

FILED: August 14, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of E. F.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

C. F.,
Appellant.

Klamath County Circuit Court
1100621JV2

Petition Number
1100621M

In the Matter of B. F.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

C. F.,
Appellant.

Klamath County Circuit Court
1100621JV3

Petition Number
1100621M

A152181

Roxanne B. Osborne, Judge.

Argued and submitted on January 22, 2013.

Christa Obold-Eshleman argued the cause and filed the briefs for appellant.

Inge D. Wells, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

WOLLHEIM, J.

Affirmed.

1 WOLLHEIM, J.

2 Father appeals a judgment of the juvenile court taking jurisdiction over his
3 children. He argues that Department of Human Services (DHS) failed to prove that the
4 history of domestic violence between father and mother created a current threat of serious
5 loss or injury to the children. Because we conclude that there is legally sufficient
6 evidence in the record to support the court's judgment taking jurisdiction, we affirm.

7 The parties have not requested *de novo* review, and we decline to review
8 the record *de novo*. See ORS 19.415(3)(b) (providing for discretionary *de novo* review of
9 certain equitable actions); ORAP 5.40(8)(c) (the court will exercise discretion to try the
10 cause anew on the record only in exceptional cases). Accordingly, "we view the
11 evidence, as supplemented and buttressed by permissible derivative inferences, in the
12 light most favorable to the trial court's disposition and assess whether, when so viewed,
13 the record was legally sufficient to permit that outcome." *Dept. of Human Services v. N.*
14 *P.*, 257 Or App 633, ___, ___ P3d ___ (2013) (slip op at 7).

15 Mother and father began their relationship in 2009. They have two children
16 together, E and B.¹ In December 2011, DHS filed its initial petition. Then, in February
17 2012, DHS filed an amended petition, followed by a second amended petition in April
18 2012. In May 2012, DHS filed its final amended petition, asserting that the children were
19 under the jurisdiction of the court because they were residing under threat of harm. All
20 the time, E was two years old and B was one year old. That petition alleged that mother

¹ Mother has another child with a different father.

1 and father had engaged in incidents of domestic violence, some of which occurred in the
2 presence of the children, placing the children under a threat of harm for physical abuse
3 and mental injury, and that mother did not believe that father presents a safety risk to the
4 children and failed to protect them.

5 The juvenile court held a hearing on May 3, 2012, to determine whether the
6 court had jurisdiction. Mother admitted the allegations; father did not. The court then
7 heard testimony from a number of witnesses concerning past acts of domestic abuse by
8 father. Father did not deny the incidents of domestic violence, but testified that it had
9 been at least a year and a half since the last physical altercation between the parents.
10 Father said that their faith in God and their church, as well as an improvement in
11 finances, had changed their relationship.

12 On May 9, 2012, the court entered a "Jurisdiction and Disposition
13 Judgment" stating that jurisdiction was established on May 3, 2012. The findings and
14 conclusions in the judgment relate to mother only. The May 9, 2012, judgment states,
15 "This case shall next be reviewed on May 21, 2012 @ 1:30pm for Action Agreement for
16 mother and continued Jurisdictional hearing on [father]." Neither mother nor father
17 appealed the May 9, 2012, judgment.

18 The hearing to determine jurisdiction as to father reconvened on May 21,
19 2012. The juvenile court's oral decision as to jurisdiction over father stated:

20 "[D]omestic violence is something that can--people can learn to give in to
21 the other party over and over again in order to avoid a confrontation once
22 there's--it's escalated to that point it affects the relationship negatively
23 always in the future until there's been an adjustment so that that person

1 never has to be afraid again. There's always the threat there to control the
2 other person."

3 On July 11, 2012, the court entered a "Jurisdiction & Disposition Judgment" with regard
4 to father, finding the children within the jurisdiction of the court. Father appeals the July
5 11, 2012, judgment.

6 On appeal, father asserts that, because there was no evidence of domestic
7 violence within the 18 months before the hearing, there was no evidence of a current
8 threat of serious loss or injury to the children. Initially, DHS raises a procedural
9 argument. DHS argues that, because father did not appeal from the judgment
10 establishing jurisdiction as to mother but only appealed the judgment establishing
11 jurisdiction as to father, his appeal is not justiciable. DHS also contends that father's
12 claim fails on the merits. We conclude that the appeal is justiciable but fails on the
13 merits.

14 ORS 419B.100 governs the juvenile court's subject matter jurisdiction in
15 dependency cases. *Dept. of Human Services v. S. P.*, 249 Or App 76, 84, 275 P3d 979
16 (2012). ORS 419B.100(1)(c) provides that "the juvenile court has exclusive original
17 jurisdiction in any case involving a person who is under 18 years of age and * * *
18 [w]hose condition or circumstances are such as to endanger the welfare of the person or
19 of others[.]" ORS 419B.325(1) provides that, "[a]t the termination of the hearing or
20 hearings in the proceeding, the court shall enter *an appropriate order* directing the
21 disposition to be made of the case." (Emphasis added.) "The statutes contemplate that
22 ORS 419B.100(1)(c) brings *the child* whose condition or circumstances are as described

1 in the statute within the jurisdiction of the court[.]” *S. P.*, 249 Or App at 84 (emphasis in
2 original). The juvenile court's focus at the hearing on jurisdiction is on *the child's*
3 conditions or circumstances at the time of the hearing and whether the totality of those
4 circumstances demonstrates a reasonable likelihood of harm to the welfare of the child.
5 *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005).

6 DHS asserts that father's appeal is not justiciable because, "even if this
7 court were to reverse the July 11, 2012 judgment on appeal, [E] and [B] would still be
8 wards of the court pursuant to the earlier judgment." We disagree that father's appeal is
9 not justiciable. Based on the language in the May 9, 2012, judgment, we conclude that
10 the juvenile court did not intend for that judgment to conclusively resolve all matters
11 concerning jurisdictional allegations as to father. In the May 9, 2012, judgment, the court
12 stated, "This case shall next be reviewed on May 21, 2012 @ 1:30pm for Action
13 Agreement for mother and continued Jurisdictional hearing on [father]." That judgment
14 expressly contemplated a further hearing as to whether father created a threat of injury to
15 the children. If, in the later hearing, the court had decided that father did not present a
16 threat of injury to the children, the juvenile court had the authority to set aside its earlier
17 judgment or enter a judgment so stating. Accordingly, we conclude that the May 9, 2012,
18 judgment did not deprive the juvenile court of authority to later determine jurisdiction as
19 to father.

20 Thus, we turn to the merits of father's appeal: whether there was legally
21 sufficient evidence in the record to support the court's decision to take jurisdiction

1 because the children were residing under a threat of harm due to incidents of domestic
2 violence that occurred in the presence of the children. "To endanger the child's welfare,
3 the condition or circumstances must create a current 'threat of serious loss or injury to the
4 child' and 'there must be a reasonable likelihood that the threat will be realized.'" *S. P.*,
5 249 Or App at 84 (quoting *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259
6 P3d 957 (2011)). "A condition or circumstance need not involve the child directly, but
7 may be found harmful by reason of creating a harmful environment for the child." *State*
8 *ex rel Juv. Dept. v. Smith*, 316 Or 646, 653, 853 P2d 282 (1993). We consider the totality
9 of the circumstances in determining whether there is a reasonable likelihood of harm to
10 the welfare of the child. *State ex rel Juv. Dept. v. T. S.*, 214 Or App 184, 193, 164 P3d
11 308, *rev den*, 343 Or 363 (2007).

12 "[W]hen determining whether the court has jurisdiction because of
13 conditions and circumstances, the focus must be on the child's current conditions and
14 circumstances and not on some point in the past." *Dept. of Human Services v. L. G.*, 251
15 Or App 1, 4, 281 P3d 681, *adh'd to on recons*, 252 Or App 626, 290 P3d 19 (2012).

16 Father contends that, because there was no evidence that domestic abuse had occurred
17 within 18 months of the hearing, the incidents of domestic violence were insufficient to
18 prove that they created a current threat to the children.

19 Father primarily relies on *State ex rel Dept. of Human Services v. D. T. C.*,
20 231 Or App 544, 219 P3d 610 (2009). In *D. T. C.*, there was evidence that the father's
21 abuse of alcohol endangered the welfare of his children. We held that, because the

1 evidence at the hearing was that the father had last used alcohol 10 months before the
2 hearing, the state had failed to show a reasonable likelihood of harm to the welfare of the
3 children. *Id.* at 554-55. But *D. T. C.* is distinguishable from this case because, in *D. T.*
4 *C.*, we applied *de novo* review to determine whether the state had proved the facts
5 supporting jurisdiction by a preponderance of the evidence. *Id.* at 547, 553.

6 Here, there is evidence in the record that (1) mother expressed fear of
7 father; (2) in December 2011, mother obtained a protective order against father based on
8 the allegations of domestic violence and sought help from the Women's Crisis Center; (3)
9 mother told a DHS investigator that she was not able to leave the house on a frequent
10 basis, and was not able to go to the library, her parenting classes, or WIC appointments;
11 and (4) mother's behavior demonstrated a pattern that is common in domestic violence,
12 which presents a risk to the children. We conclude that the record was legally sufficient
13 to permit the court's ruling that there was a current threat of serious injury to the children.
14 Accordingly, the court did not err in taking jurisdiction.

15 Affirmed.