

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of J. S., aka J. W. S.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,
and

J. S.,
aka J. W. S.,
Respondent,

v.

C. E.,
aka C. B. E.,
Appellant.

Douglas County Circuit Court
1000398;
Petition Number 14JU273;
A164764 (Control)

In the Matter of J. W.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,
and

J. W.,
Respondent,

v.

C. E.,
Appellant.

Douglas County Circuit Court
1100301;
Petition Number 14JU272;
A164765

Luke A. Stanton, Judge pro tempore.

Submitted September 12, 2017.

Shannon Storey, Chief Defender, Juvenile Appellate Section, and Holly Telerant, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant C. E.

Ginger Fitch filed the brief for respondents J. S. and J. W.

Judy C. Lucas, Assistant Attorney General, waived appearance for respondent Dept. of Human Services.

Before Garrett, Presiding Judge, and Powers, Judge, and Wollheim, Senior Judge.

GARRETT, P. J.

Affirmed.

GARRETT, P. J.

In this consolidated appeal, father appeals from permanency judgments in which the juvenile court changed the permanency plans for his two children, B and N, away from reunification.¹ Father’s sole argument on appeal is that the juvenile court erroneously considered facts extrinsic to the bases for jurisdiction in determining that father had failed to make sufficient progress to ameliorate those bases. We conclude that the juvenile court did not err and affirm.

None of the parties request *de novo* review, and we conclude that the case is not one that warrants such review. See ORAP 5.40(8)(c); ORS 19.415(3)(b). “Whether a juvenile court erred by relying on facts extrinsic to a jurisdictional judgment is a legal question that we review for errors of law.” *Dept. of Human Services v. T. L.*, 287 Or App 753, 755, ___ P3d ___ (2017) (internal quotation marks omitted). In so doing, “we defer to the juvenile court’s explicit findings of historical fact if those findings are supported by any evidence in the record, and we assume that the juvenile court implicitly found predicate facts necessary to support its disposition.” *Dept. of Human Services v. S. M. H.*, 283 Or App 295, 297, 388 P3d 1204 (2017).

In September 2014, the Department of Human Services (DHS) removed B and N from father’s home after father was arrested for assaulting his then-wife in the presence of children in his care. Father was subsequently convicted of felony fourth-degree assault and reckless endangerment. Father later admitted that, during the incident, he was under the influence of alcohol and prescription medications.

According to DHS reports, father’s then-wife, along with several of his former romantic partners, described father as abusive and controlling and said that father had subjected them to physical and verbal abuse. In addition, a report stated that father had been “physically abusive with all of the children in his care,” and his methods of “discipline” included striking the children in the head and face with “sticks, spoons, belts, and other objects.” A DHS worker

¹ B and N have different mothers; neither mother is a party to this appeal.

also described father as “domineering with his children,” stating that, although father recognized that B and N had “experienced abuse and neglect,” father did not pursue professional help for them.

In November 2014, the juvenile court asserted jurisdiction over B and N based on findings that father “has substance abuse issues resulting in a safety threat to the child,” “has engaged in acts of domestic violence with children present, resulting in a safety threat to child,” and “engages in inappropriate physical discipline resulting in a safety threat to his child.”

The initial case plan, filed concurrently with the combined jurisdictional and dispositional judgment, set forth conditions for the children’s return to father, including requirements that father “express genuine remorse about his abusive behavior towards his children,” that he “demonstrate an openness to cooperate with whatever level of involvement from [providers] is required to assure child safety,” and that he “have sufficient safety service resources [to] the level of effort necessary to manage behavior and/or provide social connections and/or provide basic parenting assistance.” The case plan also stated:

“[Father] indicates that he has become addicted to the pain medication he received as a result of a back injury and subsequent back surgery. Other underlying issues of concern include controlling behavior, alcohol addiction, and overwhelming childcare responsibilities. [Father] also has a pattern of engaging in unhealthy relationships.”

The case plan noted a recommendation from Valley View Counseling that father should obtain a psychological evaluation. With respect to father’s relationships, the plan also noted that father “appears driven by talking about himself and his accomplishments or how he’s been the victim of relationships” and of “his own inability to recognize his need to be in relationships that require an extensive amount of work on his partner.” According to the case plan, one caseworker had advised father that his “need to be in unhealthy relationships so that he can focus on ‘fixing’ his partner/s is not indicative of someone who is thinking about his children’s needs.”

In February 2015, father received a psychological evaluation. The evaluator diagnosed father with narcissistic personality disorder with dependent and antisocial features. The evaluator observed that father shifted the blame for his problems onto his romantic partners and disregarded concerns about his own behavior. The evaluation noted that a female counselor had expressed an inability to work with father, observing that father “‘tries to utilize charm and emotional tactics to manipulate females.’” During the evaluation, father alleged that his ex-wife would “‘sell herself” sexually, then “end up in bed with men” while father was in the same bed, and, according to father, she would ask father “if he wanted to watch”; the evaluator concluded that father was misrepresenting what had occurred. In assessing the likelihood of father’s reunification with his children, the evaluator stated that father’s potential for change was “virtually nonexistent,” and that father would “invariably” remain “a narcissistic and grandiose individual who fails to accept feedback, cannot make changes, ‘mimics’ remorse and insight, but continues to direct blame toward other individuals while displaying virtually *no* capacity to internalize any of his own faults or the need for change.” (Emphasis added.)

In March 2015, father completed a substance-abuse treatment program. In January 2016, father completed a “Batterer Treatment Program,” and, shortly before he completed the program, he admitted that his behaviors were “of any concern” to his children. In June 2016, DHS returned N to father’s physical custody.

In January 2017, father was charged with eight counts of promoting prostitution, ORS 167.012 (2015), *amended by* Or Laws 2016, ch 10, § 1. According to a probation-violation report, father and his girlfriend had placed an internet ad stating that father’s girlfriend was willing to exchange sex for money. The report also stated that police had recorded discussions between father and his girlfriend about her prostitution activities and the money that she had earned. Father denied knowledge of the prostitution activities. After father’s arrest, DHS again removed N from father’s home, eventually placing him in the same foster care home as B.

In March 2017, the juvenile court held a permanency hearing, at which time the foster care provider for N (almost six years old) and B (seven) had expressed interest in being a long-term placement resource for both children.

At the hearing, B and N sought to change their permanency plans away from reunification.² In arguing that father had not made sufficient progress in ameliorating the jurisdictional bases except for the substance-abuse allegation, counsel for B and N argued that father's pending charges for promoting prostitution were relevant insofar as they related to "not just physical violence," but also father's "more ambiguous issues around domestic violence [related to] power and control" and "issues around women."

As to children, the caseworker testified that N has "significant anxiety issues" and that he had displayed physical aggression, emotional instability, and sexual inappropriateness "across multiple placements." She further stated that a psychological provider had made specific recommendations as to discipline for N. She testified that father had not been consistent in bringing N to counseling, nor was he consistent in his ability to "provide the recommended disciplinary techniques." Specifically, father declined to attempt the majority of the recommendations because he felt that they were "not suitable" for N and that "the providers didn't know what they were talking about." The caseworker also testified that, while N was still living with father, she had asked N "what happens when he gets in trouble," and N "stated that he couldn't tell me those things because his dad would end up back in jail, and he'd end up back in foster care."

With respect to B, the caseworker testified that he was "very easily emotionally deregulated," causing him to scream "for four to six hours at a time." According to the caseworker, B "describes a fear of his father that's pretty intense," and B "has called himself trash, thrown himself in the trash, [and run] into oncoming traffic." She further stated that B had run away from foster placements, had been sexually inappropriate, had been aggressive "to adults,

² B's mother did not take a position as to the change in B's permanency plan. N's mother did not object to a change in plan for N.

children, animals, [and] himself,” and had attempted to hang himself. She testified that father was the primary source of B’s emotional dysregulation, but that other stimuli, such as loud noises, also caused that response. She testified that B has “extraordinary” needs with respect to discipline, “even in comparison to [N].” She testified that father had resisted criticism of his parenting, including the appropriateness of the manner in which he disciplines his children.

In arguing that he had made sufficient progress regarding the three bases for jurisdiction, father cited his completion of substance-abuse treatment and the lack of evidence of ongoing substance abuse; the lack of evidence that he had disciplined N inappropriately during N’s most recent placement with father; and the lack of evidence that father had perpetrated domestic violence against his current romantic partner. Father also argued that information about his alleged conduct in promoting prostitution and the children’s special needs was extrinsic to the bases for jurisdiction and should not be considered.

The juvenile court changed the permanency plan away from reunification. In doing so, the court concluded that the department had made reasonable efforts and that father had made sufficient progress with respect to the substance-abuse allegation. The court concluded, however, that father had not made sufficient progress on the other two bases for jurisdiction—domestic violence and inappropriate discipline—because “the evidence has demonstrated, unequivocally, that [father] has engaged in services but has not adjusted his conduct,” and father “has rejected” or “was unable to implement the interventions.” As to the prostitution activities, the court stated that it was not relying on the indictment itself as proof that father was guilty of promoting prostitution, but the court cited father’s previous description of his ex-wife “sell[ing] herself,” concluding that it was “clear to the court that there is an issue here.” The court observed that father was merely “going through *** the motions as to the services he’s being offered” as “a result of his narcissistic personality.” The court also noted that, as the caseworker testified, father “found it insulting” when he was “given recommendations by counselors as to what behaviors he needed to engage in to safely parent his child.”

On appeal, father argues that the juvenile court erred by considering facts extrinsic to the jurisdictional bases when evaluating the sufficiency of father's progress—specifically, the charges against father for promoting prostitution and the information about B's and N's special needs. Father argues that, without the evidence bearing on extrinsic matters, the record was insufficient to support the trial court's conclusion that father made insufficient progress toward reunification with B and N.

Children respond that the information about promoting prostitution and their special needs is not extrinsic to the bases for jurisdiction. Relying largely on the case plan accompanying the jurisdictional judgment, children argue that father's controlling behavior was expressly noted in the original case plan, and thus, father has been on notice that his "controlling and abusive behavior towards others—including his sons—created unsafe conditions and circumstances for his children."

Before the juvenile court may change a ward's permanency plan away from reunification, the proponent of the change must prove that, despite DHS's reasonable efforts to reunify the parent with his or her child, the parent has not "made sufficient progress for the ward to safely return home." *Dept. of Human Services v. S. M. H.*, 283 Or App 295, 305, 388 P3d 1204 (2017) (citing ORS 419B.476(2)(a)). In making that determination, "the court shall consider the ward's health and safety the paramount concerns." ORS 419B.476(2)(a).

A juvenile court may not change a ward's permanency plan away from reunification "based on conditions or circumstances that are not explicitly stated or fairly implied by the jurisdictional judgment." *Dept. of Human Services v. A. R. S.*, 256 Or App 653, 660, 303 P3d 963, *rev den*, 354 Or 386 (2013). "Reliance on other facts can affect a parent's right to both notice of what conditions or circumstances the parent must remediate and a reasonable opportunity—through access to services—to remediate them." *Dept. of Human Services v. N. T.*, 247 Or App 706, 715, 271 P3d 143 (2012). In determining whether a parent was on notice that his or her progress would be assessed based upon particular

facts, we look to the petition, the jurisdictional judgment, and documentation attached to the jurisdictional judgment providing the parent notice as to the conditions for reunification. See *Dept. of Human Services v. M. M. B.*, 253 Or App 431, 440, 290 P3d 891 (2012), *rev den*, 353 Or 280 (2013) (looking to the petition, the findings in the jurisdictional judgment, and the Action Agreement attached to the judgment in determining whether the juvenile court considered extrinsic facts in making its permanency determination). Then, in order to determine whether the relied-upon facts were “fairly implied” by the jurisdictional judgment, we assess whether a reasonable parent would have known that he or she “needed to address the condition or circumstances exemplified by those facts.” *T. L.*, 287 Or App at 763 (internal quotation marks omitted).

Our decision in *Dept. of Human Services v. N. M. S.*, 246 Or App 284, 266 P3d 107 (2011), is instructive with respect to the proper scope of jurisdictional findings. In that case, the juvenile court asserted jurisdiction over the child based on a single jurisdictional finding—the mother’s admission that the child had “presented with unexplained physical injuries deemed by medical professionals to have been non-accidental.” *Id.* at 288. At a permanency hearing, the court concluded that mother had made insufficient progress toward reunification based on deficiencies in her “hygiene, parenting skills, and her overall judgment,” including the fact that her home was “consistently filthy,” she had “unnecessarily quit her job,” and she suffered from “the combined effects of a paranoid personality disorder and a dependent personality disorder.” *Id.* at 290-91 (internal quotation marks and emphasis omitted).

On appeal, we rejected the assertion that “the jurisdictional basis properly encompassed *any* unsafe and detrimental conduct of a parent which necessarily impacted the best interests of the children.” *Id.* at 298 (emphasis added; internal quotation marks omitted). But we also rejected the mother’s contention that “she was only on notice ‘that she needed to participate in services to prevent any future non-accidental injury to her children.’” *Id.* We concluded that the proper scope of the sole jurisdictional finding

encompassed “those ‘conditions or characteristics’ potentially demonstrated by the specific facts alleged”—in other words, “those conditions or characteristics that could have caused the nonaccidental injury.” *Id.* at 300 (quoting [Dept. of Human Services v. G. E.](#), 243 Or App 471, 479, 260 P3d 516, [adh’d to as modified on recons](#), 246 Or App 136, 266 P3d 107 (2011)). Although we recognized that “[t]hat universe is admittedly broad,” we reasoned that its scope would “narrow as DHS identifies possible explanations for the injury and develops a case plan based on that knowledge.” *Id.* We then concluded that the juvenile court had erroneously relied on concerns about mother’s hygiene because such concerns could not conceivably be implicated in an allegation of an unexplained, nonaccidental injury. *Id.* at 300-01.³

It follows from our reasoning in *N. M. S.* that, when a jurisdictional judgment (or attached documentation) specifically identifies a potential cause underlying a jurisdictional finding, it can be “fairly implied” that that identified cause will be a referent for measuring the parent’s progress. *Cf. M. M. B.*, 253 Or App at 440 (concluding that the mother was on notice that her progress would be assessed based on whether such progress could be noticed by her family members because the Action Agreement attached to the jurisdictional judgment specifically stated as much); [Dept. of Human Services v. J. R. L.](#), 256 Or App 437, 450-51, 300 P3d 291 (2013) (concluding that mother was not on notice that reunification was conditioned on ameliorating her anxiety and depression because, unlike in *M. M. B.*, the form attached to the jurisdictional judgment did not clearly state as much).

Applying that logic here, we conclude that the scope of the jurisdictional basis concerning father’s domestic violence includes the potential *causes* of domestic violence that are explicitly cited in the case plan attached to the

³ Although in *N. M. S.* we reasoned that a court may properly rely on facts concerning an underlying cause for the jurisdictional bases where the case plan narrowly identified such a cause, in *A. R. S.*, we clarified that a court may not rely upon unadjudicated causes where “it would be impossible” for the parent to cure the conditions supporting jurisdiction “without first addressing” the unadjudicated cause. *See A. R. S.*, 256 Or App at 663-64 (concluding that juvenile court erred insofar as it relied on the mother’s unadjudicated mental health condition as representing “the ‘barrier’” to reunification (emphasis added)).

jurisdictional judgment—*i.e.*, father’s controlling behavior and his pattern of pursuing unhealthy romantic relationships. In that light, facts indicating that those causes have not been ameliorated—such as, facts concerning father’s alleged participation in his romantic partner’s prostitution—are relevant to the “sufficient progress” inquiry and are not “extrinsic” to the basis for jurisdiction. The jurisdictional judgment and accompanying case plan placed father on notice that evidence of his continued pursuit of unhealthy and controlling romantic relationships could be relied on by the juvenile court to conclude that the threat of domestic violence persists.

For similar reasons, we conclude that the facts regarding N’s and B’s special needs are not extrinsic to the “inappropriate discipline” basis for jurisdiction. The initial case plan included as a condition for reunification a requirement that father demonstrate that he could utilize services “at the level of effort necessary to manage” his children’s “behavior.” That express condition provided reasonable notice that father’s ability to provide appropriate discipline would be assessed in terms of whether he made the necessary changes to manage *his* children’s behavior. The juvenile court noted father’s failure to implement the recommendations made to him, along with his inability to accept criticism of his approach to disciplining children. Thus, we conclude that the need for father to engage in appropriate discipline as necessitated by his sons’ heightened emotional needs was “fairly implied” by the relevant documents, and, therefore, father was on notice that an assessment of his progress would turn in part on his ability to provide the type of discipline that is appropriate for his children in particular.

Affirmed.