

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

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

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

J. G. K.,
Appellant.

Douglas County Circuit Court
17JU06610; A169103 (Control)

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

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

J. G. K.,
Appellant.

Douglas County Circuit Court
18JU01237; A169104

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

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

J. G. K.,
Appellant.

Douglas County Circuit Court
18JU03228; A169105

Jason R. Thomas, Judge pro tempore.

Submitted May 30, 2019.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Judy C. Lucas, Assistant Attorney General, filed the brief for respondent.

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

LAGESEN, P. J.

Affirmed.

LAGESSEN, P. J.

In this consolidated juvenile dependency appeal, father challenges jurisdictional judgments with respect to his son B and daughter O, who were four and one, respectively, at the time of the hearing below. Father assigns error to the juvenile court's exclusion of evidence, on the ground of relevance, that father's sister, the children's paternal aunt, was prepared to assist him with parenting. On review for legal error, *see, e.g., Dept. of Human Services v. T. L.*, 279 Or App 673, 684-86, 379 P3d 741 (2016), we conclude that the juvenile court erred but that any error was harmless. We therefore affirm.

The juvenile court originally took dependency jurisdiction over O in August 2017. The Department of Human Services (DHS) later petitioned the juvenile court to (1) assert dependency jurisdiction over O on additional bases not included within its initial petition and (2) take dependency jurisdiction over B in the first instance. With respect to B, DHS alleged that dependency jurisdiction was warranted as to father because, among other circumstances, (1) father's residential instability; (2) his "incoherent thought processes" and inability to communicate about B's basic needs; (3) his failure to provide needed dental treatment for B; and (4) his inability to provide a safe and sanitary environment for B presently endangered B's welfare. With respect to O, DHS alleged that dependency jurisdiction was warranted as to father because, in addition to previously established jurisdictional bases, (1) father's residential instability and (2) "incoherent thought processes" and inability to communicate about O's basic needs endangered her welfare.

At the hearing, the children's paternal aunt was called as a witness. She previously had provided care for B for a short amount of time, and father asked her whether she would be in a position to take B into her care for a longer period of time. DHS objected to father's question on the grounds of relevance. The juvenile court sustained the objection. It ruled that the evidence that father sought to elicit about the aunt's capacity to care for B was "not relevant to jurisdiction" and would be "exclusively relevant to

a disposition which we have not got to yet but it certainly would be something we could consider at the disposition of the case should jurisdiction be established.”

Father then asked to make an offer of proof by questioning the aunt, and the juvenile court allowed him to do so. The aunt testified that the family had been discussing that either she or a friend of father’s who lives in Idaho would be able to care for B and help father “get on his feet.” She explained that she had the money for a bus ticket to Idaho for father and that they would figure out how to get B to Idaho if needed. In response to a question about where B would be living if he went to Idaho, the aunt responded that she and father’s friend had not yet discussed that. She also testified that father himself had only been a “little bit” involved in her discussions with his friend in Idaho.

The juvenile court ultimately determined that jurisdiction over B as to father was warranted on the grounds identified above. It also determined that DHS had established the identified additional bases for jurisdiction over O. Appealing those jurisdictional judgments, father assigns error to the juvenile court’s exclusion of the aunt’s testimony regarding her ability to assist in providing care for B. He contends that, under our decision in *T. L.*, the evidence was relevant to the question of whether dependency jurisdiction was warranted and that the juvenile court erroneously concluded otherwise. DHS responds that *T. L.* does not apply because that case involved a motion to dismiss jurisdiction, as distinct from an initial jurisdictional determination, and that the juvenile court otherwise correctly concluded that the evidence was not relevant to the question of dependency jurisdiction in the first instance. Alternatively, DHS contends that the exclusion of the aunt’s testimony was harmless. DHS points out that father’s offer of proof did not suggest that father had a plan in place for providing care for O, and that, as to B, any plan was so speculative that the excluded evidence had no likelihood of affecting the juvenile court’s decision.

The juvenile court was wrong when it excluded as irrelevant to dependency jurisdiction the evidence that father sought to elicit as to aunt’s willingness to assist with

B's care. Contrary to DHS's argument, the fact that *T. L.* involved a ruling on a motion to dismiss jurisdiction, rather than an initial determination of jurisdiction, does not render its holding inapplicable. The legal questions presented at an initial jurisdictional hearing are the same as those presented on any subsequent motion to dismiss dependency jurisdiction: Do the alleged (in the case of an initial jurisdictional hearing) or the established (in the case of a motion to dismiss jurisdiction) jurisdictional bases pose a "current threat of serious loss or injury" to the child and, if so, is there a "reasonable likelihood that the threat will be realized"? *T. L.*, 279 Or App at 678, 684-85 (internal quotation marks and citations omitted). In either instance, evidence that a parent has the assistance of friends and family members is relevant to the jurisdictional inquiry, because it is probative of how likely it is that the threat of harm or injury presented by the alleged or established jurisdictional bases will be realized. If the involvement of friends and family members sufficiently counters the risk to a child otherwise presented by a parent's deficits so that the child is safe, dependency jurisdiction is not warranted. As we explained in *T. L.*:

"Whether particular evidence is relevant will, of course, turn on the facts of each case. However, as a general matter, evidence of measures that parents have taken to mitigate any risk posed by particular jurisdictional bases will be probative of how likely it is that risk of harm posed by those jurisdictional bases will be realized [absent dependency jurisdiction]."

Id. at 685.

The juvenile court should have permitted father to develop the evidence regarding paternal aunt's ability to assist him in caring for B and taken that evidence into account in assessing whether any risks to which B was exposed were of the sort for which the law authorizes the court's exercise of dependency jurisdiction.

The juvenile court's error, however, was harmless. The testimony that father developed through his offer of proof shows that there was no concrete plan in place to help father parent B, let alone O—just that paternal aunt and father's friend in Idaho had discussed how to help father

get back on his feet. Given the ill-defined nature of paternal aunt's plan to assist father, we are confident that the juvenile court's erroneous exclusion of the evidence of that plan had no likelihood of affecting its jurisdictional determinations.

Affirmed.