IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of M. A. E.,
a Person Alleged to have Mental Illness.

STATE OF OREGON,
Respondent,

v.

M. A. E.,
Appellant.

Marion County Circuit Court
16CC02048; A164596

Michael J. Gillespie, Senior Judge.

Submitted February 5, 2018.

Alexander C. Cambier and Multnomah Defenders, Inc., filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Inge D. Wells, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

HADLOCK, P. J.

Affirmed.

HADLOCK, P. J.

Appellant seeks reversal of an order that continues her commitment to the Oregon Health Authority for an additional period not to exceed 180 days. The order is based on a determination by the trial court that appellant is unable to provide for her basic needs under the current version of ORS 426.005(1)(f)(B), which became effective on January 1, 2016, and that she is in need of further treatment. On appeal, appellant contends that the record does not support a determination that she is unable to provide for her basic needs. We disagree. As we explain below, the current version of ORS 426.005(1)(f)(B) sets out a new standard for a "basic needs" commitment. Although this is a close case, the record adequately supports the trial court's determination under that new standard. Accordingly, we affirm.

The trial court may continue the involuntary commitment of a person if it determines by clear and convincing evidence that "the person is still a person with mental illness and is in need of further treatment." ORS 426.307(6). A "[p]erson with mental illness" is defined as

> "a person who, because of a mental disorder, is one or more of the following:
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> "(A) Dangerous to self or others.
>
> "(B) Unable to provide for basic personal needs that are necessary to avoid serious physical harm in the near future, and is not receiving such care as is necessary to avoid such harm."

ORS 426.005(1)(f).

The underlying facts are not disputed by the parties. Appellant was civilly committed in April 2016. In February 2017, the state petitioned for appellant's continued commitment on the sole basis that appellant was unable to provide for her basic needs; it did not contend that she was dangerous to herself or to others. The trial court held a hearing in March 2017 and continued appellant's commitment at that time; it is that commitment that is the subject of this appeal. Dr. Zurflieh, who had been appellant's attending psychiatrist at the Oregon State Hospital since her admittance in April 2016, testified at the hearing. Zurflieh explained that

appellant, who was then 73 years old, has a diagnosis of schizophrenia and that she has persistent fixed delusions, including delusions that she has died and risen multiple times and that ammonia is put in her food and under her nose when she is eating. She also has other elaborate delusions about computers, space travel, the FBI, and Nazis. Zurflieh testified that appellant needs reminders to attend to her basic hygiene and that, without staff encouraging her, she likely would not bathe or change her clothes. Appellant lacks insight into her condition; she does not believe that she has a mental illness and does not believe that she needs or benefits from medications. She has been hospitalized at least 16 times in the Oregon State Hospital system.

During the hospitalization that is the subject of this appeal, appellant was given an antipsychotic medication, Haldol, which was administered intramuscularly because she refused to take any oral medications. Appellant's behavior improved with medication. She became more social, attended to her basic activities of daily living, ate and drank adequately, and was less likely to be angry and verbally abusive. When appellant was on a lower dose of medication in the fall of 2016, she was more irritable and angry. Zurflieh testified that she believed appellant would not take medication outside the hospital setting because appellant had told her that she would not take medication and that "she would rather stay [in the hospital] until she dies."[1]

Appellant had not lined up a place to stay if she were to be released. On the morning of the hearing, she told Zurflieh that if she were released she "will walk the streets until [she] die[s]." Later, appellant said to Zurflieh that she could use help in getting housing. Zurflieh described the unsuccessful efforts that the hospital had made to discharge appellant: The hospital arranged for people from various residential facilities to come in and interview appellant, but appellant told them all that she will refuse to take medication. Consequently, because appellant has a history of becoming aggressive and violent when she is not

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[1] At the hearing, appellant suggested that she might feel better if she drank holy water from a Catholic church and expressed an opinion that "[c]hemical meds are chemical straight-jackets."

taking medication, those facilities declined to accept her as a resident.

Zurflieh also testified that, in her opinion, appellant would be unable to provide for her basic needs if she were released. Appellant would decompensate in a matter of days to a week if she did not have injections of Haldol, according to Zurflieh, who stated her view that,

> "if [appellant] left the hospital and was not taking medications, she would ultimately decompensate psychiatrically, become much more psychotic, become accusatory, agitated and violent as she has in the past.
>
> "So providers such [as] homeless shelters, or soup kitchens, would not be willing to serve her if she presented in that state. It is likely that [she] may end up wandering the streets and having some very poor outcome."

Zurflieh also explained that it was her opinion that appellant would not be able to make arrangements for her hygiene or for eating and drinking outside of the hospital due to her mental disorder. As far as potential physical harm to appellant, Zurflieh stated, "I would imagine that if she were wandering the streets with the current climate conditions that she could come to serious harm within a matter of weeks." Zurflieh did not describe the "current climate conditions" or what she meant by "serious harm."

A licensed clinical social worker from the state hospital also testified. He explained that at the time appellant came to the hospital, she was receiving social security disability income, Medicaid, and Medicare. If appellant were released from the hospital, Medicare would cover medications, hospitalization, and inpatient-outpatient treatment, including doctor, licensed clinical social worker, nurse practitioner, and therapist services. Medicaid would also allow for other services, such as a residential placement. However, all of those services are something that appellant, or someone on her behalf, would have to make arrangements for—they are not automatic—and, as noted above, at the time of the hearing, multiple residential placements had been contacted and had declined to accept appellant as a resident.

The trial court stated that the question was whether the fact that appellant still suffers from mental disorder was "sufficient to demonstrate that she can't provide for her basic personal needs upon release." The court acknowledged the closeness of the question, but ultimately determined that the state had met its burden to show that appellant was unable to meet her basic needs, stating that

> "* * * she does with cuing her independently in the hospital, eat food, although she thinks it's poisoned. That she has delusions that affect those types of choices which are one of the concerns the court has.
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> "* * * * *
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> "The question is, basically, can she obtain food and shelter on her own. The evidence doesn't support any claim that it is not as a result of the lack of financial ability, because she has some demonstratable financial history, it is the mental illness that simply inhibits her to the extent that without medication she couldn't function.
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> "It is obvious today in this hearing in the courtroom that even with medication, her delusions continue. They continue to an extent that is fairly severe, actually. Although she has a plan, that plan substitutes * * * choices to self medicate in a way that will only exacerbate her mental health condition to the extent that it appears to this court that she would immediately suffer harm, because she will not be able to function in a self-controlled setting."

The trial court further determined that appellant was in need of continuing treatment and signed an order continuing her commitment for an additional indefinite period of time up to 180 days.

On appeal, appellant contends that the evidence in the record is insufficient to support a determination that, at the time of the hearing, she was unable to provide for her basic personal needs. Appellant asserts that only speculation leads to concerns that she would suffer serious physical harm because of an inability to obtain food, water, or shelter. In support of that contention, appellant argues that the evidence showed that she had a monthly income, which, she asserts on appeal, demonstrates that she had the financial means to obtain housing at a local motel or apartment.

Further, according to appellant, there was no evidence that she would not eat—rather, it was clear from her conduct at the hospital that she had decided to eat the food there despite her belief that it had been poisoned with ammonia. For those reasons, appellant asserts that there is insufficient evidence in the record to show that she would sustain serious physical harm in the near future from a lack of necessary food, water, shelter, or medical care.

In response, the state contends that the evidence is sufficient to meet the legal test contained in the current version of ORS 426.005(1)(f)(B), which became effective on January 1, 2016. According to the state, the language of the amended statute provides a different standard than that contained in the prior version of the statute. The parties' dispute, then, involves a question of statutory interpretation.

As with any statutory analysis, we begin with the text and context of the statute and look to legislative history to the extent it is useful to our analysis. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). By way of background, ORS 426.005(1)(e) (2013), *amended by* Or Laws 2015, ch 461 § 1; Or Laws 2015, ch 433 § 1, stated that a

> "'[p]erson with mental illness' means a person who, because of a mental disorder, is one or more of the following:
>
> "(A) Dangerous to self or others.
>
> "(B) Unable to provide for basic personal needs and is not receiving such care as is necessary *for health or safety*."

(Emphasis added.) To meet the standard that a person was unable to provide for basic needs necessary for health and safety, we had explained that the state was required to establish that

> "the individual, due to a mental disorder, is unable to obtain some commodity (*e.g.*, food and water) or service (*e.g.*, life-saving medical care) without which [the individual] cannot sustain life. The legislature's 'basic needs' commitment standard focuses on the capacity of the individual to survive, either through [the individual's] own resources or with the help of family or friends. While the state need not postpone commitment until the mentally ill person is on the brink of death, the purpose of the statute is to

> authorize involuntary commitment *only when an imminent threat to safe survival exists*."

State v. S. P., 282 Or App 177, 185, 387 P3d 443 (2016) (emphasis added; brackets in *S. P.*; internal quotation marks and citations omitted); *see State v. A. D. S.*, 258 Or App 44, 48, 308 P3d 365 (2013) (interpreting "necessary for health and safety" as "a likelihood that the person probably would not survive in the near future" (quoting *State v. Bunting*, 112 Or App 143, 146, 826 P2d 1060 (1992))); *State v. R. A.*, 209 Or App 647, 654, 149 P3d 289 (2006) (state did not prove "basic needs" standard when there was "no evidence in the record that appellant's near-term survival was jeopardized by his mental disorder").

In 2015, the legislature changed the "basic needs" definition of "person with mental illness" to state that such a person is "[u]nable to provide for basic personal needs *that are necessary to avoid serious physical harm in the near future*, and is not receiving such care as is necessary *to avoid such harm*." ORS 426.005(1)(f)(B) (emphases added). The state argues that a risk of "serious physical harm in the near future" is not the same as "a risk of death in the near future" or "a likelihood that the person probably would not survive in the near future." *See A. D. S.*, 258 Or App at 48-49. We agree with the state that the current statute sets out a new standard for a "basic needs" commitment.

The 2015 legislation changed the statute in two ways, one that relates to the type of risk the allegedly mentally ill person must face if not involuntarily committed ("serious physical harm") and one that relates to the time-frame in which that risk must exist ("in the near future"). We address those points in turn.

Because the legislature did not define the phrase "serious physical harm," we "assume that the legislature intended the words in the statute to have their plain and ordinary meanings." *State v. Clemente-Perez*, 357 Or 745, 763, 359 P3d 232 (2015). *Webster's Third New Int'l Dictionary* (unabridged ed 2002) defines "serious" as "such as to cause considerable distress, anxiety, or inconvenience : attended with danger <a ~ injury> <a ~ accident> * * *." *Id*. at 2073. The definition of "physical" includes "of or

relating to the body <~ strength>—often opposed to *mental*." *Id.* at 1706 (emphasis in original). And "harm" is defined as "physical or mental damage : INJURY <safety glass protects passengers from ~> * * *." *Id.* at 1034. Thus, the plain meaning of the phrase does not equate solely to a risk of *death*. Although a risk of death qualifies as one kind of risk covered by the phrase "serious physical harm," that phrase also encompasses a broader range of still serious, but less severe, risks.

Looking beyond the text of the amended basic-needs provision, the state makes a contextual argument, asserting that the amended language of the basic needs portion of the statute parallels our interpretation of the other subparagraph of the statute—ORS 426.005(1)(f)(A)—the "danger to self" provision. We have held that a "person is 'dangerous to self' [within the meaning of ORS 426.005(1)(f)(A)] if the person's mental disorder puts her at a nonspeculative risk of serious physical harm or death in the near future, absent commitment." *State v. S. E. R.*, 297 Or App 121, 122, 441 P3d 254 (2019). Under the state's theory, "the amendment [to subparagraph (B)] appears to mean that the difference between the danger-to-self and basic-needs analyses is that the former requires a likelihood that an individual will engage in behavior that causes her substantial physical harm, while the latter requires that she lack capacity to avoid that same type of harm." Although we need not decide if the legislature intended to create the distinction that is articulated by the state, we do conclude that, considering the amended language in the context of paragraph (1)(f) as a whole, the legislature intended for the same kinds of risks to be of concern for both subparagraphs in paragraph (f). That is, the test for the basic-needs analysis, like the requirement for the danger-to-self analysis, can be satisfied if there is a risk of serious physical harm *or* a risk of death.

The legislative history is undeveloped as to the legislature's intended meaning of the phrase "necessary to avoid serious physical harm." However, the legislative history does not persuade us that the legislature intended "serious physical harm" to mean something different from what the plain meaning of those words conveys. At the May 28, 2015, work session of the Senate Committee on Judiciary,

the committee read portions of our prior case law into the record with the stated intention of incorporating language from that case law and putting it into the statute. The committee specifically quoted the following language from three of our cases:

- "The statute does not express a standard by which the imminence of the threat to life is to be measured. A speculative threat *** is not itself sufficient." *State v. M. J.*, 174 Or App 74, 78, 23 P3d 990, *rev den*, 332 Or 316 (2001) (internal quotation marks and citations omitted).

- "[T]he state need not postpone action until the individual is on the brink of death. The goal of the commitment statute is safe survival, not merely the avoidance of immediate death." *State v. D. P.*, 208 Or App 453, 461, 144 P3d 1044 (2006) (internal quotation marks omitted).

- "There [must be] a likelihood that the person probably would not survive in the near future because the person is unable to provide for [their] basic personal needs." *State v. C. A.*, 176 Or App 342, 347, 31 P3d 475 (2001) (internal quotation marks omitted).

Video Recording, Senate Committee on Judiciary, HB 3347 A, May 28, 2015, at 19:10, http://oregon.granicus.com/MediaPlayer.php?view_id=24&clip_id=9826 (accessed Aug 27, 2019).

That the legislative committee quoted those passages reflects legislative concern about the ability of a person with a mental illness to *safely* survive in the absence of commitment. We conclude that the legislature meant that a person risks "serious physical harm," for purposes of ORS 426.005(1)(f)(B), if there is a nonspeculative threat that the person's inability to provide for basic needs means that the person will not safely survive without treatment—a concept that the legislature appears to have viewed as different from a threat of imminent death. Thus, the phrase "serious physical harm," in that context, means bodily harm that is serious enough that a person who suffers that harm is unsafe in the absence of commitment, treatment, or other amelioration of the physical condition.

We turn to the legislature's addition of the phrase "in the near future" to the statute. We incorporated that phrase into our interpretation of the basic-needs provision of the statute in 1992, *State v. Bunting*, 112 Or App 143, 146, 826 P2d 1060 (1992), and we have repeated that phrasing in more recent cases, including *C. A.*, which is cited in the legislative history of the 2015 legislation. 176 Or App at 347. Considering that wording choice in the context of the legislature's focus on the need for safe survival—and not merely avoidance of immediate death—we conclude that the legislature intended "in the near future" to mean something different from "imminent," a word that we had used in other cases decided under previous versions of the basic-needs statute. *See, e.g.*, *State v. T. W. W.*, 289 Or App 724, 730, 733, 410 P3d 1032 (2018) (applying 2013 version of ORS 426.005(1) and concluding that basic needs standard was not met because there was no evidence that the appellant's "refusal to eat posed an imminent threat to his health and safety"). That is, the risk of serious physical harm need not be *immediate* to justify involuntary commitment, so long as the person's mental disorder, and resulting lack of ability to provide for basic needs, puts the person at risk of such harm in the near future.

In sum, a person meets the "basic needs" definition of a "[p]erson with mental illness" under ORS 426.005 (1)(f)(B) if the person is unable to provide for his or her basic personal needs in a way that leaves the person at nonspeculative risk of "serious physical harm"—meaning that the person's safe survival will be compromised—in the near future, even though that risk is not imminent.

Application of the statute depends, of course, on the facts of each case. Here, the trial court was persuaded that appellant is mentally ill because her mental disorder causes her to be unable to provide for her basic personal needs. The court found that appellant has delusions that affect the choices she makes, such as eating food, and that those delusions continued and were "fairly severe" even with the medication that the hospital was giving to appellant against her wishes. The court also found that appellant "will not be able to function in a self-controlled setting," and that her mental

disorder "simply inhibits her to the extent that without medication she couldn't function."

The record supports those determinations. It includes evidence that appellant's mental disorder causes her to have significant delusions even when she is given prescribed medications. The record also includes evidence that appellant would not take medication if released and, as a result, would decompensate "within a matter of days to a week," becoming agitated, aggressive, and violent.

The real question in this case is whether the record supports a determination that such decompensation would leave appellant unable to provide for her basic personal needs in a way that would put her at risk of "serious physical harm" in the near future. On that point, the direct evidence is scanty. Zurflieh testified that appellant "may end up wandering the streets and having some very poor outcome" and that she could "come to serious harm." But Zurflieh did not explain what she meant by those statements, and those statements alone are not evidence of what "serious physical harm" appellant would be unable to avoid in the near future. ORS 426.005(1)(f)(B). In addition, although Zurflieh testified that, in her opinion, appellant would be unable to provide for her basic needs if she were released, that statement is a legal conclusion and not evidence of what would actually happen to appellant if she were released.

Nonetheless, other evidence in the record adequately—if barely—supports an inference that appellant would quickly suffer harm if she were released from the hospital, stopped taking her medications, and decompensated. Specifically, Zurflieh testified that providers like "soup kitchens" would not be willing to serve appellant if she appeared in the psychotic, agitated, and violent state that likely would result if she were released. Moreover, Zurflieh believes that appellant would not be able to make food arrangements for herself in that unmedicated state.

Viewed as a whole, the record thus supports a determination that, if appellant were released from the hospital, she would stop taking medication and, in no more than a week, become unable to obtain food, even if she might wish

to eat. Although no witness testified as to the harm associated with an absence of food, the trial court could infer, as a matter of common knowledge, that a person who literally does not eat will soon be at risk of suffering serious physical harm—of a sort that compromises the person's ability to safely survive—in the near future.[2] Accordingly, the record adequately supports the trial court's "basic needs" determination.

Affirmed.

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[2] The evidence that appellant would become unable to obtain *any* food distinguishes this case from others in which people's mental disorders would only complicate their ability or willingness to obtain food, result in a lessened (but not eliminated) intake of food, or result in unhealthy diets. *See, e.g.*, *State v. S. T.*, 294 Or App 683, 685-87, 432 P3d 378 (2018) (evidence that the appellant would not be able "to fix a proper meal" or "obtain[] healthy food" was insufficient to support a basic-needs commitment); *State v. T. W. W.*, 289 Or App at 733 (reversing basic-needs commitment under previous version of the statute where the appellant's delusions about food and water led him to eat only sporadically, but the record did not support an inference "that his near-term survival was imminently threatened by a lack of sufficient food or water").