

**FILED: December 31, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of A. M., a Child.

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

A. F.,  
Appellant.

Multnomah County Circuit Court  
2013800841

Petition Number  
109782M

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

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

A. F.,  
Appellant.

Multnomah County Circuit Court  
2013800842

Petition Number  
109782M

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In the Matter of A. M., a Child.

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

A. F.,  
Appellant.

Multnomah County Circuit Court  
2013800843

Petition Number  
109782M

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In the Matter of J. F., a Child.  
DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

A. F.,  
Appellant.

Multnomah County Circuit Court  
2013800844

Petition Number  
109782M

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In the Matter of R. F., a Child.  
DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

A. F.,  
Appellant.

Multnomah County Circuit Court  
2013800845

Petition Number  
109782M

Multnomah County Circuit Court  
2013800841, 2013800842, 2013800843, 2013800844, 2013800845

A156851

Katherine E. Tennyson, Judge.

Argued and submitted on October 15, 2014.

Megan L. Jacquot argued the case and filed the brief for appellant.

Michael S. Shin, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief was Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

EGAN, J.

Vacated and remanded.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Appellant

- No costs allowed.
  - Costs allowed, payable by
  - Costs allowed, to abide the outcome on remand, payable by
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1 EGAN, J.

2 In this juvenile dependency case, father appeals a judgment establishing  
3 jurisdiction over his five children. Father argues that the evidence is factually insufficient  
4 to support jurisdiction. Father also argues that the court erred by denying him the  
5 opportunity to present evidence that he did not commit sexual abuse despite his criminal  
6 conviction; we reject that argument without discussion. We conclude that, because the  
7 juvenile court was required to consider whether the challenged allegations in mother's  
8 stipulation continued to persist at the time of the jurisdictional hearing, the court must  
9 reconsider its decision. Accordingly, we vacate and remand.

10 When reviewing a juvenile court's jurisdictional determination, we view the  
11 evidence, as supplemented and buttressed by permissible derivative inferences, in the  
12 light most favorable to the juvenile court's ruling and then assess whether the record was  
13 legally sufficient to permit the outcome that was reached. *Dept. of Human Services v.*  
14 *N. P.*, 257 Or App 633, 639, 307 P3d 444 (2013). We are bound by the juvenile court's  
15 factual findings unless there is no evidence to support those findings. *Dept. of Human*  
16 *Services v. C. Z.*, 236 Or App 436, 442, 236 P3d 791 (2010). Father does not request that  
17 we exercise our discretion to engage in *de novo* review, and we decline to do so.  
18 ORS 19.415(3)(b); ORAP 5.40(8)(c) (we conduct *de novo* review only in "exceptional"  
19 cases).

20 The following facts are undisputed. In January 2013, the Department of  
21 Human Services (DHS) filed a petition alleging jurisdiction over father's five children  
22 based, in part, on allegations that father had sexually abused his oldest child, A, and other

1 relatives. The state brought a criminal case against father. The juvenile court served  
2 father with a dependency summons and postponed the jurisdictional hearing until after  
3 the criminal trial. In September 2013, approximately nine months later, father was  
4 convicted of multiple counts of sexual abuse. The victim of two of those counts was A.  
5 The court sentenced father to 219 months' imprisonment under Measure 11.

6           After father's conviction, the state filed an amended petition, and mother  
7 stipulated to the following facts contained in that amended petition:

8           "2A. The Father was convicted of 14 counts of sexual abuse in the  
9 first degree for [abusing A] and [other relatives]. The mother needs the  
10 assistance of DHS and the court in order to access services specifically  
11 designed to address sex abuse in the family. She also needs services to  
12 learn how to protect all her children from sexual abuse.

13           "\* \* \* \* \*

14           "2C. The mother needs the assistance of the court and DHS to meet  
15 [A]'s emotional needs and learn to protect her from family emotional and  
16 physical pressure regarding the child's disclosure of sexual abuse."

17 In December 2013, the court issued findings accepting those stipulations.

18           In January 2014, DHS filed a second amended petition. Like each of the  
19 preceding petitions, the allegations in the second amended petition begins:

20           "The children are within the jurisdiction of the Court by reason of  
21 the following facts: The condition and circumstances of the above-named  
22 minor children are such as to endanger their own welfare or the welfare of  
23 others, to-wit:"

24           As with each of the preceding petitions, a number of factual paragraphs  
25 follow that statement. In the second amended petition, the relevant paragraphs are:

26           "2D. The father sexually abused the children. He was convicted of  
27 two counts of Sexual Abuse in the First Degree and one count of Sexual

1 Abuse in the Third Degree for sexually abusing [A]. [Father] also was  
2 convicted of three counts of Sexual Abuse in the First Degree for sexually  
3 abusing [another relative]. [Father] also was convicted of three counts of  
4 Sexual Abuse in the First Degree for sexually abusing [another relative].  
5 [Father] also was convicted of three counts of Sexual Abuse in the First  
6 Degree for sexually abusing [another relative]. On November 4, 2013, the  
7 father was sentenced to 219 months (18 years, 11 months) in prison under  
8 Ballot Measure 11. The father is not available as a custodial resource to his  
9 children.

10 \* \* \* \* \*

11 "2F. The father has sexually abused multiple family members. Over  
12 the years, his condition has not remediated. In November 2013, the father  
13 was sentenced to 219 months of prison for sexually abusing child family  
14 members. This sexual abuse constitutes aggravated circumstances."

15 Father did not stipulate. He contested jurisdiction. The jurisdictional  
16 hearing took place in April 2014. When calling the case, the district attorney stated,  
17 "This is set for a trial on allegations to the father only." Even so, mother was present,  
18 represented by counsel, and introduced on the record. Father and his attorney were  
19 present and introduced on the record, as were A and her attorney, and the remaining  
20 children, who were collectively represented by a fourth attorney. During the hearing, A  
21 presented evidence that mother was actively involved in counseling, attending weekly  
22 meetings, and that she consistently made protective statements about the children.  
23 Moreover, mother's counselor and the children's counselor both recommended increased  
24 autonomy from DHS and the court for mother and the children. One counselor wrote in a  
25 letter that "continued Court and DHS involvement will be an impediment to [mother and  
26 the children's] therapeutic processing of these events." In their closing arguments, A,  
27 father, and the children made arguments based on that evidence. The court did not call

1 on mother to make arguments or call witnesses.

2           Following the hearing, the juvenile court entered a jurisdictional judgment.  
3 In the findings section of that form judgment, the court wrote, "Referee Hughes found the  
4 children within the jurisdiction as to mother on 12/17/13. This finding was not  
5 challenged by any party." Regarding father, the court found allegations 2D and 2F to be  
6 true. After making those findings, the court took jurisdiction of the children "pursuant to  
7 ORS 419B.100."

8           ORS 419B.100 provides, in relevant part:

9           "(1) Except as otherwise provided in subsection (5) of this section  
10 and ORS 107.726, the juvenile court has exclusive original jurisdiction in  
11 any case involving a person who is under 18 years of age and:

12           "\* \* \* \* \*

13           "(c) Whose condition or circumstances are such as to endanger the  
14 welfare of the person or of others;

15           "\* \* \* \* \*

16           "(e) Whose parents or any other person or persons having custody of  
17 the person have:

18           "\* \* \* \* \*

19           "(D) Failed to provide the person with the care, guidance and  
20 protection necessary for the physical, mental or emotional well-being of the  
21 person[.]"

22           As a preliminary matter, we note that the juvenile court's judgment does not  
23 specify the portion of ORS 419B.100 on which the court relied upon in determining that  
24 the court had jurisdiction. On appeal, DHS asserts that the court found jurisdiction based  
25 on ORS 419B.100(1)(e)(D). However, neither the state's second amended petition, nor

1 any of the preceding petitions, allege jurisdiction under that portion of the statute. "The  
2 petition alleging jurisdiction must set forth in ordinary and concise language \* \* \* the  
3 facts that bring the child within the jurisdiction of the court, including sufficient  
4 information to put the parties on notice of the issues in the proceeding."  
5 ORS 419B.809(4). "Only the petition or the jurisdictional judgment can provide a parent  
6 with adequate notice." *Dept. of Human Services v. J. R. L.*, 256 Or App 437, 450, 300  
7 P3d 291 (2013) (internal quotation marks omitted). Here, the state's petitions neither  
8 references ORS 419B.100(1)(e)(D) nor use the language of that subparagraph. Each  
9 petition, however, does mirror the language of ORS 419B.100(1)(c), stating, "The  
10 children are within the jurisdiction of the Court by reason of the following facts: *The*  
11 *condition and circumstances* of the above-named minor children *are such as to endanger*  
12 *their own welfare or the welfare of others[.]*" (Emphasis added.) Therefore, we reject  
13 DHS's assertion that the court determined jurisdiction based on ORS 419B.100(1)(e)(D)  
14 and analyze this case under ORS 419B.100(1)(c), the basis alleged in the petitions.

15 Under ORS 419B.100(1)(c), "the burden is on the state to show that harm  
16 is, in fact, present." *C. Z.*, 236 Or App at 443. The risk of harm must exist at the time of  
17 the hearing. *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957  
18 (2011). ORS 419B.100(1)(c) "requires the court to consider all of the facts in the case  
19 before it and to consider whether, under the totality of the circumstances, the child's  
20 welfare is endangered." *Dept. of Human Services v. W. A. C.*, 263 Or App 382, 394, 328  
21 P3d 769 (2014). "[I]f a child has a parent who appears in the proceeding and is capable  
22 of caring for the child safely, juvenile court jurisdiction is not warranted \* \* \* unless and

1 until DHS prove[s] that neither parent who appeared could safely parent the child[.]” *Id.*

2           We begin by analyzing the court's findings about mother's capability to  
3 safely care for the children because that issue is dispositive. As mentioned, mother  
4 stipulated to allegations in December 2013, the court accepted those stipulations at that  
5 time, and, following the jurisdictional hearing in April 2014, the court again made  
6 findings about mother's stipulations. Father argues that mother had ameliorated the  
7 conditions and circumstances identified in the stipulations by the time of the hearing.  
8 Thus, because ORS 419B.100(1)(c) requires findings at the time of the hearing, the  
9 stipulations are insufficient to support jurisdiction. DHS's response is twofold. DHS  
10 argues that (1) the stipulations did not have to be made at the time of the hearing because  
11 the court had already established jurisdiction of the children "as to mother" when it  
12 accepted the stipulations in December 2013, and alternatively, (2) the judgment of  
13 jurisdiction incorporated mother's stipulations and therefore the findings were made at the  
14 time of the hearing.

15           We first address DHS's argument that the court had jurisdiction of the  
16 children "as to mother" prior to the jurisdictional hearing. As we have recently clarified,  
17 although the use of the shorthand phrases "jurisdiction as to mother" or "jurisdiction as to  
18 father" is common, the court does not take jurisdiction with regard to a mother or a  
19 father; rather, the court takes jurisdiction of a child. *W. A. C.*, 263 Or App at 392.

20           In *W. A. C.*, the mother stipulated to allegations contained in a petition,  
21 including allegations that the father had subjected the mother to domestic violence. *Id.* at  
22 385-86. The father did not stipulate to jurisdiction--in fact, he contested those

1 allegations. *Id.* at 386. The court set a future date to consider allegations against the  
2 father, but purported to take jurisdiction of the children at the time that it accepted the  
3 mother's stipulations. *Id.* The father argued that "the juvenile code contemplates a single  
4 judgment of jurisdiction, based on the totality of the conditions and circumstances of *the*  
5 *child*, not on a division of proof as to each parent." *Id.* at 391-92 (emphasis in original).

6 We agreed, holding that

7 "a juvenile court cannot assert jurisdiction over a child based on the  
8 admissions of one parent when the other parent has been served and  
9 summoned, appears, and contests the allegations in the petition. In such a  
10 case, the juvenile court can only assume jurisdiction over the child after a  
11 contested hearing on the allegations denied by the other parent."

12 *Id.* at 394. Consequently, a court must make findings regarding contested allegations  
13 about both parents who before the court may take jurisdiction over the children. *See id.*  
14 (noting that DHS cannot "depriv[e] one parent of legal and physical custody of the child[  
15 ] without a determination that that parent cannot safely parent the child").

16 Thus, in this case--where father was served, summoned, appeared, and  
17 contested jurisdiction--the court could not have taken jurisdiction over the children prior  
18 to the jurisdictional hearing on the contested allegations. *Id.* at 394. Consequently, we  
19 reject DHS's argument that the court had jurisdiction of the children at the time of  
20 mother's stipulations.

21 As noted, the court stated in the jurisdictional judgment, "Referee Hughes  
22 found the children within the jurisdiction as to Mother on 12/17/13. This finding was not  
23 challenged by any party." However, like the father in *W. A. C.*, father, A, and the  
24 children contested mother's stipulations. A's lawyer presented evidence that mother was

1 actively involved in counseling and consistently made protective statements about her  
2 children, that all counselors recommended increased autonomy from DHS, and that one  
3 counselor opined that continued court and DHS involvement would be an impediment to  
4 mother and the children's recovery. In their closing arguments, father and the children  
5 made arguments based on that evidence.

6           That evidence directly challenges mother's stipulations--made several  
7 months before the jurisdictional hearing in the wake of father's recent sexual abuse  
8 convictions--that mother needed the assistance of DHS to "access services specifically  
9 designed to address sex abuse in the family, \* \* \* to learn to protect all her children from  
10 sexual abuse, \* \* \* to meet [A]'s emotional needs, and learn to protect her from family  
11 emotional and physical pressure regarding the child's disclosure of sexual abuse." Yet,  
12 the court found that no party challenged mother's stipulations. We hold that there is no  
13 evidence to support that finding, because, in fact, the parties did challenge mother's  
14 stipulations.

15           Turning to DHS's second argument--that the April 2014 jurisdictional  
16 judgment incorporated the court's December 2013 findings about mother--we agree that a  
17 court may make findings about one parent and then proceed to make findings about the  
18 other parent before finally taking jurisdiction based on that totality of evidence.  
19 However, the conditions and circumstances that give rise to jurisdiction must exist at the  
20 time of the hearing. *A. F.*, 243 Or App at 386. Here, A presented evidence that the  
21 conditions and circumstances identified in mother's stipulations did not exist at the time of  
22 the hearing. Yet, the court's April 2014 findings about mother merely state that the court

1 had made prior findings about mother and deny that those findings were challenged.  
2 However, those findings were challenged. Accordingly, the court erred in finding that no  
3 party had challenged mother's stipulations. Consequently, we vacate and remand for the  
4 court to determine whether, in light of the totality of the evidence presented by the  
5 parties, there exists a basis for jurisdiction.

6 Vacated and remanded.