IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of Z. S.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
*Petitioner-Respondent,*

*v.*

L. L. S.,
aka L. S.,
*Appellant.*

Marion County Circuit Court
16JU02171; A164578

Heidi O. Strauch, Judge pro tempore.

Submitted September 6, 2017.

Shannon Storey, Chief Defender, Juvenile Appellate Section, and Amelia Andersen, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Keith L. Kutler, Assistant Attorney General, filed the brief for respondent.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

LAGESEN, P. J.

Reversed and remanded.

DeVore, J., dissenting.

**LAGESEN, P. J.**

In this appeal by father of a juvenile court judgment changing the permanency plan for father's son, Z, from reunification to adoption, we are called upon once again to assess the efforts that the Department of Human Services (DHS) must make to reunify a child, committed to its care by the juvenile court, with an incarcerated parent before the juvenile court may change the child's permanency plan from reunification to another plan. The legal question presented is whether a parent's lengthy term of incarceration, standing alone, means that DHS is excused from making efforts to reunify the child with the incarcerated parent, such that the child's permanency plan may be changed from reunification. In other words, when a parent's term of incarceration is lengthy, do minimal to no efforts constitute "reasonable efforts" within the meaning of ORS chapter 419B. Our case law supplies the answer to that question: no. Because the juvenile court concluded otherwise, and relied on that erroneous conclusion to change Z's permanency plan, we reverse and remand.

STANDARD OF REVIEW

Neither party has requested *de novo* review, and we do not perceive this to be the type of "exceptional" case that would warrant *de novo* review. As we have explained, on appeal of a permanency judgment, "[t]he juvenile court's determination[] whether DHS's efforts were reasonable * * * [is a] legal conclusion[] that we review for errors of law." *Dept. of Human Services v. G. N.*, 263 Or App 287, 294, 328 P3d 728, *rev den*, 356 Or 638 (2014). In conducting that review, we are bound by the juvenile court's explicit factual findings if there is evidence to support those findings. *Id.* To the extent that a court does not make its findings express, we presume that the court made any necessary implicit factual findings in a manner consistent with its ultimate legal conclusion. *Id.* However, "[i]f an implicit factual finding is not necessary to a trial court's ultimate conclusion or is not supported by the record, then the presumption does not apply." *Pereida-Alba v. Coursey*, 356 Or 654, 671, 342 P3d 70 (2015).

## FACTUAL AND PROCEDURAL BACKGROUND

The juvenile court issued a thorough and thoughtful letter opinion explaining its ruling. Consistent with our standard of review, we draw the facts primarily from the court's express findings in its opinion, supplementing them with consistent facts drawn from the record, and also from the procedural history of the case.

DHS became involved with Z's family in March 2016. At that time, Z was living with mother and father was in jail awaiting trial on charges of sexual offenses against one of mother's minor relatives. DHS became involved because of concerns about mother's parenting and father's unavailability to parent Z because of his incarceration. Two months later, on May 21, 2016, the juvenile court took jurisdiction over Z after concluding that Z's conditions and circumstances endangered his welfare within the meaning of ORS 419B.100(1)(c).[1] By that time, father had been convicted of some of the charges against him, and had been sentenced to more than 30 years in prison. The court's jurisdictional determination was based on two admissions by parents: mother's admission that her "substance abuse interferes with her ability to safely parent the child" and father's admission that he "has been convicted of sexually abusing another child and is incarcerated and currently unavailable to be a custodial resource." Z was placed in substitute care with his maternal grandmother.

A few days after the juvenile court took jurisdiction, father was transferred to the Eastern Oregon Correctional Institution (EOCI) to serve his sentence. With respect to mother, DHS focused its efforts on helping mother ameliorate the risk posed to Z by her admitted substance abuse problem. Apart from its efforts to assist mother in addressing her substance abuse problem—efforts which,

[1] ORS 419B.100(1)(c) states, in part, that "the juvenile court has exclusive jurisdiction in any case involving a person who is under 18 years of age and * * * [w]hose condition or circumstances are such as to endanger the welfare of the person or of others." For purposes of ORS 419B.100(1)(c), a child's condition or circumstances endanger the child's welfare if "the child is facing a current threat of serious loss or injury, and there is a reasonable likelihood that the threat will be realized." *Dept. of Human Services v. T. L.*, 279 Or App 673, 678, 379 P3d 741 (2016) (internal quotation marks and emphasis omitted).

if successful, perhaps could have ameliorated the risk to Z posed by father's incarceration by ensuring that he had a safe home notwithstanding father's incarceration—DHS made no independent efforts to assist father in addressing the risk posed to Z by father's incarceration.

Rather, DHS had no contact with father for nearly 10 months. After father was transferred to EOCI, Skelton, the caseworker responsible for working with father, did not make any attempt to identify the facility where father had been transferred, apparently because Skelton believed that the juvenile court had directed father to notify Skelton where he was transferred.[2] Eventually, in July, Skelton asked father's attorney where father had been taken, and the attorney suggested that Skelton look father up on the VINE system. Skelton did so and found out that father had been taken to EOCI. After a phone call with father's prison counselor, Miles, Miles and Skelton exchanged several emails about Miles arranging a phone call between father and Z. A few months later, on October 3, 2016, Skelton emailed Miles again to ask if the phone call had taken place. Nearly a month later, Miles responded, stating that he had been "out of the office for most of August and September and was just now 'catching up,'" and he would arrange for the phone call "in the next week or two." Miles did not follow through.

Mother died unexpectedly of a drug overdose on October 6, 2016. Still, DHS did not contact father. Rather, on November 22, 2016, Rhonda Riley emailed Skelton that she would be father's new prison counselor. Thereafter, Riley and Skelton exchanged emails about setting up phone visits between Z and father. As a result, father had a phone visit with Z toward the end of December 2016 and another phone visit with Z at the end of January 2017. However, Skelton himself never contacted father, or arranged for another DHS worker to contact father to discuss the dependency case. Skelton did, however, send an action agreement to father at the end of December 2016 or in early January 2017.

After mother's death, DHS requested that the juvenile court change Z's permanency plan from reunification to

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[2] The record does not supply a basis for assessing whether Skelton's belief was accurate, and the juvenile court made no findings on that point.

adoption. The juvenile court held a contested permanency hearing in early February 2017. As of the time of the hearing, Skelton still had not had any contact with father, apart from sending father the action agreement. Relying on *Dept. of Human Services v. C. L. H.*, 283 Or App 313, 388 P3d 1214 (2017), father argued that DHS's efforts—or lack of efforts—toward father did not qualify as reasonable efforts for purposes of ORS 419B.476(2)(a), which governs the change of a permanency plan from reunification to adoption, and that the juvenile court should deny DHS's request to change the permanency plan because of DHS's failure to make reasonable efforts to reunify Z with father. Z's lawyer agreed with father that DHS's efforts were not reasonable, "because they didn't have contact with [father]. And they didn't make sure that he was aware of the services," but argued that the court should change the plan nonetheless. DHS disagreed, urging the court to conclude that Skelton's efforts to set up phone visits between father and Z met the statutory standard for reasonable efforts.

The juvenile court took the matter under advisement and, as noted, issued a thoughtful letter opinion explaining its decision to change the plan. The juvenile court found that it was "indeed alarming that Mr. Skelton has never spoken with [father], either by telephone or face-to-face," even though DHS administrative rules required him to have monthly face-to-face contact with father to discuss with father the conditions for achieving the return of Z, and father's progress toward meeting those conditions. The court nonetheless determined that DHS's efforts to reunify father with Z were reasonable for purposes of ORS 419B.476(2)(a) because, in the court's view, "there [were] no services or supports the DHS could have provided that could have ameliorated the jurisdictional bases as they relate to [father] in this case." In particular, the court reasoned that "[t]here is nothing that either DHS or [father] can do that could shorten the length of [father's] incarceration to make him available to parent [Z]." Further, the court concluded that father's convictions for sexual offenses against a child relieved DHS of its obligations to make reasonable efforts to reunify a parent and child under ORS 419B.340(5)(a)(D), which provides that DHS may request to be excused from the

obligation to make reasonable efforts to reunify a child with a parent who has been convicted of certain sexual offenses against a child. *See* ORS 419B.340(5)(a)(D).[3] The court also concluded that father had not made sufficient progress to permit reunification. Based on those conclusions, among others, the court entered a permanency judgment changing Z's permanency plan from reunification to adoption.

Father appeals. He assigns error to the juvenile court's determination that Skelton's efforts constituted "reasonable efforts" for purposes of ORS 419B.476(2)(a) and its corresponding decision to change Z's permanency plan from reunification to adoption based, in part, on that "reasonable efforts" determination. He argues that, as matter of law, DHS's virtually nonexistent efforts to help father address the jurisdictional basis as to him do not qualify as "reasonable efforts" under the legal standard set forth in our case law. In particular, father asserts that "[t]he department's failure to speak with father for the first nine months of the dependency case or to establish contact between father and [Z] for the first seven months renders its efforts unreasonable as a matter of law." In response, the department does not dispute that DHS had no contact with father during the first nine months of the dependency case, and also does not dispute that DHS's relatively passive efforts toward father resulted in father having no contact with Z for seven months. Rather, DHS urges us to adopt the reasoning of the juvenile court and conclude that the efforts by Skelton constitute "reasonable efforts" for purposes of ORS 419B.476(2)(a) because "[n]o amount of visitation or other services could ameliorate the basis for jurisdiction." DHS argues that the only way that father can ameliorate the basis for jurisdiction is to obtain a "much shorter prison sentence." Because DHS lacks the power to do anything to shorten father's prison sentence, it asserts that its efforts were reasonable.

## ANALYSIS

Absent exceptions not applicable here, to change Z's permanency plan from reunification to adoption under

[3] In its original letter opinion, the court found that DHS was excused from the reasonable efforts requirement under ORS 419B.502(1). However, that statute does not apply in dependency proceedings. The court later amended its letter opinion to refer to ORS 419B.340(5).

ORS 419B.476, the juvenile court was required to make two predicate determinations: (1) that DHS made "reasonable efforts" to reunify Z with father; and (2) that, notwithstanding those efforts, father's progress was not sufficient to permit reunification. *C. L. H.*, 283 Or App at 322. For purposes of ORS 419B.476, reasonable efforts to reunify a child with his parent or parents mean efforts that focus on ameliorating the adjudicated bases for jurisdiction, and that give "parents a 'reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents.'" *Dept. of Human Services v. S. M. H.*, 283 Or App 295, 306, 388 P3d 1204 (2017) (quoting *Dept. of Human Services v. M. K.*, 257 Or App 409, 417, 306 P3d 763 (2013)). That is, reasonable efforts are ones aimed at reducing or eliminating the risk of harm that led to juvenile court intervention in the first place.

Furthermore, consistent with the foregoing, the concept of reunifying a child with a parent within the meaning of the dependency statutes is not limited to physical reunification. The legislature has announced that it is "the policy of the State of Oregon to guard the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution," and, further, that the dependency statutes are to be "construed and applied" consistently with the requirements of the federal constitution. ORS 419B.090(4). Under the Fourteenth Amendment, a parent's liberty interest in parenting his child is broad, and encompasses "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 US 57, 66, 120 S Ct 2054, 147 L Ed 2d 49 (2000). Accordingly, when the dependency code is construed in view of the scope of the fundamental Fourteenth Amendment right to parent, reunification of a child with a parent means the restoration of the parent's right to make the decisions about the child's care, custody, and control without state supervision, even if the child will not be returned to the parent's physical custody because of other impediments, such as incarceration.

Consistent with this understanding of the nature and scope of the constitutional right to parent, our cases have long recognized that the fact that a parent may not be

able to be physically reunited with a child because of incarceration or similar impediments does not excuse DHS from making reasonable efforts to reunify the parent and child: "It is well established that DHS is not excused from making reasonable efforts toward reunification simply because a parent is incarcerated." *S. M. H.*, 283 Or App at 306 (citing *State ex rel Juv. Dept. v. Williams*, 204 Or App 496, 506, 130 P3d 801 (2006)). As we have recognized, one way that an incarcerated parent may be able to ameliorate the risk of harm posed to a child by the parent's incarceration—typically, that risk appears to be that no one is available to care for the child—is by enlisting the assistance of others. *Dept. of Human Services v. T. L.*, 279 Or App 673, 685-86, 379 P3d 741 (2016).

Under those legal standards, the juvenile court erred in concluding that DHS's virtually nonexistent efforts to reunify Z with father were reasonable for purposes of ORS 419B.476. The court reasoned that DHS's efforts were reasonable because, in its view, there was nothing DHS could do to ameliorate the basis for jurisdiction:

> "In fact, I find that there are no services or supports the DHS could have provided that could have ameliorated the jurisdictional bases as they relate to [father] in this case. Nor is there anything that [father] could have done to 'make progress' toward ameliorating the fact that he is incarcerated with a scheduled release date of December 9, 2046."

Essentially, as we understand the court's ruling, the court concluded that any efforts to ameliorate the jurisdictional basis as to father would have been futile, so as to excuse DHS from making any efforts toward assisting father.[4]

[4] The court may have inadvertently applied the "reasonable efforts" standard in the statute governing shelter hearings, ORS 419B.185(1)(a). Under that statute, the legislature explicitly has directed juvenile courts to find that DHS made reasonable efforts to reunify the family *if* the juvenile court "finds that no services were provided but that reasonable services would not have eliminated the need for protective custody." ORS 419B.185(1)(a) (providing that "the court shall consider the department to have made reasonable efforts" under circumstances where the court finds that no services would eliminate the need for protective custody). In contrast with ORS 419B.185, ORS 419B.476(2), which governs the reasonable efforts determination in permanency hearings, does not contain a similar provision authorizing a juvenile court to equate no efforts with reasonable efforts under circumstances in which the court finds that there are no services that could ameliorate a jurisdictional basis.

That determination is erroneous for three reasons.

First, the juvenile court's conclusion that father's incarceration, on its own, effectively excused DHS from making efforts to ameliorate the risk posed to Z by father's incarceration conflicts with our longstanding recognition that the fact of incarceration, standing alone, does not relieve DHS of its obligation to make reasonable efforts to ameliorate the bases of jurisdiction. *S. M. H.*, 283 Or App at 306.

Second, the juvenile court's ruling rests on an erroneous understanding of the jurisdictional basis as to father. The juvenile court did not take jurisdiction over Z as to father based on the simple fact of father's incarceration and inability to serve as a custodial resource. Rather, it took jurisdiction over Z as to father because father's incarceration, and his correlative unavailability as a custodial resource, *endangered* Z. Indeed, the juvenile court could not lawfully have taken jurisdiction over Z as to father unless father's incarceration and inability to serve as a custodial resource subjected Z to a current risk of serious loss or injury that was reasonably likely to be realized in the absence of juvenile court jurisdiction. *T. L.*, 279 Or App at 678 (articulating standard for juvenile court dependency jurisdiction). Said another way, the incarceration of a parent only provides a basis for juvenile court jurisdiction over a child if, as a result of that incarceration, the child faces a threat of serious harm, and there is a reasonable likelihood that that harm will come about.

Third, and relatedly, the juvenile court's misunderstanding of the jurisdictional basis as to father led it to erroneously conclude that there is nothing that DHS could do to assist father in ameliorating the risk of harm posed to Z by his incarceration. Although the court was correct that there was nothing that DHS could do to ameliorate father's incarceration, and therefore could not ameliorate the risk of harm to Z by shortening father's sentence, that does not mean that there was nothing that DHS could do to ameliorate the basis for jurisdiction. The court report that DHS prepared for the permanency hearing lays out what father must achieve to obtain Z's "return" while incarcerated, and explicitly contemplates that father may be able to do so by

enlisting the assistance of another caregiver to provide a safe home for Z. Significantly—and consistently with our case law—the report does not state that father must obtain freedom and personally provide care for Z. Instead, it states that the "Conditions of Return" for father are as follows:

> "There will be a home like setting that is safe, stable and sanitary where the child can live.
>
> "The home environment will be calm, free of violence, negative attitudes and substance abuse that will affect the child's wellbeing.
>
> "A parent/*caregiver* who is willing to cooperate with the safety plan, working with DHS and community partners cooperatively and allowing them access to their home for services.
>
> "The parent/*caregiver* will identify safety service providers, approved by DHS, which can assist in implementing the safety plan to assure child safety."

(Emphases added.)

At the very least, DHS could have discussed with father whether he had any ideas about how to satisfy these conditions from the confines of prison, and assessed whether father's ideas, if any, would be ones that father could accomplish with reasonable assistance from DHS. Yet DHS did not make even that minimal effort.

Under these circumstances, the undisputed facts demonstrate that father was not given the "reasonable opportunity" contemplated by ORS 419B.476 to demonstrate that he was capable of parenting Z. *S. M. H.*, 283 Or App at 306. DHS's efforts, as a matter of law, therefore were not reasonable for purposes of the statute. The juvenile court erred in concluding otherwise and in changing the permanency plan based on that erroneous "reasonable efforts" determination.

The question remains whether we must reverse. As noted, the juvenile court also found that, as a result of father's conviction, DHS was excused under ORS 419B.340(5) from making reasonable efforts by virtue of his convictions. Both parties agree that the juvenile court necessarily intended that finding to operate prospectively only

and that, therefore, the finding does not supply an alternative basis for affirmance, and father has not assigned error to the juvenile court's decision to excuse DHS from further efforts. Although the parties have not raised the point, the court's finding under ORS 419B.340(5) raises the question of whether a reversal will have a practical effect on father's rights, in view of the fact that DHS no longer has the obligation to make reasonable efforts to reunify father with Z.

It will. As a result of a reversal, father will be entitled to a new permanency hearing. At that hearing, the court necessarily will have to consider whether father has made sufficient progress toward meeting the conditions for reunification with Z, even absent the assistance of DHS. In other words, the fact that a court excuses DHS from assisting a parent does not preclude a parent from acting independently to achieve the return of the parent's child. Thus, notwithstanding the juvenile court's decision to excuse DHS from further reasonable efforts, our decision will have a practical effect on father's rights because he will be entitled to advocate that the permanency plan should remain reunification because of father's own efforts to redress the jurisdictional bases or, alternatively, that the circumstances warrant a different permanency plan that does not contemplate the complete severance of father's parental relationship with Z. For that reason, we conclude that the juvenile court's legal error is one that requires reversal of the permanency judgment on appeal.

The dissenting opinion would reach a different conclusion. However, its approach does not comport with the rule of law that governs in these cases. Our case law is clear: DHS's efforts qualify as reasonable for purposes of ORS 419B.476 if and only if those efforts supply a parent with "a reasonable opportunity to demonstrate [his] ability to adjust [his] conduct and become [a] minimally adequate parent[]." *S. M. H.*, 283 Or App at 306. Nowhere does the dissenting opinion explain how DHS's efforts met that legal standard. Instead, the dissenting opinion advances three primary arguments for affirmance. None hold up.

The dissenting opinion first argues that reversal is inappropriate because father never specifically identified

for the juvenile court what specific additional efforts DHS should have made. 290 Or App at ___ (DeVore, J., dissenting). But that was not the legal question before the juvenile court. The legal question before the juvenile court was whether DHS's efforts gave father a "reasonable opportunity" to demonstrate that he could ameliorate the risk of harm posed to Z by father's incarceration. Here, DHS's efforts did not meet that standard. DHS did not even talk to father or let him know what he had to do to achieve Z's return until months into the case. Moreover, there is no authority for the dissenting opinion's proposition that a parent must identify what additional efforts that DHS should have made to dispute the reasonableness of the efforts that DHS did make. In that regard, it is worth observing that families that enter the dependency system do so because they need help with parenting, and DHS is charged with supplying that help. That did not happen here.

Next, the dissenting opinion appears to argue that we are inappropriately engaging in *de novo* review, implicitly suggesting that, absent *de novo* review, affirmance would be required. 290 Or App at ___ (DeVore, J., dissenting). But we have not engaged in *de novo* review; instead, we have taken the historical facts about DHS's efforts directly from the juvenile court's opinion, and have not supplanted those facts with our own factual findings. Beyond that, the law is clear that we review a juvenile court's reasonable efforts determination for legal error. *G. N.*, 263 Or App at 294 ("The juvenile court's determinations whether DHS's efforts were reasonable and the parent's progress was sufficient are legal conclusions that we review for errors of law."). That is the standard of review that we have applied to determine the legal correctness of the juvenile court's reasonable efforts determination.

Finally, the dissenting opinion suggests that it is "curious" for us to reverse in view of the juvenile court's unchallenged prospective determination that DHS is excused from making additional reasonable efforts under ORS 419B.340(5). 290 Or App at ___ (DeVore, J., dissenting). But, as we have explained, the fact that DHS is excused from making reasonable efforts to assist a parent does not

equate to a conclusion that the appropriate permanency plan for the parent's child is adoption, if the parent, acting independently of DHS, ameliorates the bases for jurisdiction or, short of that, demonstrates that a permanency plan other than adoption is in the child's best interests. Moreover, the juvenile court's decision to change the permanency plan is a significant decision that has profound implications for father's fundamental right to parent, as well as for Z's future. *Dept. of Human Services v. T. L.*, 358 Or 679, 692, 369 P3d 1159 (2016) (explaining that a change in permanency plan "marks a profound change of course in the path to finality for children in care"). Given the profound nature of the decision, and its potential for long-lasting repercussions for both father and Z, we see nothing "curious" about remanding, where the court's previous decision was based on an incorrect application of the law, and where further proceedings based on additional information could lead to a different conclusion regarding the best course of permanency for Z. We acknowledge that a remand may delay finality, but that is what we understand adherence to the rule of law to require in this case.

Reversed and remanded.

**DeVORE, J.,** dissenting.

This case poses the question whether DHS has failed to make reasonable efforts for a two-year old child to be returned to home, when his mother has died, his father is sentenced to imprisonment for years beyond his son's childhood, and DHS was slow in setting up telephone calls between the child and father in prison. The majority concludes that the efforts to return the child to home were not reasonable, particularly because DHS failed to ask father if he "had any ideas" about another caregiver or the conditions for a home environment. 290 Or App at ___. I disagree because neither before the juvenile court nor this court has father suggested any other caregiver; because, on the case presented, the juvenile court's analysis was sound; and because I fear that, in construing applicable standards, we forget the child's interest. I will address those points in reverse order.

Oregon recognizes that children are individuals with legal rights that include "permanency with a safe family." ORS 419B.090(2)(a)(A); *Dept. of Human Services v. T. L.*, 279 Or App 673, 677, 379 P3d 741 (2016). When a child has been removed from a home, it is also Oregon's policy to offer parents appropriate reunification services to allow them the opportunity to adjust their conduct and the circumstances "to make it possible for the child to safely *return home* within a *reasonable time*." ORS 419B.090(5) (emphases added). To "ensure that children do not languish in foster care," our statutes require the juvenile court to conduct a permanency hearing to develop or revise a permanency plan for the child. *T. L.*, 279 Or App at 679. The objective is that "children not be left indefinitely in a placement limbo." *State ex rel Juv. Dept. v. F. W.*, 218 Or App 436, 469, 180 P3d 69, *rev den*, 344 Or 670 (2008). At a permanency hearing, the juvenile court has authority to change a plan from reunification, as here, to adoption, but only if DHS "has made reasonable efforts * * * to make it possible for the ward to safely return home" and, despite those efforts, the parent has not made sufficient progress to make it possible for the ward to safely return home. ORS 419B.476(2)(a). The same statute dictates, "In making its determination, the court shall consider the ward's health and safety the paramount concerns." *Id.*; *see also* *Dept. of Human Services v. C. L. H.*, 283 Or App 313, 323, 388 P3d 1214 (2017) (reciting same). We have described those standards as reflecting "a child-centered policy orientation." *F. W.*, 218 Or App at 469. The standards are designed to achieve permanency for the child "as expeditiously as possible." *Dept. of Human Services v. J. M.*, 266 Or App 453, 461, 338 P3d 191 (2014), *rev den*, 356 Or 689 (2015).

In this case, the juvenile court properly focused the inquiry. The court had taken jurisdiction as to father, not due to substance abuse, domestic violence, or anger management like so many other cases.[1] *See, e.g.*, *C. L. H.*, 283 Or App at 317 (jurisdiction based on a father's anger control, failure to provide adequate food, and child's need for specialized care). The court had taken jurisdiction as to father based directly on the danger to Z of homelessness resulting

[1] The court took jurisdiction as to mother due to substance abuse.

from father's incarceration itself—that is to say, father's inability to be a custodial resource. Father admitted that Z's welfare was endangered because "father has been convicted of sexually abusing another child and is incarcerated and currently unavailable to be a custodial resource." As a result, those "particular issues" provided the "framework" for the court's analysis. *Dept. of Human Services v. N. T.*, 247 Or App 706, 715, 271 P3d 143 (2012).

Among other things, father complained that DHS had not contacted him in prison and had not made prison programs known to him. More particularly, he complained about DHS's delay in setting up the first telephone calls with Z, and he asked that the court order DHS to provide him with face-to-face visits. Father did not contend that he could ameliorate the risk of Z's homelessness—the risk posed by his incarceration—by suggesting another caregiver. Z was in the foster care of his maternal grandmother, where he was "doing really good." The paternal grandfather had not expressed interest in being a custodial resource. DHS had spoken with father, and father had not suggested the paternal grandfather as a custodial resource. Given that, the juvenile court framed the question that was actually presented to it, then answered it bluntly. The court stated:

> "In making a reasonable efforts determination, the court assesses DHS's efforts based on a totality of the circumstances, 'including both the costs associated with providing services and whether the parent is likely to benefit from services in a way that would increase the chances of family reunification.' *Dept. of Human Services v. M. K.*, 257 Or App 409, 418, (2013). *The efforts that DHS is required to make must be focused on ameliorating the bases of jurisdiction.* *Dept. of Human Services v. C. L. H.*, 283 Or App 313, 322-23 (2017). *The basis of jurisdiction in this case is incarceration*—for the next 29 years. What services could DHS provide that would ameliorate that basis? There is nothing that either DHS or [father] can do that could shorten the length of [father's] incarceration to make him available to parent [Z]."

(Emphases added.) As the majority notes, the juvenile court was justly alarmed that DHS had permitted delays in arranging periodic telephone calls between father in prison and his son. The court would respond to the visitation

complaint in its *next* ruling. But, in its letter decision on permanency, the juvenile court reasoned:

> "For the purposes of changing a child's permanent plan, the efforts that DHS is required to make *must be rationally related to ameliorating the basis of jurisdiction*. To reject a change in plan and require DHS to provide to father a service that has no possibility of ameliorating the jurisdictional basis would fly in the face of a plain reading of the statute and require DHS to expend funds that cannot make reunification possible."

(Emphasis added.) The problem remained the basis of jurisdiction. That is, father's sentence meant that he was unable to provide a home for all of the years of Z's childhood. The juvenile court determined:

> "Because visitation is not related to ameliorating the jurisdictional basis, I find that DHS's delay in setting up telephone visits does not affect this court's reasonable efforts finding. In fact, I find that there are no services or supports the DHS could have provided that could have ameliorated the jurisdictional bases as they relate to [father] in this case. Nor is there anything that [father] could have done to 'make progress' toward ameliorating the fact that he is incarcerated with a scheduled release date of December 9, 2046."

Due to the unusual length and circumstances of father's incarceration, the court concluded that DHS had employed reasonable services insofar as those that relate to the basis for jurisdiction. As to the circumstances of father's incarceration, the juvenile court added a finding of aggravated parental conduct. Under ORS 419B.340(5), a court may determine that DHS is not required to make reasonable efforts if it finds one of a number of aggravated circumstances, including the sexual abuse of any child.[2] The court found that

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[2] In part, ORS 419B.340(5) provides:

> "If a court determines that one of the following circumstances exist, the juvenile court may make a finding that the department is not required to make reasonable efforts to make it possible for the ward to safely return home:
>
> "(a) Aggravated circumstances including, but not limited to, the following:
>
> "* * * * *
>
> "(D) The parent has subjected any child to rape, sodomy or sexual abuse[.]"

father had been convicted of first-degree sexual abuse and first-degree unlawful penetration, and, as a consequence, the court declared that DHS was relieved of responsibility to make efforts for the return of Z to father.

After those determinations, the court entered a permanency judgment that referred to a concurrent plan for adoption. The judgment that recited that plan included a diligent relative search and ongoing discussions with the current provider about being a long-term resource, presumably Z's maternal grandmother. Notwithstanding the adoption plan, the court subsequently entered a review judgment that directed DHS to begin Skype visits between father and Z.

In our review of this permanency judgment, the majority appropriately considers the principle from our seminal case about DHS's continuing responsibility to an incarcerated parent. In *State ex rel Juv. Dept. v. Williams*, 204 Or App 496, 503, 130 P3d 801 (2006), we held that DHS cannot be "excused based *solely* on a parent's incarceration, *without more*." (Emphases added.) In that case, father had been acquitted of all charges but one, and he was scheduled to be released about three and a half months after the permanency hearing. *Id.* at 500. We concluded that, given the father's "relatively short incarceration, the lack of any information about his relationship with the child, and his apparently imminent release from jail within four months of the permanency hearing," DHS's efforts were not reasonable. *Id.* at 507; *see also C. L. H.*, 283 Or App 313 (involving a father with a 23-month prison term where DHS failed to provide the programming that could have addressed the bases of jurisdiction with anger-management and parent programs).

We reached a different conclusion in *Dept. of Human Services v. S. W.*, 267 Or App 277, 340 P3d 675 (2014), where the father was sentenced to 45 months in prison, DHS had made earlier efforts when he was not incarcerated, but DHS had done little while he was subsequently incarcerated. Father criticized the efforts as not reasonable due to failure to maintain a greater connection with him. We responded that

> "father does not explain how, even if DHS had more contact with prison officials or called father more frequently, that would have furthered the statutory objective of allowing [the child] to safely return home. *** Nor is that a self-evident proposition, *in light of father's lengthy incarceration* at the time that [the child] needed stability and permanency."

*Id.* at 291 (emphasis added; internal quotation marks omitted). We recalled that, in considering whether the department's efforts were reasonable, the court is required to make the child's "health and safety the paramount concerns." *Id.* at 293. We reiterated, "Even if additional visits would have been desirable, father does not explain how they would have materially advanced his ability to reunify with [the child]." *Id.* We observed, "The fact that the statute requires DHS to make 'reasonable efforts' does not mean that the responsibility for developing a relationship between parent and child is the department's alone." *Id.* at 294. We recognized "that the length and circumstances of a parent's incarceration are factors that the juvenile court may consider in determining whether DHS has made 'reasonable efforts' to allow a child to 'safely return home.'" *Id.* (citing ORS 419B.476(2)(a)). We determined:

> "Thus, to prohibit the juvenile court from considering the *length of incarceration* in evaluating the reasonableness of DHS's efforts would be illogical, impractical, and inconsistent with the text of the statute, which expressly subordinates the question of 'reasonable efforts' to the 'paramount concern' of the 'ward's health and safety.' ORS 419B.476 (2)(a)."

*Id.* (emphasis added). We affirmed the permanency judgment that changed the plan from reunification to adoption.

Sadly, the facts in this case are more difficult than the precedents involving incarcerated parents. Here, father is sentenced to be incarcerated until Z is 32 years old. Thus, the juvenile court properly considered the *length* of the incarceration as important to the determination of reasonable efforts to reunify father and child. In addition, the juvenile court found that the aggravated circumstances of father's offenses are such that DHS does not need to make

further efforts to reunify.[3] Those things make this case much different than cases involving a parent with short-term incarceration.

Father was represented by counsel before the juvenile court and this court, and he did not intimate that DHS failed to make reasonable efforts because it did not ask him if he had "any ideas" for another caregiver. Nor did he offer one. Although DHS certainly bore the burden of persuasion as to reasonable efforts, DHS cannot be expected to disprove every unspoken negative. If there were a caregiver to assist father in raising the child, other than the paternal grandfather or maternal grandmother, then, to paraphrase *S. W.,* it was not "the department's role alone" to suggest who that caregiver might be—who might provide the home that father cannot provide. It was father's role, too. But, he did not say he might have "other ideas," and he did not suggest anyone. Consequently, the juvenile court decided the case presented to it. And, it did so correctly. The court turned to adoption to find a home, with a plan making a "diligent relative search" with "ongoing discussions with [the] current provider about being a long-term resource." In doing so, the juvenile court did not err.

The majority reverses and remands in order that DHS may discuss with father whether he has "any ideas" how to satisfy the conditions of providing a home and caregiver "from the confines of prison." 290 Or App at ___. In doing so, we have done more than decide whether the juvenile court had substantial evidence to have found reasonable efforts. *See* *Dept. of Human Services v. N. P.*, 257 Or App 633, 639, 307 P3d 444 (2013) (reviewing the evidence in the light most favorable to the juvenile court's disposition and assessing whether the record was legally sufficient to permit the outcome). When we remand to suggest DHS do something that even father did not ask—consideration of an unknown, alternate caregiver—we seem to exercise *de novo* review and without invitation. To do so is entirely unnecessary because father has the right, even after the

[3] Although I agree that the court's finding of aggravated circumstances is not retroactive, the finding nonetheless makes curious our remand for DHS to make up for *missed* efforts, when the juvenile court has made an unchallenged statutory determination that *further* efforts are not necessary.

permanency judgment, to proffer an alternate caregiver, if there truly were one, with a motion to dismiss jurisdiction entirely. *See T .L.*, 279 Or App at 692 (doing so). Thus, in the end, what we really do is delay the permanency plan, delay adoption, delay the certainty and stability that a child needs, and elevate procedural criticism over the paramount interests of a child.

With appreciation for the sincerity of the majority and the importance of a father's relationship with his son, I respectfully dissent.