



# Oregon Juvenile Law Appellate Update

THROUGH THE EYES OF THE CHILD CONFERENCE

July 2023 – June 26, 2024

# Table of Contents

<b>Delinquency</b> .....	3
COMMITMENT TO OREGON YOUTH AUTHORITY.....	3
COMPETENCE.....	3
CONFIDENTIALITY .....	4
DISPOSITION AND COMMITMENT TO OREGON YOUTH AUTHORITY.....	4
EVIDENCE .....	5
RECORDS.....	5
RESTITUTION.....	6
SEX OFFENDER REPORTING.....	6
VIOLATIONS.....	7
<b>Dependency</b> .....	7
APPEALABILITY .....	7
DISPOSITION.....	8
<i>Psychological Evaluation</i> .....	8
JURISDICTION.....	8
<i>Admissions (and Lack of Custody Order)</i> .....	8
<i>Domestic Violence/Substance Use</i> .....	9
<i>Domestic Violence</i> .....	9
<i>ICWA</i> .....	9
<i>Lack of Custody Order</i> .....	10
<i>Parents delegate care to a third party</i> .....	10
<i>Substance Use</i> .....	11
MOTION TO DISMISS.....	11
MOTION TO INTERVENE .....	11
MOTION TO SET ASIDE JUDGMENT OR ORDER.....	13
PERMANENCY HEARINGS .....	13
<i>Reasonable/Active Efforts (also No Compelling Reason)</i> .....	13
<i>Right to Participate</i> .....	15
<i>Sufficient Progress</i> .....	15
RECORDS.....	16
REVIEWABILITY .....	17
TERMINATION OF PARENTAL RIGHTS.....	18
<i>Best Interests of the Children</i> .....	18
<i>Inadequacy of Counsel</i> .....	20

# Delinquency

## COMMITMENT TO OREGON YOUTH AUTHORITY

- *State v. B.Y.*, [371 Or 364](#) (2023)

The supreme court granted review of *State v. B.Y.*, 319 Or App 208 (2022) to answer a question regarding consecutive and concurrent periods of commitment in juvenile delinquency cases. ORS 419C.501 provides the maximum amount of time a youth can be committed to the custody of OYA for each type of offense. The juvenile court imposed a consecutive commitment for a youth who was already in the custody of OYA and committed another offense while on parole for the initial adjudication and disposition. The Court of Appeals held that a consecutive commitment was not appropriate in the case, given the statutory history and based on legislative interpretation. The Supreme Court granted review, and also determined that even though youth was no longer in OYA custody at the time of appeal, it should nevertheless exercise discretion to review the consecutive commitment issue. The Court examined the text, context, and legislative history of ORS 419C.501 and related provisions of the juvenile code. It noted that 419C.501 neither expressly prohibits nor permits the imposition of consecutive commitments. The Court reasoned that the legislature has given juvenile courts wide latitude regarding dispositions, and if it had intended to limit the ability to impose consecutive commitments, it would have indicated as much. The Court further reasoned that permitting juvenile courts to impose a commitment that is consecutive to an existing commitment is most consistent with the rehabilitative purposes of the juvenile code. It is notable that the court narrowly defined the question to be whether the commitment term may be consecutive when the conduct that resulted in that commitment occurred while the youth was in OYA custody for the earlier commitment.

The youth also challenged the juvenile court's imposition of a one-year sentence for an A misdemeanor (the max sentence is 364 days). The court of appeals held that the juvenile court erred in imposing a one-year sentence and the Supreme Court agreed. Affirmed in part and reversed in part.

## COMPETENCE

- *State v. J.H.*, [326 Or App 640](#) (2023)

Youth sought a reversal of the judgment finding him within the jurisdiction of the court for Sex abuse I. Youth asserted that the court erred by ruling that a four-year-old witness was competent to testify. The court of appeals held that the juvenile court applied an incorrect legal standard to determine whether the witness was competent to testify under OEC 601 (applying *State v. Sarich*, 352 Or 601 (2012)). Although the juvenile court accurately focused on the witness's general ability to perceive, recollect, and communicate, it did not make a determination of the witness's ability to perceive, recollect, and communicate about issues to be decided at trial. The court of appeals noted that the burden was on the prosecution to show that the four-year-old witness would have been able to competently testify about events that had happened a year prior. While the court acknowledged that the standard under OEC 601 allows some latitude, and

questions of credibility should be left to the fact-finder, those principles did not dilute the determinations and standards needed to determine competency to testify. Further, the juvenile court's evidentiary error was not harmless. The court did note that Reversed and remanded.

## CONFIDENTIALITY

- *State v. C.P.*, [371 Or 512](#) (2023)

The Supreme Court granted review of the Court of Appeals case, *State v. C.P.*, 322 Or App 51 (2022), regarding the interpretation of ORS 419A.258. In juvenile court, the Youth admitted to Assault II. Before a dispositional hearing, the victim filed a motion under ORS 419A.258, requesting to inspect and copy parts of the juvenile court's Supplemental Confidential File (SCF). The court granted that motion in part, subject to a protective order, and ordered disclosure of the youth's psychological evaluation, the JCC report, and police reports. Youth appealed and the Court of Appeals reversed, concluding that the juvenile court had misinterpreted ORS 419A.258. The Court examined the text, context, and legislative history of the statute, which provides in part that the court shall allow inspection or copying of a confidential file "only as necessary to serve the legitimate need of the person or entity filing the motion." The court noted that the statute specifically lists the victim's interests as one that the court must weigh in making the determination about disclosure. The court then reasoned that given the context and legislative history, the statute should be read to provide juvenile courts with the discretion to order disclosure if it would be essential to serving a purpose *consistent* with the law, and not a purpose *required* by the law. The Court noted this will not always entitle victims to access records in a juvenile case, but will give discretion to weigh the victim's interests against others, including the youth's privacy interests. Held: ORS 419A.258 gives juvenile courts some discretion in weighing the interests at stake before determining whether and to what extent disclosure of a juvenile court record or file is necessary to serve a legitimate need of the person seeking disclosure. Decision of the Court of Appeals reversed. Juvenile Court order affirmed.

## DISPOSITION AND COMMITMENT TO OREGON YOUTH AUTHORITY

- *State v. B.Y.*, [371 Or 364](#) (2023)

The supreme court granted review of *State v. B.Y.*, 319 Or App 208 (2022) to answer a question regarding consecutive and concurrent periods of commitment in juvenile delinquency cases. ORS 419C.501 provides the maximum amount of time a youth can be committed to the custody of OYA for each type of offense. The juvenile court imposed a consecutive commitment for a youth who was already in the custody of OYA and committed another offense while on parole for the initial adjudication and disposition. The Court of Appeals held that a consecutive commitment was not appropriate in the case, given the statutory history and based on legislative interpretation. The Supreme Court granted review, and also determined that even though youth was no longer in OYA custody at the time of appeal, it should nevertheless exercise discretion to review the consecutive commitment issue. The Court examined the text, context, and legislative history of ORS 419C.501 and related provisions of the juvenile code. It noted that 419C.501 neither expressly prohibits nor permits the imposition of consecutive commitments. The Court reasoned that the legislature has given juvenile courts wide latitude regarding dispositions, and if

it had intended to limit the ability to impose consecutive commitments, it would have indicated as much. The Court further reasoned that permitting juvenile courts to impose a commitment that is consecutive to an existing commitment is most consistent with the rehabilitative purposes of the juvenile code. It is notable that the court narrowly defined the question to be whether the commitment term may be consecutive when the conduct that resulted in that commitment occurred while the youth was in OYA custody for the earlier commitment.

The youth also challenged the juvenile court's imposition of a one-year sentence for an A misdemeanor (the max sentence is 364 days). The court of appeals held that the juvenile court erred in imposing a one-year sentence and the Supreme Court agreed. Affirmed in part and reversed in part.

## EVIDENCE

- *State v. A.O.*, [328 Or App 762](#) (2023)

Youth appealed from a judgment finding him in the jurisdiction of the court for minor in possession of alcohol, a Class B violation. ORS 471.430. The court found him within its jurisdiction based on a preponderance of the evidence standard of proof. Though ORS 153.076 only requires a preponderance of the evidence standard in adult court, parties agreed that was not the case in a juvenile proceeding. Under ORS 419C.400(2) “[t]he facts alleged in the petition showing the youth be within the jurisdiction of the court as provided in ORS 419C.005, unless admitted, must be established beyond a reasonable doubt.” There is no provision allowing a lesser standard for violations handled in juvenile court. Reversed and remanded. Note – The citation to this case changed an earlier nonprecedential opinion and reissuing this as precedential based on Youth’s request under ORAP 6.25(1)9f) and 10.30(1)(e).

## RECORDS

- *State v. C.P.*, [371 Or 512](#) (2023)

The Supreme Court granted review of the Court of Appeals case, *State v. C.P.*, 322 Or App 51 (2022), regarding the interpretation of ORS 419A.258. In juvenile court, the Youth admitted to Assault II. Before a dispositional hearing, the victim filed a motion under ORS 419A.258, requesting to inspect and copy parts of the juvenile court’s Supplemental Confidential File (SCF). The court granted that motion in part, subject to a protective order, and ordered disclosure of the youth’s psychological evaluation, the JCC report, and police reports. Youth appealed and the Court of Appeals reversed, concluding that the juvenile court had misinterpreted ORS 419A.258. The Court examined the text, context, and legislative history of the statute, which provides in part that the court shall allow inspection or copying of a confidential file “only as necessary to serve the legitimate need of the person or entity filing the motion.” The court noted that the statute specifically lists the victim’s interests as one that the court must weigh in making the determination about disclosure. The court then reasoned that given the context and legislative history, the statute should be read to provide juvenile courts with the discretion to order disclosure if it would be essential to serving a purpose *consistent* with the law, and not a purpose *required* by the law. The Court noted this will not always entitle victims to access records in a



juvenile case, but will give discretion to weigh the victim’s interests against others, including the youth’s privacy interests. Held: ORS 419A.258 gives juvenile courts some discretion in weighing the interests at stake before determining whether and to what extent disclosure of a juvenile court record or file is necessary to serve a legitimate need of the person seeking disclosure. Decision of the Court of Appeals reversed. Juvenile Court order affirmed.

## RESTITUTION

- *State v. R.D.M.*, [330 Or App 692](#) (2024)

Youth appealed from a supplemental judgment awarding restitution, arguing that the state’s presentation of restitution evidence was untimely. ORS 419C.450(1)(a) requires the state to present evidence as to the nature and amount of restitution “prior to or at the time of adjudication”. The youth argued that “the time of adjudication” was at the conclusion of the jurisdictional hearing, while the state argued that it occurred later, when the judgment of jurisdiction and disposition was memorialized. The court noted the holding from *State v. M.A.S.*, 302 Or App 687, 705 (2020) that “adjudication is a determination of jurisdiction over a youth based on a finding of delinquency[.]” The court of appeals held that the state’s presentation of restitution evidence was untimely. While the state presented evidence at the jurisdictional and dispositional hearing about the nature of the victim’s injury, loss, or damage, it did not present evidence as to the amount until after the entry of the judgment. The state did make an argument about the amount (around \$2,000) both at the jurisdictional hearing and in a filed “restitution schedule” a week later. However, the court of appeals determined neither of those were “evidence” of the amount of injury, loss, or damage. The court also noted that though ORS 419C.150(1)(a)(B) provides a mechanism to establish a specific amount of restitution after adjudication, the law still requires the above-noted evidence to be presented before adjudication. Supplemental judgment reversed; otherwise affirmed.

## SEX OFFENDER REPORTING

- *State v. X.E.W.*, [331 Or App 1](#) (2024)

Youth assigns error to the juvenile court’s denial of his petition for relief from registration as a sex offender under ORS 163A.030(1). Youth challenged the factual bases for the ruling and contends that the record did not support the juvenile court’s ruling as a matter of law. After the parties submitted their briefs, the Supreme Court issued *State v. A.R.H.*, 371 Or 82 (2023) (explaining that “a youth’s pre-adjudication conduct, alone, will support the court’s finding only when there is a ‘nonspeculative connection’ between that pre-adjudication conduct and the youth’s status at the time of the hearing under ORS 163A.030”). Held: The Court of Appeals concluded that the juvenile court may have failed to consider the factors in ORS 163A.030(8) in light of youth’s current risk of reoffending. The court exercised its discretion to review de novo in order to apply the legal principles outlined in *A.R.H.*. The opinion outlines many details of the youth’s progress through treatment and his time in OYA custody, including details about his providers, polygraphs, and progress. On de novo review, the court found that youth proved by clear and convincing evidence that he was rehabilitated and did not pose a threat to public safety that supports registration. Reversed.

## VIOLATIONS

- *State v. A.O.*, [328 Or App 762](#) (2023)

Youth appealed from a judgment finding him in the jurisdiction of the court for minor in possession of alcohol, a Class B violation. ORS 471.430. The court found him within its jurisdiction based on a preponderance of the evidence standard of proof. Though ORS 153.076 only requires a preponderance of the evidence standard in adult court, parties agreed that was not the case in a juvenile proceeding. Under ORS 419C.400(2) “[t]he facts alleged in the petition showing the youth be within the jurisdiction of the court as provided in ORS 419C.005, unless admitted, must be established beyond a reasonable doubt.” There is no provision allowing a lesser standard for violations handled in juvenile court. Reversed and remanded. Note – The citation to this case changed an earlier nonprecedential opinion and reissuing this as precedential based on Youth’s request under ORAP 6.25(1)9f) and 10.30(1)(e).

(Summaries coming soon...)

*State v. A.E.A.*, [332 Or App 584](#) (2024)

*State v. B.I.Z.V.*, [332 Or App 726](#) (2024)

*State v. E.S.*, [333 Or App 350](#) (2024)

*State v. K.L.F.*, [333 Or App 434](#) (2024)

## Dependency

### APPEALABILITY

- *Dept. of Human Services v. A.C.S.G.*, [328 Or App 191](#) (2023)

Mother appeals the juvenile court orders denying her motions to invalidate dependency proceedings and dismiss dependency petitions concerning each of her two children, both of whom are Indian children under the Oregon Indian Child Welfare Act (ORICWA) and the federal Indian Child Welfare Act (ICWA). She asserts six errors, challenging the court's determinations under the ICWA/ORICWA that Oregon Department of Human Services (DHS) provided her with adequate notice of the dependency proceedings and made active efforts to reunite her family. According to mother, the alleged lack of adequate notice and of active efforts were ICWA/ORICWA violations that required the court to vacate the proceedings. DHS moved to dismiss the appeal, arguing it is moot because the court has since dismissed jurisdiction and terminated the wardship and there were no probable adverse consequences to mother.

Held: DHS did not meet its burden to persuade the Court of Appeals that mother's appeal was moot. However, On the merits, the court did not err because there was no violation of the ICWA/ORICWA. The notice of intent to initiate foster care proceedings and establish wardship that mother received via certified mail over 10 days prior to the related hearing was proper ICWA/ORICWA notice. The court identified that the proper notice required notice of the proceedings, and not necessarily notice of each hearing. Likewise, the active-efforts

determinations that the court made at each shelter hearing met the respective ICWA/ORICWA requirements and standard. The efforts were well documented on the record and included efforts to contact tribal representatives, provide a visitation plan, and identify adequate services for mother. Motion to dismiss appeal as moot denied; affirmed.

## DISPOSITION

### Psychological Evaluation

- *Dept. of Human Services v. J.A.G.*, [328 Or App 739](#) (2023)

Father appeals from a judgment of jurisdiction and disposition in which he was ordered to undergo a mental health assessment. First, he asserts that the court erred under ORS 419B.387 because the state did not present adequate evidence that he needed the assessment to ameliorate the circumstances that led to wardship. Limited evidence was presented through testimony of a caseworker about concerns of father's past trauma. Second, he argues that the court erred if it relied on ORS 419B.337(2) as a source of authority for the order. The Court of Appeals held that the state did not present sufficient evidence to prove that father needed the assessment or that it was "connected more than tenuously" to the jurisdictional bases (as required by *F.J.M.*, 370 Or 434 (2022)). The court did not reach the second assignment of error because ODHS disclaims any reliance on ORS 419B.337(2). Reversed and Remanded for entry of judgment omitting order for the mental health assessment, otherwise affirmed.

## JURISDICTION

### Admissions (and Lack of Custody Order)

- *Dept. of Human Services v. B.L.M.*, [331 Or App 295](#) (2024)

Father appeals two judgments asserting dependency jurisdiction over his two children. Father made admissions that he used inappropriate physical discipline and lacked the parenting skills to safely parent his children. Mother admitted she did not have sole custody and was unable to protect the children from father's abusive behavior. Father argued that notwithstanding those admissions, the juvenile court erred in asserting dependency jurisdiction because the children did not face a current threat of serious loss or injury that was likely to be realized. The Court of Appeals found that father preserved his claim of error, as his counsel made the arguments at both jurisdictional hearings. Before ODHS filed the dependency petitions, mother obtained an immediate-danger order in the domestic relations case that granted her temporary custody and allowed father to only have supervised parenting time. The Court rejected the State's argument that father was challenging mother's admission, which was improper because he was trying to litigate another party's issue. Instead, the court determined father was not challenging her admission, but the legal effect of the admission. The Court of Appeals agreed with father that, given the immediate-danger order, the department failed to prove the children were exposed to a current threat of serious loss or injury that was likely to be realized. Reversed.



## Domestic Violence/Substance Use

- *Dept. of Human Services v. M.M.*, [327 Or App 268](#) (2023)

On mother's appeal from a juvenile court judgment asserting dependency jurisdiction over her child, Z, mother challenges the sufficiency of the evidence to prove each of the jurisdictional bases, as well as the ultimate determination of dependency jurisdiction. The first basis was that mother had exposed her child to violence. The second was that she had another child, C, for whom she was not a parental resource, and the conditions and circumstances that brought him into care (specifically dv and sub abuse), had not changed or been ameliorated and interfered with her ability to safely parent Z. The third basis was derivative of the other two. While the court recognized that mother had a history of substance use and had failed to engage in treatment, no evidence was presented that she was actively using, or using in a way that interfered with her ability to safely parent Z. Additionally, no evidence was presented about current domestic violence, though there was evidence about historical violence in relationships and no engagement in services. The court held that the juvenile court erred in asserting jurisdiction over Z, because the evidence was insufficient to prove a current threat of serious loss or injury to Z. Reversed.

## Domestic Violence

- *Dept. of Human Services v. G.O.*, [330 Or App 178](#) (2024)

Mother and Father appealed from the juvenile court's judgment asserting jurisdiction over their child. In mother's first two assignments of error, she challenges each basis on which the juvenile court took jurisdiction. The two bases relate to father's domestically violent relationship with others and his failure to address or ameliorate that, as well as his domestic violence against mother and her failure to protect the child from exposure to his violence. Mother and father jointly argue that the juvenile court erred in asserting dependency jurisdiction over their child. The Court of Appeals held that the juvenile court did not err in asserting jurisdiction on the bases challenged, and that under the totality of the circumstances, the court did not err in asserting jurisdiction over the child. Affirmed.

## ICWA

- *Dept. of Human Services v. A.C.S.G.*, [328 Or App 191](#) (2023)

Mother appeals the juvenile court orders denying her motions to invalidate dependency proceedings and dismiss dependency petitions concerning each of her two children, both of whom are Indian children under the Oregon Indian Child Welfare Act (ORICWA) and the federal Indian Child Welfare Act (ICWA). She asserts six errors, challenging the court's determinations under the ICWA/ORICWA that Oregon Department of Human Services (DHS) provided her with adequate notice of the dependency proceedings and made active efforts to reunite her family. According to mother, the alleged lack of adequate notice and of active efforts were ICWA/ORICWA violations that required the court to vacate the proceedings. DHS moved to dismiss the appeal, arguing it is moot because the court has since dismissed jurisdiction and terminated the wardship and there were no probable adverse consequences to mother.

Held: DHS did not meet its burden to persuade the Court of Appeals that mother's appeal was moot. However, On the merits, the court did not err because there was no violation of the ICWA/ORICWA. The notice of intent to initiate foster care proceedings and establish wardship that mother received via certified mail over 10 days prior to the related hearing was proper ICWA/ORICWA notice. The court identified that the proper notice required notice of the proceedings, and not necessarily notice of each hearing. Likewise, the active-efforts determinations that the court made at each shelter hearing met the respective ICWA/ORICWA requirements and standard. The efforts were well documented on the record and included efforts to contact tribal representatives, provide a visitation plan, and identify adequate services for mother. Motion to dismiss appeal as moot denied; affirmed.

### **Lack of Custody Order**

- *Dept. of Human Services v. B.L.M.*, [331 Or App 295 \(2024\)](#)

Father appeals two judgments asserting dependency jurisdiction over his two children. Father made admissions that he used inappropriate physical discipline and lacked the parenting skills to safely parent his children. Mother admitted she did not have sole custody and was unable to protect the children from father's abusive behavior. Father argued that notwithstanding those admissions, the juvenile court erred in asserting dependency jurisdiction because the children did not face a current threat of serious loss or injury that was likely to be realized. The Court of Appeals found that father preserved his claim of error, as his counsel made the arguments at both jurisdictional hearings. Before ODHS filed the dependency petitions, mother obtained an immediate-danger order in the domestic relations case that granted her temporary custody and allowed father to only have supervised parenting time. The Court rejected the State's argument that father was challenging mother's admission, which was improper because he was trying to litigate another party's issue. Instead, the court determined father was not challenging her admission, but the legal effect of the admission. The Court of Appeals agreed with father that, given the immediate-danger order, the department failed to prove the children were exposed to a current threat of serious loss or injury that was likely to be realized. Reversed.

### **Parents delegate care to a third party**

- *Dept. of Human Services v. S.J.*, [329 Or App 723 \(2023\)](#)

The mother appealed a juvenile court judgment taking jurisdiction over her 8-year-old child. Mother did not challenge the sufficiency of the evidence as it related to the jurisdictional bases, but instead argued that ODHS should not have taken jurisdiction because mother made an appropriate plan for her child's care. The child was placed with maternal aunt after being hospitalized for injuries suffered in mother's care. Mother argued that the agency did not establish that her child was unsafe in the aunt's care. The court distinguished this case from others in which the children were in placements that were arranged prior to court involvement, and in which evidence showed that parents would not interfere with those placements. The court distinguished this case to note that evidence showed mother did not necessarily entrust her child's care to maternal aunt, and would not necessarily abide by continued placement without court involvement. Affirmed.

## Substance Use

- *Dept. of Human Services v. M.M.*, [327 Or App 268](#) (2023)

On mother's appeal from a juvenile court judgment asserting dependency jurisdiction over her child, Z, mother challenges the sufficiency of the evidence to prove each of the jurisdictional bases, as well as the ultimate determination of dependency jurisdiction. The first basis was that mother had exposed her child to violence. The second was that she had another child, C, for whom she was not a parental resource, and the conditions and circumstances that brought him into care (specifically dv and sub abuse), had not changed or been ameliorated and interfered with her ability to safely parent Z. The third basis was derivative of the other two. While the court recognized that mother had a history of substance use and had failed to engage in treatment, no evidence was presented that she was actively using, or using in a way that interfered with her ability to safely parent Z. Additionally, no evidence was presented about current domestic violence, though there was evidence about historical violence in relationships and no engagement in services. The court held that the juvenile court erred in asserting jurisdiction over Z, because the evidence was insufficient to prove a current threat of serious loss or injury to Z. Reversed.

## MOTION TO DISMISS

- *Dept. of Human Services v. M.P.*, [328 Or App 503](#) (2023)

Both parents appealed the juvenile court's denial of their motion to dismiss on the grounds that the juvenile court lacked subject matter jurisdiction under the UCCJEA. Father additionally assigns error to the court's decisions to appoint a guardian ad litem, and the court did not reach the other assignments of error. The Court of Appeals held that the juvenile court erred in finding that it had home-state jurisdiction under the UCCJEA because Oregon was not the child's home state when the petition was filed based on the protective custody order issued the prior year. The court of appeals conducted statutory interpretation of the UCCJEA statutes, looking at the text, legislative intent, and context. The court held that a protective custody order (filed in April 2021) was not an "initial child custody determination" that gave Oregon continuing and exclusive home-state jurisdiction. The court determined that because the protective custody order does not require the same notice and right to be heard, the intent was that it would not be considered an initial child custody determination. The court also rejected the argument that the declaration filed with the protective custody order was the first pleading in the case, because the order and declaration were not part of the dependency proceeding. Instead, the initial child custody determination took place after the dependency petition was filed in March 2022. The court additionally affirmed the juvenile court's decision to appoint a GAL for father because any error was not plain. Vacated and remanded.

## MOTION TO INTERVENE

- *Dept. of Human Services v. R.F.*, [328 Or App 267](#) (2023)

Appellants R. F. and M. F. appeal the juvenile court's denial of their motion to intervene in Child's dependency case. Child is an enrolled member of the Oglala Sioux Tribe (tribe) and is an Indian child within the meaning of ICWA/ORICWA. DHS placed child with appellants shortly after birth because, while not members of a tribe, they are adoptive parents of Child's cousins. DHS later placed Child with another family, the Ls, after an attempt at reunification with the mother failed. DHS made this placement because a representative of Child's tribe informed the agency that the tribe did not view appellants as relatives under ICWA. After appellants moved to intervene in the case under ORS 419.116, the tribe reversed its position. DHS requested a home study for appellants that would be provided to the tribe pursuant to ORICWA/ICWA so that the tribe could make an updated recommendation on Child's placement. The home study was still ongoing at the time of the hearing on appellants' motion. The juvenile court denied appellants' motion to intervene because it was not persuaded, by a preponderance, that the existing parties could not adequately present the case. The court noted that the resource parents for the child included a Multnomah County Circuit Court Judge, and while recognizing a *risk* that legal parties could not adequately present a case, the court was not persuaded by a preponderance that they would not adequately present a case.

Held: The juvenile court did not err in denying appellants' motion to intervene. No party requested de novo review, so the court reviewed to determine whether the record supported the juvenile court's determination. At the time of the motion to intervene, it was not yet known who the existing parties would argue should be the Child's preferred placement under ICWA, the juvenile court was not compelled to find that existing parties could not adequately present the case regarding Child's proper placement under ICWA. The Court of Appeals noted the possibility that intervention may need to be allowed, if no party presented the case that appellants constituted the preferred placement. Affirmed.

- ***Dept. of Human Services v. B.B.*, [328 Or App 754](#) (2023)**

Appellants challenge a juvenile court order denying their motion to intervene in the dependency case under ORS 419B.116. In this case, ODHS selected a paternal relative located in Virginia as the adoptive placement over the foster parents, in whose home the child had resided since birth. The child's attorney and CASA both opposed that selection. Appellants contend that the juvenile court erred when it failed to balance the requirements for granting a motion for intervention, and when it determined that appellants failed to prove the requirement that the existing parties could not adequately present a case. The Court of Appeals concluded that ORS 419B.116 does not allow a juvenile court to balance the requirements for intervention and that, because the evidence before the juvenile court did not compel a contrary conclusion, the court did not err. Affirmed.

- ***Dept. of Human Services v. J.C.L.*, [329 Or App 246](#) (2023)**

Father appealed the order allowing his son's former foster mother to intervene in the juvenile dependency case under ORS 419B.116. The Appellate Commissioner dismissed the appeal and rejected father's argument that the appeal should not be dismissed because the orders were not appealable. Father argued that they were final orders entered after judgment that adversely affected his rights. Father petitioned for reconsideration and the Commissioner referred the petition to the Motions Department of the CoA. The Court of Appeals held the orders were appealable under ORS 419A.200(1) because intervention could adversely affect father's rights in

two ways. First, an added party could present arguments (in addition to ODHS) about his fitness to parent, and the appropriate plan. Second, allowing intervention burdened father's fundamental right to parent his son in the context where the intervening party sought to be considered as an adoptive placement. Reconsideration allowed; order dismissing appeal vacated.

## MOTION TO SET ASIDE JUDGMENT OR ORDER

- *Dept. of Human Services v. K.M.*, [331 Or App 106](#) (2024)

Mother appealed the juvenile court's denial of her motion to set aside a judgment taking jurisdiction over her two children on the grounds of excusable neglect, ORS 419B.923(1)(b), after she failed to appear at the dependency hearing. After the prima facie case was presented, Mother was seen outside the courtroom by DHS and her attorney. She was habitually late to many of the hearings, an argument her attorney made prior to the prima facie being presented. She contends that she demonstrated excusable neglect based on her financial circumstances. The Court of Appeals held that the court did not err because there was no evidence connecting her financial circumstances with her failure to appear. Affirmed. Of note, the Court declined to determine whether the standard for excusable neglect differed depending on the type of case or hearing for which the parent failed to appear (dependency vs. termination).

## PERMANENCY HEARINGS

### Reasonable/Active Efforts (also No Compelling Reason)

- *Dept of Human Services v. C.H.*, [327 Or App 61](#) (2023) *rev. allowed*, 371 Or 509 (2023)

Mother and father appeal a juvenile court ruling changing their child's permanency plan from reunification to adoption. Parents challenge the juvenile court's conclusion that DHS made reasonable efforts to reunify parents with their child. Despite concerns that DHS had not resolved conflicts in a culturally competent manner or facilitated the support parents needed to access services given their intellectual disabilities, the court of appeals concluded that DHS's efforts to reunify were reasonable given the breadth and length of services offered. Parents also challenged the lower court's conclusion that they had not made progress sufficient to allow reunification to happen. In determining whether a parent has made sufficient progress, the highest priority is to a child's health and welfare. The court of appeals held that while parents engaged in hands-on parenting services once or twice a week, they did not demonstrate an ability to parent independently, nor did they engage in the services that would have enabled them to make the progress required to safely parent their child.

Finally, parents challenged the lower courts holding that no compelling reason existed to forgo changing the plan to adoption, arguing that preserving their "positive relationship with [their child]" was a compelling reason not to change the plan to adoption. Parents carry the burden of demonstrating a compelling reason why another permanency plan is better suited to meet the health and safety needs of the child. The court of appeals acknowledged the importance of preserving a child's relationship with her biological parents but found that the parents did not

meet their burden of providing a compelling reason. The Parents did not propose a detailed alternative to the adoption plan, but merely suggested that permanent guardianship should be pursued. Affirmed.

- ***Dept. of Human Services v. M.A.Z.*, [332 Or App 389](#) (2024)**

Father appealed a change in plan from reunification to guardianship, challenging the court's finding that DHS made reasonable efforts and that his progress was insufficient. He argued that DHS's significant delay in implementing therapy for his child was unreasonable in light of the basis for jurisdiction, and that he made sufficient progress toward reunification because he met all of the expectations that the court set and demonstrated progress toward understanding how to parent his child. The court held that despite DHS's delay, the record showed that DHS implemented therapy in the year leading up to the permanency hearing, and, when viewed in context with DHS's other efforts toward reunification, the record sufficiently supported the juvenile court's determination that DHS made reasonable efforts. Further, given the evidence regarding the child's specific needs, the record supported the court's determination that father had not made sufficient progress toward reunification. Affirmed.

- ***Dept. of Human Services v. J.L.M.*, [328 Or App 722](#) (2023)**

In this juvenile dependency case, mother appeals from a judgment changing the permanency plan for her child from reunification to adoption. Mother, who is incarcerated, challenges the reasonable efforts findings. ODHS did not establish that providing a substance abuse evaluation and treatment to mother while incarcerated was not possible. Initially, ODHS contacted DOC, which indicated they were not providing substance abuse services during the COVID-19 pandemic, and did not approve of outside providers. Mother was moved to a minimum security facility and while ODHS did ask about access to substance abuse treatment there, they did not attempt to bring in outside providers. ODHS is required to establish that the difficulties and cost of providing mother with that service outweighed the potential benefits, and it failed to do so on the record. The court also rejected the state's argument that a substance abuse evaluation would have little benefit, as the correct inquiry was whether the service was capable of ameliorating a jurisdictional basis. The substance abuse evaluation and treatment is critical to the case plan and goes directly to ameliorating the jurisdictional bases. Reversed and remanded.

- ***Dept. of Human Services v. T.F.*, [331 Or App 682](#) (2024)**

Father appealed the juvenile court's permanency judgment changing the plan from reunification to adoption, arguing that ODHS did not meet its burden to show that it made reasonable efforts. The Court of Appeals concluded that the juvenile court erred in finding that ODHS made reasonable efforts, and thus, in changing the permanency plan from reunification to adoption. The court must consider the totality of the circumstances, which includes a review of the department's conduct over the life of the case, considers the unique circumstances of the parent and child, and is measured by the adjudicated bases of jurisdiction. In this case, no evidence was presented that DHS made any effort, beyond a phone call and monthly emails to assist father, who lived in West Virginia, with ameliorating the new bases of jurisdiction that were added six months before the permanency hearing. The court noted that while they can consider a parent's



cooperation with DHS, the reasonable efforts inquiry is focused on DHS's conduct, and not that of the parent. Reversed and remanded.

### **Right to Participate**

- *Dept. of Human Services v. M.D.L.*, [330 Or App 237 \(2024\)](#)

Father appeals the permanency judgments changing the plan for his three children from reunification to adoption. Father assigns error to the court's ruling that barred his attorney from advocating on his behalf when he was not present in the courtroom. The state and one child concede the error. The Court of Appeals held that father had a statutory right under ORS 419B.875(2)(c) to "participate in hearings," which included the right to have counsel advocate on his behalf, even when he wasn't present. The juvenile court plainly erred. Reversed and remanded.

### **Sufficient Progress**

- *Dept. of Human Services v. Y.B.*, [372 Or 133 \(2024\)](#)

The Supreme Court granted review of the appellate court ruling that affirmed without opinion a juvenile court order changing the permanency plan from reunification to guardianship. The court allowed review to clarify the nature of the determination assigned to the juvenile court by ORS 419B.476(2)(a) and to address the related question of the Court's standard of review for that determination. In the underlying case, the child had been removed from mother after she caused an injury to their arm and was later convicted of Assault IV. ODHS provided multiple services, and the court found that they the efforts were reasonable, the mother had not made sufficient progress. There had been an attempted return, though A was removed a second time after the mother struggled to parent. The juvenile court changed the plan to guardianship. Mother appealed and the Court of Appeals affirmed without opinion.

The Supreme Court held that the juvenile court's determination under ORS 419B.476(2)(a) that a parent has or has not made "sufficient progress" to allow a child to return home safely is a legal conclusion that an appellate court reviews for error of law, rather than a finding of fact. "The nature of the competing interests at stake, as well as the text and context calling for the application of a legal standard, persuade us that the juvenile court's 'determination' of sufficient progress is a legal conclusion that this court reviews for errors of law." However, the Court does note that because the sufficient progress determination is heavily fact-driven, appellate courts should apply the error-of-law standard of review by examining whether the facts explicitly and implicitly found by the juvenile court, together with all inferences reasonably drawn from those facts, were legally sufficient to support the juvenile court's determination. Ultimately, the court held that the facts found by the juvenile court were legally sufficient to support the determination that mother had not made sufficient progress to make it possible for the child to safely return home within a reasonable time, and to support its decision to change the permanency plan from reunification to guardianship. Affirmed.

- *Dept. of Human Services v. N.A.S.*, [332 Or App 89 \(2024\)](#)

Mother appealed a judgment changing the permanency plan from reunification to guardianship. Mother argued the juvenile court erred when it determined she had made insufficient progress to ameliorate her pattern of substance abuse, because DHS did not present evidence that she was using substances at the time of the permanency hearing. The Court of Appeals determined that it has never held that DHS must present direct evidence of contemporaneous substance abuse before a juvenile court can determine that the parent's progress was insufficient. The court further explained that a juvenile court may draw reasonable inferences from the evidence to support its determination. The Court noted that the record contained evidence that mother had a long-standing pattern of substance abuse, she failed to engage in treatment, she refused to provide UA's, and she was evasive. Evidence was not presented to show a substantial change in her behavior. Therefore, the court concluded that the evidence permitted the juvenile court to reasonably infer that mother's pattern of substance abuse was unchanged and that her progress toward ameliorating the jurisdictional basis was insufficient. Affirmed.

## RECORDS

- *Dept. of Human Services v. C.E.S.*, [328 Or App 57 \(2023\)](#)

This appeal arises from a judgment terminating dependency jurisdiction and wardship. Child/Petitioner challenges the court's denial of her motion, made after she turned 18, for an order directing DHS to destroy health records about her that it had collected and maintained in its dependency file while acting as her legal custodian. Petitioner asserted that the juvenile court erred in not protecting her interests when it declined to order the destruction of health records in DHS's possession as it closed the dependency case. DHS countered that the juvenile court was without authority to order the destruction of those records because they are public records subject to statutory retention requirements. The court noted that while she held a strong privacy interest in the records, that was not the same as an ownership interest (comparing ODHS retention of the records to those of a doctor who creates the record). The court determined that the records are public records subject to statutory retention requirements. The juvenile court statutory and HIPPA protections still apply. The court did not address petitioner's second assignment of error, requesting the court order DHS to seal the records, because it was not preserved. Affirmed.

- *Dept. of Human Services v. M.A.H.*, [332 Or App 25 \(2024\)](#)

Father appeals from a juvenile court order directing the Oregon Department of Corrections (DOC) to disclose his mental health records to the Department of Human Services (DHS) for use in dependency proceedings. Father argues that the court erred in issuing that order because DHS failed to establish that those records, which are generally protected by federal and state law, were necessary or relevant to the purpose for which DHS sought their disclosure. The court held that in the absence of a source of law prohibiting or limiting courts from issuing such orders, the juvenile court could order DOC to disclose father's protected health information as part of the dependency proceeding. The Court of Appeals noted no statutory authority that limits a juvenile court order to disclose protected information or that sets a standard to which the court is bound. The court instead looked to an administrative rule that places limits on DHS in this circumstance. Whether DHS was entitled to that order involved a question of law concerning whether DHS showed that the disputing records were "reasonably necessary to accomplish the purposes" of

DHS's request. See OAR 407-014-0040(5) (imposing that limit). DHS proposed the records were needed to determine what services had been completed, what further efforts would be needed, whether father had made sufficient progress to ameliorate the bases for jurisdiction, among other things. DHS complied with OAR 407-014-0040 by presenting evidence that the disputed records were "reasonably necessary" for use at the pending permanency hearing. Affirmed.

## REVIEWABILITY

- *Dept. of Human Services v. C.S.*, [333 Or App 7](#) (2024)

Mother appealed from an order that denied her motion to revoke her relinquishment of parental rights. Mother initially relinquished her rights, and then later moved to revoke the relinquishment, claiming she had been under duress at the time of the agreement. The court denied her motion and later separately entered a judgment dismissing DHS's petition for termination of parental rights. Mother appealed from the order denying her motion but not from the judgment of dismissal. Mother argued that the order denying her motion is itself an appealable judgment. The Court of Appeals concluded that the order was not an appealable judgment under ORS 419A.205 because it was neither a "final disposition of a petition" under ORS 419A.205(1)(c) nor a "final order adversely affecting mother's rights" that was "made in a proceeding after judgment" under ORS 419A.205(1)(d). The court reasoned that neither the permanency judgment changing the plan nor the jurisdictional judgment qualified as a "proceeding after judgment" because the termination proceeding was a separate proceeding and the order was entered before the TPR was dismissed. Dismissed.

- *Dept. of Human Services v. T.J.N.*, [371 Or 650](#) (2023)

In consolidated appeals that the Court of Appeals had dismissed as moot, the Oregon Supreme Court held that the "some speculation" standard that the Court of Appeals employed in reaching its mootness determination had incorrectly excused ODHS from its burden to prove that resolution of the appeals would have no practical effect on the parents' rights. But the Court also held that DHS had met its burden to prove that the appeals are now moot, and the Court declined to exercise whatever discretionary authority that may be afforded to it, under ORS 14.175, to decide the parties otherwise moot challenge to the merits of the original placement decisions.

The Supreme Court granted review of *Dept. of Human Services v. T.J.N.*, 323 Or App 258 (2023). In the underlying case, the parents appealed from a review judgment (from March, 2022), changing the placement preference for the children from in home with the mother to foster care. The court of appeals noted the argument from DHS that several subsequent orders were entered (and a new petition was filed), continuing the placement in substitute care as the placement preference. Though the parents argued that the March order was still significant for purposes of calculating the 15 out of 22 months rule for filing a TPR, the court found that numerous exceptions to the required filing of a TPR exist in ORS 419B.498, and it is not possible for the court or parties to know at this point what the circumstances will be at that time. However, the Supreme Court allowed review to consider whether the Court of Appeals correctly dismissed the cases as moot.

In a unanimous opinion, the Supreme Court reversed the decision of the Court of Appeals, but dismissed the appeals as moot, after the juvenile court entered judgments dismissing them while the case was pending in the Supreme Court. The Court noted that the parents had pointed to an entire statutory scheme that set in motion certain “permanency” timelines for children who are in substitute care. The court explained that there might be variables that make it impossible to predict the ultimate outcome of any particular dependency case, but there was no lack of certainty about the rules that governed that outcome. Nor was there any dispute that one of those rules was a statutory default requirement, in ORS 419B.498(1)(a), that DHS file a termination petition once a child has been in substitute care for 15 of 22 months, unless an exception applies. However, while the appeals were pending in the Supreme Court, wardship was terminated and the cases were dismissed. Thus, the Court concluded that no party had identified collateral consequences that would have a practical effect on the parties and prevent the appeals from now being moot. The court declined to exercise whatever discretionary authority that ORS 14.175 may have afforded it. Court of Appeals decision dismissed; Appeals dismissed as moot.

- *Dept. of Human Services v. L.N.S.*, [328 Or App 588](#) (2023)

Mother and child appealed from a judgment asserting jurisdiction, challenging the denial of their motion to dismiss and the rulings on the allegations. While the appeal was pending, the court dismissed jurisdiction and terminated wardship, and ODHS moved to dismiss the appeal as moot. Mother argued that the jurisdictional judgment will disadvantage her in a possible domestic relations proceedings brought by nonparents (the child has no legal father), and in future child welfare investigations and proceedings. The consequences that mother identified were legally insufficient to render her appeal justiciable under the applicable legal standards. The court noted that both of mother’s arguments were too speculative. First, a nonparent custody case under ORS 109.119 would focus on current, rather than past, circumstances. Additionally, ODHS had been involved with her older child for three years, and that child remained a ward of the court at the time of the appeal. Mother failed to identify a real and adverse effect or probable collateral consequence from the underlying case. Appeal dismissed as moot.

## TERMINATION OF PARENTAL RIGHTS

### Best Interests of the Children

- *Dept. of Human Services v. T.M.M.*, [327 Or App 631](#) (2023)

Mother appeals from a judgment terminating her parental rights to two of her children. On appeal, she argues that termination is not in her children’s best interest due to the stability she achieved in the months before the termination trial and the testimony of several witnesses that having contact with her would be positive for the children. The court held that based on the particular circumstances in the case, which includes the children’s lack of attachment to mother and strong attachment to their current caregivers (the proposed adoptive parents), and mother’s history and lack of insight into the children’s needs, termination of mother’s parental rights is in the best interest of the children.

- *Dept. of Human Services v. J.M.-A.*, [333 Or App 334](#) (2024)

Father appealed a judgment terminating his parental rights, arguing that termination was not in his child's best interests. He did not challenge unfitness nor neglect, rather argued that a permanent guardianship would satisfy the child's need for permanency given that no adoptive resource was identified at the time of trial. Though he did not raise permanent guardianship at trial, the state agreed that he did preserve his argument relating to best interests, and the court noted the various options for achieving permanency would remain for the juvenile court to consider on remand. The child was born premature, with an array of medical conditions that leave her medically vulnerable and with high needs. The juvenile court based its best-interest determination on evidence purporting to show that father declined to visit his child in the hospital and refused to attend the child's medical appointments. The court of appeals held that the evidence in the record was insufficient to determine by clear and convincing evidence that termination was in the child's best interest. The record reflects that DHS controlled father's visits to the hospital, failed to facilitate visits in a way that was workable for father, and that he did not have meaningful opportunities to coordinate visits with the hospital directly, making scheduling more cumbersome. Ultimately, the record did not clearly establish that, under the totality of the circumstances, father was unable or unwilling to maintain contact with the child that that termination of their legal relationship was in the child's best interest. Reversed and remanded.

- ***Dept. of Human Services v. A.L.B.*, [332 Or App 467](#) (2024)**

Mother appealed judgments terminating her parental rights based on unfitness, under ORS 419B.504. Mother argued that evidence was not sufficient to support the court's determination that termination was in the child's best interests, and that permanent guardianship was better suited to the children's need for permanency. The Court of Appeals reviewed *de novo* and observed that mother's conduct and mental health conditions had an ongoing negative effect on the children, that the children's attachment to mother appeared to be insecure, and that mother demonstrated poor capacity to cooperate with the terms of a permanent guardianship. Affirmed.

- ***Dept. of Human Services v. M.C.C.*, [332 Or App 565](#) (2024)**

Father appealed from a judgment terminating his parental rights based on unfitness, arguing that DHS did not prove it was in his child's best interests, as required by ORS 419B.500. He argued that a permanent guardianship would better suit the child's needs. The Court of Appeals disagreed with the analysis conducted by the juvenile court, but agreed that termination was in the child's best interests. Father had been incarcerated since child's birth, in 2017, and would likely remain so until 2025. He advocated for her to be placed with his family members, and worked hard to maintain contact with her. The child ultimately remained with the same foster family for a majority of her life, except for a short period with father's relatives. The court determined that the record did not support many of the juvenile court's best-interest findings, including findings that indicated the child had no interest in maintaining a relationship with father or his relatives. However, the court determined that there was a concern regarding father's capacity to support a permanent guardianship, given his past attempts to disrupt and minimize the importance of the child's relationship with the designated adoptive parents. The court also highlighted the importance of preserving whatever relationship between father and child was possible, and did not believe termination would prevent that, based on the record. Affirmed.

- ***Dept. of Human Services v. L.P.*, [332 Or App 659](#) (2024)**

In a consolidated TPR case, father appealed from the judgments that terminated his parental rights to his two children. He challenged the juvenile court's determination that he was unfit at the time of the TPR and that termination was in the children's best interests. The court of appeals determined he was unfit, based on the record that he had not developed the skills to be a minimally adequate parent, especially given the children's high needs, nor that he would do so within a reasonable time. The court then balanced the children's interest in maintaining a legal connection with father and their interest in being freed for adoption. The court found from the record that there would likely be disruption in a permanent guardianship, not necessarily from the father, but from members of father's family pressuring the children (which father did not prevent). The court also found that severing the legal relationship did not mean father would have no relationship with the children, especially given the foster parents' commitment to fostering that relationship. The court found that clear and convincing evidence demonstrated that termination was in the children's best interests. Affirmed.

### **Inadequacy of Counsel**

- *Dept. of Human Services v. L.T.G.*, [329 Or App 270](#) (2023)

Mother appealed from a judgment terminating her parental rights in her absence. She contends that her counsel was inadequate for failing to move for a continuance and for failing to argue that the court should not proceed in her absence, and that these failures denied her a fair trial. After being advised of the need to appear in person at the Call and Trial dates, mother failed to appear on the first day of a TPR trial. She also failed to appear at Call, but the court allowed her to appear remotely and again reminded her of the need to appear at trial the following Monday. The Court of Appeals found that the record did not support any legal or factual basis on which trial counsel could have sought a continuance and thus, the mother did not establish she was denied adequate assistance or suffered prejudice. The Court of Appeals concluded that because the record did not support a determination that "no adequate counsel" would have acted as mother's counsel did "under the circumstances," mother did not meet her burden to establish inadequacy of counsel. *See Dept. of Human Services v. T.L.*, 358 Or 679 (2016) (establishing that burden). Affirmed.