father, and that mother's parenting skills were less than ideal, there was insufficient evidence that these problems were seriously detrimental to the children to the level that termination of parental rights would be justified.

► *Dept of Human Services v. B.P.*, [281 Or App 218 \(2016\)](#)

Facts:

In March 2014, DHS removed M from father and disallowed contact between father and M based on allegations of sexual abuse, drug abuse and neglect. Mother admitted to petition allegations related to mental health. The court held a jurisdictional hearing as to father in October 2014, and found DHS failed to prove the petition allegations. However, at the conclusion of the hearing and upon consent of both parties, the court amended the petition and asserted jurisdiction over M based on findings that father was neglectful by not enrolling the child in school for three months and by regularly failing to bring the child to school on time; the child's educational and social needs were not being met and the child suffered harm by falling behind and needing to repeat her kindergarten year in school. Father appealed the judgment, arguing the court's findings that father neglected M's educational and grooming needs and allowed M to have contact with her mother despite a contrary visitation order were insufficient to support jurisdiction. While the appeal was pending, the court changed the permanency plan to adoption in May 2015. In June, DHS filed a petition to terminate father's parental rights. In July, 2015, DHS filed a second dependency petition with allegations as to father only. In October, 2015, after a hearing on the 2015 petition, the juvenile court asserted jurisdiction over M on several grounds: (1) M's PTSD and other emotional, psychological and behavioral problems, and father's unwillingness to meet those special needs; (2) father's failure to visit M, and (3) father's failure to participate in court-ordered therapeutic services. In November, 2015, the juvenile court conducted a permanency hearing and continued the permanency plan of adoption from the May, 2015 permanency judgment. On the same day, DHS amended the petition to terminate father's parental rights to include the findings of both jurisdictional judgments. Father failed to appear at the TPR trial in December, and the juvenile court, after receiving evidence from DHS, terminated father's parental rights. Father appealed both the 2015 jurisdictional judgment and the TPR judgment.

On March 16, 2016, the Court of Appeals reversed the 2014 jurisdictional judgment, accepting DHS's and M's concessions that the allegations found to be proved by the juvenile court were insufficient to support jurisdiction.

Held: Affirmed.

2015 Jurisdictional Judgment. The reversal of the 2014 judgment did not render the 2015 judgment invalid as a matter of law, and the juvenile court did not err in asserting jurisdiction over M based on the 2015 petition. The court found the issues that were adjudicated in the 2015 petition were distinct from those adjudicated in 2014. The court rejected father's argument that the juvenile court committed plain error by failing to consider mother's fitness to parent in making the 2015 jurisdictional determination. At the time of the 2015 jurisdictional hearing, the 2014 jurisdictional judgment was still valid. The juvenile court took judicial notice of the 2014 case file, which included admissions by mother of her inability to parent M. Father did not object to consideration of the 2014 file, acknowledged it contained mother's admission, and presented no evidence to challenge mother's admission. The court found the record did not plainly demonstrate that the juvenile court did not consider mother's previous admission when it asserted jurisdiction over M.

TPR Judgment. Father argued the juvenile court lacked authority to terminate father's parental rights because the termination petition was predicated on the reversed 2014 jurisdictional judgment and the May 2015, permanency judgment (which was also based on the 2014 jurisdictional judgment). The court found the allegations in the TPR petition were based on both the 2014 and 2015 jurisdictional judgments, the majority of which were related to findings the court made during the 2015 dependency proceeding. In addition, the May 2015 permanency judgment that changed M's plan to adoption after the 2014 jurisdictional judgment was continued in a separate order after the 2015 jurisdictional judgment. The court held father's argument did not provide a basis for the court to reverse the TPR judgment on appeal.

► *Dept. of Human Services v. B. J. J.*, [282 Or App 488 \(2016\)](#)

Father appealed judgments terminating his parental rights with respect to his twins, EM and EJ, and his other son, X. The trial court ruled that father's rights should be terminated on the basis of unfitness (ORS 419B.504), because of father's personality disorder, anger management problems, housing instability, and failure to make a lasting adjustment to those conditions and circumstances. Father appealed.

Held: Reversed and remanded.

To terminate a parent's rights based on unfitness, the court must find that (1) the parent has engaged in conduct or is characterized by a condition that is seriously detrimental to the child; (2) integration of the child into the parent's care is improbable within a reasonable time due to conduct or conditions not likely to change; and (3) termination is in the best interests of the child. In considering part one of the test, the court focuses on the detrimental effect of the parent's conduct or condition on the child, and the inquiry is child specific and calls for testimony regarding the needs of the particular child. Also, the unfitness must exist at the time of termination hearing.

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. In this case, the only incidents of violence in father's past involved other adult

males, and there was little evidence of the frequency of the incidents or that father was modeling violent behavior in front of his children. No evidence was presented on how father's behavior affected the children. In addition, there was insufficient evidence of how father's use of physical discipline (spanking) would affect the children any differently than the thousands of children who are being raised in similar circumstances (the mental health experts who testified about the children's needs did not testify about the seriously detrimental effect that physical discipline would have on these children). Although there was mixed evidence presented at trial regarding father's parenting ability, the parenting coaches who testified said they were not concerned about the children's safety. There was insufficient evidence that father was unfit on the basis of physical and emotional neglect when father had been visiting his children and making efforts to work with parenting coaches, and when there were questions about whether the parents had been notified of the children's medical appointments. Regarding father's lack of a viable plan for the children to return home, the court found concerns about barriers to visibility in the home (for the parents to monitor the children's special needs) were not significant enough to show the home could not be made safe. In addition, although father was unwilling to work with DHS, there was insufficient evidence to indicate father would not rely on agencies like WESD and medical providers, for assistance to meet the children's medical and educational needs.