

Comments

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An Analysis of Recent Oregon Court of Appeals Decisions Regarding Juvenile Dependency & Their Impact on Parental Constitutional Rights

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INTRODUCTION

In recent years, the Oregon Court of Appeals has overturned a number of juvenile court orders based on the Oregon juvenile dependency statute, which provides that a juvenile court has jurisdiction over a child when the child's circumstances or condition are such as to endanger him or her.¹ Juvenile dependency jurisdiction is the mechanism through which courts intervene to protect children who are at risk of abuse or neglect. Taking jurisdiction of a child makes the child a ward of the court.² This Comment discusses contemporary cases in an effort to analyze this ongoing trend and argues that the Oregon Court of Appeals is actively working to clarify the proper standard for taking jurisdiction over a child based on risk of abuse or neglect.³ An analysis of facts and holdings from recent cases demonstrates this trend and shows that the court of appeals is limiting the reach of the juvenile court in the absence of a direct risk to the child, thereby protecting parents' constitutional rights.

Part I provides an overview of parents' constitutional rights and the protective role the state plays on behalf of children. It also discusses the challenges courts face when determining whether to intrude into a family when allegations of abuse or neglect suggest that a child may be at risk. With this background in place, Part II begins by describing the Oregon Supreme Court's interpretation of the standard laid out in the juvenile dependency statute and briefly introduces the Oregon

¹ OR. REV. STAT. § 419B.100(1)(c) (2011) ("Except as otherwise provided in subsection (6) of this section and ORS 107.726, the juvenile court has exclusive original 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 ease of reading, this Comment refers to this statute as the "juvenile dependency statute."

² State *ex rel.* Juvenile Dep't of Multnomah Cnty. v. Gates, 774 P.2d 484, 487 (Or. Ct. App. 1989) ("Jurisdiction for a so-called 'conditions-and-circumstances' juvenile hearing is not just the power of the court to act. It also requires a factual determination that a child is dependent, which is the basis on which the court may make the child a ward of the court, that is, may place the child in the court's 'jurisdiction.'" (citation omitted)).

³ This Comment focuses solely on dependency decisions, including initial dependency decisions and decisions regarding continuing dependency. Cases analyzing termination of parental rights are not included.

Court of Appeals' subsequent decisions. A survey of recent court of appeals decisions that exemplify this trend follows; the cases are grouped according to the type of risk of harm, and the discussion focuses on the court of appeals' reasoning. Part II ends with an analysis of how the decisions clarify the standard for dependency jurisdiction and highlights the types of cases in which this trend is most evident. Part III revisits the constitutional issues and discusses how the court of appeals' decisions protect parents' fundamental constitutional rights. Finally, this Comment concludes with a determination that the Oregon Court of Appeals is taking an active role in clarifying the standard that juvenile courts should apply when considering a dependency petition, effectively limiting juvenile court jurisdiction in many cases where the risk to a child is inferred.

I

THE COMPETING INTERESTS OF PARENTS, CHILDREN, AND THE STATE IN JUVENILE COURT DEPENDENCY PROCEEDINGS

In order to help the reader understand the impact of juvenile court dependency jurisdiction decisions on parental rights, this Part provides a brief overview of constitutional rights in this context, along with a discussion of the juvenile court's role.

The U.S. Supreme Court has long recognized the fundamental right of parents to make decisions regarding the upbringing of their children,⁴ stating that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents.”⁵ Oregon's Juvenile Code recognizes “the rights of parents to direct the upbringing of their children, including, but not limited to, the right to: (a) [g]uide the secular and religious education of their children; (b) [m]ake health

⁴ *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“In light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); *Mueller v. Auker*, 700 F.3d 1180, 1186 (9th Cir. 2012).

⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Some of the earliest cases enunciating parents' rights dealt with parents' preference in the manner of their children's education. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish parents had the right to remove their children from school after eighth grade); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (explaining that a state law requiring parents to send children to public school interfered with parents' liberty). Later cases echoed parental rights in the context of medical treatment. *See, e.g., In re Green*, 292 A.2d 387, 392 (Pa. Super. Ct. 1972) (holding that “as between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is not immediately imperiled by his physical condition” (emphasis omitted)).

care decisions for their children; and (c) [d]iscipline their children.”⁶ Courts assume that, until proven otherwise, parents look out for and act in the best interest of their children.⁷ While the Supreme Court has not discussed parental rights in the context of dependency jurisdiction, its reasoning in other types of cases is informative.⁸ In analyzing a visitation statute, the Court stated that

so long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.⁹

Parents’ rights, however, are not absolute; sometimes they must yield to children’s rights or state interests.¹⁰ Because children are unable to protect themselves, states, in their role as *parens patriae*,¹¹ have a duty to protect children. In *Prince v. Massachusetts*, the Supreme Court held that a state could constitutionally intervene to protect children from being harmed by their parents.¹² “State officials may interfere in family matters to safeguard the child’s health, educational development and emotional well-being.”¹³ In other words, the state has a legitimate interest in protecting children when their well-being is at risk.¹⁴

⁶ § 419B.090(4).

⁷ *Troxel*, 530 U.S. at 68.

⁸ See *State ex rel. Dep’t of Human Servs. v. Shugars (In re K. Shugars, T. Shugars, and J. Shugars)*, 121 P.3d 702, 713 (Or. Ct. App. 2005) (considering the Supreme Court’s reasoning in *Troxel* when interpreting the Oregon juvenile dependency statute).

⁹ *Troxel*, 530 U.S. at 68–69.

¹⁰ See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (clarifying that parental rights do not extend to an absolute veto power over girls who seek abortion); *Prince*, 321 U.S. at 167 (stating that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare”). For a discussion of the balance of parents’ and children’s rights, see *Yoder*, 406 U.S. at 214 (recognizing that a state’s interest in promoting education must be balanced with parents’ interests); *Parker v. Hurley*, 514 F.3d 87, 102–03 (1st Cir. 2008) (holding that although parents have due process rights, their rights do not extend so far as to control their children’s school curriculum); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305 (2010).

¹¹ *Parens patriae* refers to the “power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child.” *In re Gault*, 387 U.S. 1, 16 (1967); see also Byrn & Ives, *supra* note 10.

¹² *Prince*, 321 U.S. at 167.

¹³ *In re Phillip B.*, 156 Cal. Rptr. 48, 51 (Cal. Ct. App. 1979).

¹⁴ *In re Cabrera*, 552 A.2d 1114, 1118 (Pa. Super. Ct. 1989) (“[T]he right of the parent to control every aspect of a child’s life is not absolute. When actions concerning a child

An introductory section of the Oregon Juvenile Code recognizes that children have a liberty interest in being free from abuse and maltreatment. It states that “children are individuals who have legal rights. Among those rights are the right to: (A) [p]ermanency with a safe family; (B) [f]reedom from physical, sexual or emotional abuse or exploitation; and (C) [f]reedom from substantial neglect of basic needs.”¹⁵

Juvenile jurisdiction law in dependency cases lies at the interface of the state’s interest in protecting children and the rights of parents to raise their children in the manner they choose. The Juvenile Code acknowledges this tension in a preliminary section outlining the policy behind the dependency provisions. It states:

It is the policy of the State of Oregon to safeguard and promote each child’s right to safety, stability and well-being. The State of Oregon recognizes the importance of a child’s relationships with parents, siblings, grandparents and other relatives.

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 to protect the rights and interests of children The provisions of this chapter shall be construed and applied in compliance with federal constitutional limitations on state action . . . with respect to interference with the rights of parents to direct the upbringing of their children¹⁶

Juvenile jurisdiction laws aim to protect children by ensuring their safety, even if that means intruding into the home.¹⁷ A frequently used jurisdictional provision provides that a “juvenile court has exclusive original jurisdiction in any case involving a [child] . . . whose condition or circumstances are such as to endanger the welfare of the [child].”¹⁸ Statutes like Oregon’s are broad and flexible to

have a relation to that child’s well-being, the state may act to promote these legitimate interests.”).

¹⁵ OR. REV. STAT. § 419B.090(2)(a) (2011).

¹⁶ § 419B.090(3)–(4).

¹⁷ In making a jurisdictional decision, the court determines only whether the child’s condition or circumstances are such that he “needs the court’s protection, not the nature or extent of the necessary protection.” State *ex rel.* Juvenile Dep’t of Deschutes Cnty. v. Vanbuskirk (*In re* Emily Wieskamp), 122 P.3d 116, 118 (Or. Ct. App. 2005). Decisions about whether a child remains in the home and decisions regarding termination of parental rights are made at later proceedings. See State *ex rel.* Juvenile Dep’t of Lane Cnty. v. Brammer (*In re* F.), 892 P.2d 720, 722 n.5 (Or. Ct. App. 1995) (“Our decision merely places the children under the protection of the juvenile court. Whether or not they remain in the home will be determined in a subsequent proceeding.”).

¹⁸ § 419B.100(1)(c). This is just one of many potential bases for the court to take jurisdiction over a child. See § 419B.100(1).

provide maximum child protection. Oregon courts, in the exercise of interpreting this broad statute, define limits on state authority.¹⁹

Because the juvenile courts' decisions regarding dependency jurisdiction have an immediate and often dramatic impact on families' rights, it is important to track the trends related to dependency jurisdiction and to analyze the impact that court decisions have on parental and family rights.

II

OVERVIEW AND ANALYSIS OF RECENT OREGON COURT OF APPEALS CASES

Oregon Court of Appeals decisions in recent years reflect a marked change in the interpretation of the scope of state authority conveyed by the Juvenile Code. Circumstances that historically might have justified juvenile court jurisdiction over a child despite only minimal evidence of risk to the child have been held insufficient. This Part begins with an analysis of the only Oregon Supreme Court case interpreting "conditions and circumstances" as used in the Oregon juvenile dependency statute.²⁰ It then analyzes a sampling of the recent court of appeals decisions applying that statute.²¹ In these cases, the court has significantly tightened the requirements for juvenile court assertion of dependency jurisdiction. These cases exemplify the ongoing trend.

A. *The Oregon Supreme Court's Decision in Smith*

In 1993, the Oregon Supreme Court issued its sole decision interpreting the juvenile dependency statute, *State ex rel. Juvenile Department of Lane County v. Smith*.²² The case involved a six-year-old boy whose father, on one occasion, had inappropriate sexual contact with the boy's twelve-year-old aunt in the family home.²³ The

¹⁹ See *State ex rel. Juvenile Dep't of Lane Cnty. v. Smith (In re Jonathan G. Smith)*, 853 P.2d 282, 285 (Or. 1993) (stating that the legislative history of the juvenile dependency statute "suggests that a general standard, involving the exercise of discretion by the juvenile court, would replace a legislative list of conditions or circumstances, the existence of which automatically would confer jurisdiction on a juvenile court").

²⁰ § 419B.100(1)(c).

²¹ It should be noted that other cases involving juvenile dependency jurisdiction were also heard during the time period discussed in this Comment, a few of which are referenced in footnotes. This Comment focuses on the cases that demonstrate the court of appeals tightening the standard for dependency jurisdiction.

²² *Smith*, 853 P.2d at 285.

²³ *Id.* at 283.

juvenile court took jurisdiction over the boy based on the risk of harm posed by his father.²⁴ The court of appeals reversed, concluding that the father's single incident of sexual conduct toward his son's aunt did not provide enough evidence to draw a valid inference that the boy was endangered.²⁵ The Oregon Supreme Court disagreed, however, and determined that the father's act of abusing another child in the family's home, plus additional evidence that the father used marijuana in his son's presence and had a history of mentally and verbally abusing his son, supported jurisdiction.²⁶ The court held that the father's conduct created a harmful environment for his son and thereby a risk of harm toward his son.²⁷

The *Smith* court interpreted the juvenile dependency statute to mean that “[i]f, after considering all the facts, the juvenile court finds that there is a reasonable likelihood of harm to the welfare of the child, the court may take jurisdiction.”²⁸ The court explained that in making this determination, a juvenile court must “consider the totality of the circumstances.”²⁹ Further, it stated that “[a] condition or circumstance need not involve the child directly, but may be found harmful by reason of creating a harmful environment for the child.”³⁰ The court based this holding on a review of legislative history, which demonstrated that the legislators intended to craft a flexible and broad provision that would protect children from a wide variety of harms.³¹ The Oregon Supreme Court rejected the court of appeals' interpretation of the statute—that “the propriety of state intervention depends on whether it is more likely than not that harm will come to a specific child.”³² The court concurred, however, with the court of appeals' position that no per se rules govern dependency jurisdiction, that harm does not have to actually befall a child in order to justify

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 286.

²⁷ *Id.* at 285.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 284–85.

³² *State ex rel. Juvenile Dep't of Lane Cnty. v. Smith*, 836 P.2d 173, 174 (Or. Ct. App. 1992) (en banc), *rev'd*, 853 P.2d 282 (Or. 1993).

jurisdiction, and that risk of harm can be sufficient to justify jurisdiction.³³

Subsequent to *Smith*, the court of appeals clarified and reiterated this rule in opinions reviewing assertions of juvenile dependency jurisdiction. The court of appeals case most commonly cited for the overarching rule is *State ex rel. Juvenile Department of Deschutes County v. Vanbuskirk*.³⁴ In *Vanbuskirk*, the court of appeals wrote: “The key inquiry in determining whether ‘conditions or circumstances’ warrant jurisdiction is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child. It is the *child’s* condition or circumstances that are the focus of the jurisdictional inquiry.”³⁵

In another key case, *State ex rel. Department of Human Services v. Shugars*, the court of appeals applied this fact-dependent standard.³⁶ The court explained that jurisdiction as to each child in a home must be a separate inquiry, and in that case the court found that the specific factual circumstances supported jurisdiction over only one of the children in the household.³⁷

Over the next five years, the court of appeals continued to refine and clarify the rule. In 2011, it crystalized the evolving standard in the case of *Department of Human Services v. A.F.*³⁸ Pulling from *Shugars* and another case, the court held that to support jurisdiction over a child, the child’s condition or circumstances must create a threat of serious loss or injury to the child, because to endanger means to threaten with serious loss or injury.³⁹ Further, the court said that the

³³ Compare *Smith*, 853 P.2d at 285 (rejecting “the proposition that any specific condition or circumstance *per se* does, or does not, establish the juvenile court’s jurisdiction,” and holding that a “condition or circumstance need not involve the child directly, but may be found harmful by reason of creating a harmful environment for the child”), with *Smith*, 836 P.2d at 175 (rejecting the state’s proposed *per se* rule and stating that harm to one child can provide a basis for jurisdiction over another child because the parent has created a harmful environment).

³⁴ *State ex rel. Juvenile Dep’t of Deschutes Cnty. v. Vanbuskirk (In re Emily Wieskamp)*, 122 P.3d 116, 118 (Or. Ct. App. 2005).

³⁵ *Id.* (citations omitted) (citing *Smith*, 853 P.2d at 282, and *State ex rel. Dep’t of Human Servs. v. Kamps (In re C.K.)*, 74 P.3d 1123, 1126 (Or. Ct. App. 2003)). For clarity, this Comment refers to the rule as stated in *Smith* and *Vanbuskirk* as “the *Smith* rule.”

³⁶ *State ex rel. Dep’t of Human Servs. v. Shugars (In re K. Shugars, T. Shugars, and J. Shugars)*, 121 P.3d 702, 710 (Or. Ct. App. 2005).

³⁷ *Id.*

³⁸ *Dep’t of Human Servs. v. A.F. (In re T.F., K.F., and R.F.)*, 259 P.3d 957, 961 (Or. Ct. App. 2011).

³⁹ *Id.*; see also *Shugars*, 121 P.3d at 713 (“Endanger connotes exposure to ‘danger,’ which generally involves ‘the state of being threatened with serious loss or injury[.]’”

evidence must show that the threat exists at the time of the jurisdictional hearing and not merely that it had existed at some point in the past.⁴⁰ The *A.F.* standard clarified the broad *Smith* standard, limiting the court's jurisdictional reach to cases with evidence of a *current* risk of serious loss or injury.⁴¹

B. Oregon Court of Appeals Decisions

The Oregon Court of Appeals refined the *Smith* rule into the *A.F.* rule through a series of decisions beginning in 2005, and more recent decisions demonstrate a continuing clarification effort. This section surveys exemplary recent decisions by topic, emphasizing points of change in the court's reasoning or in how the standard is applied. The sections cover cases concerning: (1) harm to one child as a basis for jurisdiction over another child; (2) a parent's history of sex abuse, failure to complete sex offender treatment, or possession of pornography; (3) a child's exposure to domestic violence; (4) a parent's substance abuse; (5) poor parenting decisions; and (6) the inability to parent independently.

When a parent has already harmed a child, courts consistently take jurisdiction over the child if he or she continues to be in danger. The court of appeals has stated that it is "axiomatic that the physical abuse of a child endangers the child's welfare and, thus, furnishes a basis for the exercise of dependency jurisdiction."⁴² Therefore, a history of physical abuse against the child in question is almost always a basis for dependency jurisdiction because the risk of continuing physical abuse endangers the child's welfare.⁴³ For example, the court of appeals held that jurisdiction over a seventeen-month-old child was appropriate because the State presented evidence of severe bruising

(alteration in original)); *State v. S.T.S. (In re R.T.S.)*, 238 P.3d 53 (Or. Ct. App. 2010) ("The state must prove by a preponderance of the evidence, that there is a *current* risk of harm and not simply that the child's welfare was endangered at some point in the past." (citing *State ex rel. Juvenile Dep't of Jackson Cnty. v. S.A. (In re I.R.A.)*, 214 P.3d 851, 851 (Or. Ct. App. 2009))).

⁴⁰ *A.F.*, 259 P.3d at 961.

⁴¹ *Id.* In one 2012 case, the court of appeals briefly discussed the characterizations of the rule in *Smith* and *A.F.*, saying that "[t]he two formulations complement each other and correctly state the standard." *Dep't of Human Servs. v. D.M. (In re I.T. and A.C.)*, 275 P.3d 971, 973 (Or. Ct. App. 2012).

⁴² *G.A.C. v. State ex rel. Juvenile Dep't of Polk Cnty. (In re G.A.C.)*, 182 P.3d 223, 228 (Or. Ct. App. 2008).

⁴³ *Id.*

on his face and head, which an expert witness stated resulted from non-accidental physical blows to the child's head and face by an adult hand.⁴⁴ Like evidence that a child has been physically injured, proof of ongoing sexual abuse of a child typically justifies jurisdiction over that child.⁴⁵ For example, the court of appeals held that jurisdiction was proper over a fourteen-year-old girl who alleged that her father, who had previously been investigated for sexual abuse and had authored a graphic novel about child rape, had sexually abused her over the course of three years.⁴⁶

In addition to recognizing the obvious risk presented by a history of abuse of the child in question, the court of appeals has likewise found sufficient grounds for jurisdiction in less clear circumstances. The following section discusses cases where the evidence shows that a parent has harmed another child, but not the child before the court.

1. Harm to One Child as a Basis for Jurisdiction over Another Child

Whether a parent's history of physically or sexually abusing another child, even if not his or her own child, is sufficient to establish a current threat of harm to his or her child depends on the facts and circumstances involved.⁴⁷ Cases based on this kind of fact pattern demonstrate the evolution of the law from the Oregon Supreme Court decision in *Smith* to current applications of the law. Under current case law, factors in this determination include the type of harm or abuse and the similarity of circumstances between the child who was abused and the child in question.⁴⁸ In addition, although risk to one child in a home may indicate risk to other children or siblings in the home, it does not always do so, particularly when the abused or at-risk child has special needs.⁴⁹

⁴⁴ State *ex rel.* State Office for Servs. to Children and Families v. Imus (*In re* James Imus and Jared Imus), 39 P.3d 213, 219 (Or. Ct. App. 2002).

⁴⁵ State *ex rel.* Juvenile Dep't of Klamath Cnty. v. T.S. (*In re* K.S., A.S., B.S., and N.S.), 164 P.3d 308, 313–14 (Or. Ct. App. 2007). Note, however, that a single incident of sexual abuse may not be sufficient evidence of a risk of harm, absent other evidence. *See* Dep't of Human Servs. v. M.E. (*In re* M.S. and M.S.), 297 P.3d 17, 25–26 (Or. Ct. App. 2013).

⁴⁶ T.S., 164 P.3d at 313–14.

⁴⁷ State *ex rel.* Dep't of Human Servs. v. Kamps (*In re* C.K.), 74 P.3d 1123, 1127 (Or. Ct. App. 2003); State *ex rel.* Juvenile Dep't of Lane Cnty. v. Brammer (*In re* F.), 892 P.2d 720 (Or. Ct. App. 1995).

⁴⁸ T.S., 164 P.3d at 314.

⁴⁹ State *ex rel.* Dep't of Human Servs. v. Shugars (*In re* K. Shugars, T. Shugars, and J. Shugars), 121 P.3d 702, 710 (Or. Ct. App. 2005).

In three cases decided after *Smith* but prior to 2005, the court of appeals did not focus on proof of current risk to a child as recent case law makes clear is necessary.⁵⁰ In 1995, the court of appeals reversed a juvenile court determination that a mother's conviction for sexually abusing her young son's friend in their family home did not constitute proof of a condition or circumstance dangerous to her own children.⁵¹ The court of appeals held that the mother's past exploitation of the boy in her home was sufficient to show "a reasonable likelihood of harm" to her children.⁵² The court emphasized that the law does not require a child himself to actually be injured as a prerequisite to jurisdiction.⁵³ However, while there was no doubt that the mother posed a danger to her son's friend, there was no evidence that the mother or father posed a current threat of harm to their own children.⁵⁴ Therefore, if a case with similar facts came before the court today, the court would likely find insufficient evidence of a current threat of harm to her children and would deny jurisdiction.

In a 2002 case, *State ex rel. Juvenile Department of Lane County v. Parshall*, the court of appeals held that the *Smith* standard supported jurisdiction over a baby whose father had previously abused another infant child.⁵⁵ The father served prison time for seriously physically abusing his infant, but when he later fathered another child, the juvenile court held that there was no evidence of current danger to the newborn.⁵⁶ However, the court of appeals determined that the father's history, even though he had participated in some rehabilitation programs, was a sufficient basis to establish jurisdiction over the new baby.⁵⁷ The court was unconvinced that participation in rehabilitation programs "mitigated the *potential risk*" to the baby's welfare.⁵⁸ The court did not discuss any evidence that demonstrated a *current* threat of serious harm, which the current standard would require.⁵⁹

⁵⁰ See *Brammer*, 892 P.2d 720; *State ex rel. Juvenile Dep't of Lane Cnty. v. Parshall (In re Uriah Ni'em Carter)*, 34 P.3d 713, 713–14 (Or. Ct. App. 2001); *Kamps*, 74 P.3d 1123.

⁵¹ *Brammer*, 892 P.2d at 721.

⁵² *Id.* at 722.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Parshall*, 34 P.3d at 713–14.

⁵⁶ *Id.*

⁵⁷ *Id.* at 715.

⁵⁸ *Id.* (emphasis added).

⁵⁹ *Id.* at 714 (discussing father's compliance with all post-prison supervision requirements).

Therefore, if an analogous case came before the court of appeals today, the court would likely hold that without independent evidence of a current threat of harm, the absence of rehabilitation evidence does not justify jurisdiction.⁶⁰

Similarly, in 2003, the court of appeals held that evidence of serious physical abuse to a fifteen-month-old child was sufficient to support jurisdiction over a younger sibling.⁶¹ Although the State was unable to prove which adult abused the child, the court did determine that the abuse occurred while the child was in the care of the father and his girlfriend.⁶² The court determined that the physical abuse suffered by the child justified jurisdiction over the father's other child, the six-month-old baby of the father and his girlfriend, even though there was no evidence that the baby had been abused.⁶³ The court echoed *Smith*, holding that there was "a reasonable likelihood that [the baby] could suffer harm in the future as well" and that the absence of abuse to date was not dispositive.⁶⁴

However, in 2005, the court of appeals limited the reasoning that harm to one child justifies jurisdiction over all children in a household, and emphasized the need for an individualized analysis for each child.⁶⁵ In *Shugars*, evidence that the parents had neglected a child with special needs did not warrant jurisdiction over the child's siblings who were not similarly disabled.⁶⁶ The neglected child had special needs stemming from behavioral and emotional disorders, and her parents neglected to follow crucial medical advice about her mental health needs.⁶⁷ While this neglect formed a basis for jurisdiction as to that particular child, the court of appeals said that the evidence did not show that the child's siblings, who did not have special needs, were endangered—there was no evidence that the parents failed to follow through on medical advice regarding the other

⁶⁰ Cf. *Dep't of Human Servs. v. B.B. (In re K.B.)*, 274 P.3d 242, 244–45 (Or. Ct. App. 2012) (holding that father's failure to complete sex offender treatment did not form a basis for jurisdiction over his children).

⁶¹ *State ex rel. Dep't of Human Servs. v. Kamps (In re C.K.)*, 74 P.3d 1123, 1127 (Or. Ct. App. 2003).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *State ex rel. Dep't of Human Servs. v. Shugars (In re K. Shugars, T. Shugars, and J. Shugars)*, 121 P.3d 702, 707–08 (Or. Ct. App. 2005).

⁶⁶ *Id.* at 709.

⁶⁷ *Id.* at 706, 709.

children.⁶⁸ The court contrasted this reasoning with that employed by the court in *Smith*, noting that it makes sense to “postulate that ‘harm to one child presents a risk of similar or related harm to other children in the same household’ . . . in cases involving sexual or physical abuse,” but that cases involving neglect of a special needs child must be approached differently.⁶⁹

Shortly after the court of appeals decided *Shugars*, it decided a case concerning the impact of a parent’s sexual abuse of one child on other children in the household. The court upheld a juvenile court order asserting jurisdiction over three brothers based in part on an assumption that they were at risk from their father, who had sexually abused their sister over a period of years.⁷⁰ In addition, it concluded that the mother’s failure to protect her daughter from the father also endangered the boys.⁷¹ In so holding, the court of appeals reiterated the comment from *Shugars* that “it is easy to infer the likelihood of harm to a child by past physical or sexual abuse of other children in the home.”⁷² Whereas neglect of the special needs child in *Shugars* did not amount to sufficient risk of harm to other children in the home, sexual abuse of one child can endanger other children in the home.

As demonstrated by these decisions, whether jurisdiction over a child based on risk of harm inferred from harm to another child is justified depends upon the facts and circumstances. An independent inquiry for each child in the household is required.

2. A Parent’s History of Sex Abuse, Failure to Complete Treatment, or Possession of Pornography

As previously discussed, cases involving a recent history of sex abuse of the child at issue or a similarly situated child in the home are typically straight forward. However, when a risk of sexual abuse is inferred solely from scant supporting evidence, the court conducts an assessment of the evidence provided to determine if such an inference

⁶⁸ *Id.* at 709.

⁶⁹ *Id.* at 710.

⁷⁰ *State ex rel. Juvenile Dep’t of Klamath Cnty. v. T.S. (In re K.S., A.S., B.S., and N.S.)*, 164 P.3d 308, 315 (Or. Ct. App. 2007). The juvenile court also found that the mother put the boys at risk of emotional harm by talking about the sexual abuse charges and the ongoing case in front of them. *Id.* at 312.

⁷¹ *Id.* at 315.

⁷² *Id.*

is reasonable. This is exemplified by cases in which the State argues that risk to a child should be inferred from a parent's history of sex abuse, failure to complete sex offender treatment, or possession of pornography.

In a notable 2013 case, the court of appeals relied on expert testimony to find that a stepfather did not pose a risk of harm to his stepchildren or his biological children even though he had allegedly sexually assaulted one of his stepdaughters four years prior.⁷³ The court focused on the length of time since the incident, the fact that it was an isolated incident, and the testimony of a psychologist and sex therapist, who determined that the father presented no risk to any children in the home.⁷⁴ The court referenced a prior case in which it stated that “[j]urisdiction cannot be based on speculation that a parent’s past problems persist at the time of the jurisdictional hearing in the absence of any evidence that the risk, in fact, remains.”⁷⁵

Similarly, in a 2012 case, the court of appeals held that a father’s failure to complete voluntary sex abuse treatment did not constitute sufficient evidence of risk to justify jurisdiction over a child.⁷⁶ The father had sexually abused two children when he was a child himself and had physically and sexually abused his girlfriend’s children when he was about twenty years old.⁷⁷ He was sentenced to prison in 1996 and, upon his release, participated in—but did not complete—voluntary sex offender treatment programs.⁷⁸ In 1998, he viewed child pornography.⁷⁹ Thereafter, he had four children.⁸⁰ The State failed to present evidence that the father had abused any child in the sixteen years prior to the 2011 dependency hearing or that his sex offender condition was not in remission.⁸¹ Nevertheless, the juvenile

⁷³ Dep’t of Human Servs. v. M.E. (*In re* M.S. and M.S.), 297 P.3d 17, 26 (Or. Ct. App. 2013).

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting Dep’t of Human Servs. v. M.Q. (*In re* G.Q.), 292 P.3d 616, 622 (Or. Ct. App. 2012)).

⁷⁶ Dep’t of Human Servs. v. B.B. (*In re* K.B.), 274 P.3d 242, 249 (Or. Ct. App. 2012). *But see* Dep’t of Human Servs. v. M.H. (*In re* V.H.), 300 P.3d 1262, 1263–64, 1273–74 (Or. Ct. App.) (finding that a child was at risk of serious loss or injury when the child’s father had juvenile and criminal convictions for sex abuse, failed to complete treatment, and after experts testified that he had a significant probability of reoffending—even potentially against his own biological child), *review denied*, 308 P.3d 205 (Or. 2013).

⁷⁷ *B.B.*, 274 P.3d at 244–45.

⁷⁸ *Id.* at 245.

⁷⁹ *Id.* at 246.

⁸⁰ *Id.*

⁸¹ *Id.* at 247.

court held that the father's history of sexual abuse presented a current risk of danger to his children because he had not completed voluntary treatment and had viewed child pornography thirteen years prior.⁸² The juvenile court relied in part on observations made by various professionals in the late 1990s regarding their opinions of the father's potential future behavior.⁸³

The court of appeals reversed, holding that the court could not properly draw this inference because neither the father's distant personal history of abusive behavior and pornography viewing nor his failure to complete voluntary treatment established a current risk to his children, absent other supporting evidence.⁸⁴ The court stated that "there is no presumption that father's failure to complete treatment some 11 years before the jurisdictional hearing, by itself, makes father an 'unremediated sex offender,' who in turn would be presumed dangerous to his children."⁸⁵ Further, the juvenile court's reliance on old evaluations was misplaced; the evaluations did not demonstrate that the father posed a current risk of harm to his children.⁸⁶

In 2013, the court of appeals further clarified how evidence of prior sex offenses impacts the jurisdictional analysis. The court held that a father's prior criminal record and his failure to complete sex offender treatment did not constitute a current risk of harm to a child.⁸⁷ In so holding, the court relied on two basic principles: that "a person's status as a sex offender does not *per se* create a risk of harm to a child" and "there is no presumption that a party's status as an 'untreated' sex offender presents a safety risk to a child."⁸⁸ Without evidence demonstrating how one's sex offender status or failure to complete treatment endangers a child, jurisdiction on this basis is not proper.⁸⁹

Just as failure to complete sex abuse or offender treatment does not in itself justify jurisdiction, neither does possession of pornography.

⁸² *Id.* at 246.

⁸³ *Id.* at 248–49.

⁸⁴ *Id.* at 246.

⁸⁵ *Id.* at 249.

⁸⁶ *Id.* at 248–49 ("[T]he 14-year gap between [a licensed clinical social worker's] evaluation and the jurisdictional hearing is a temporal canyon, and the 1996 evaluation does not establish that father currently poses a risk of harm to the children.").

⁸⁷ *Dep't of Human Servs. v. G.J.R. (In re Z.M.R.)*, 295 P.3d 672, 676–77 (Or. Ct. App. 2013).

⁸⁸ *Id.* at 676.

⁸⁹ *Id.*

In two recent cases, the court of appeals considered whether possession of pornography alone is sufficient to prove that children are at risk of sex abuse, rejecting the claim in both.⁹⁰ In *A.F.*, the juvenile court determined that a father's possession of adult pornography and a few partially downloaded files of child pornography endangered his children, finding a risk that they could be exposed to the pornography and a risk that the father could become sexually abusive.⁹¹ The court of appeals reversed, citing expert testimony in the case to the effect that while possession of pornography may be a red flag about a person's potential to become an abuser, possession itself is not determinative.⁹² Further, the court pointed out that there was no evidence that the father had possessed pornography since the initial allegation, thus the risk that the children would be exposed to pornography no longer existed.⁹³

The court applied the *Smith* standard, holding that in order to have jurisdiction over a child, "the child's condition or circumstances must give rise to a threat of serious loss or injury to the child."⁹⁴ Further, the court specified that the threat must be current.⁹⁵ Therefore, even if possession of pornography could possibly be a basis for jurisdiction, the lack of evidence in this case that there was "a current risk of such exposure for the children at the time of the hearing" prohibited jurisdiction on that basis.⁹⁶ Likewise, the State failed to present sufficient evidence that the father's history of possessing pornography created a risk that he would abuse his children.⁹⁷ In formulating its reasoning and holding, the court of appeals drew from previous decisions that emphasized the need for a current risk, and for an adequately serious risk, effectively creating a limit on the reach of juvenile court jurisdiction based on an inference of harm.⁹⁸

⁹⁰ See Dep't of Human Servs. v. R.V. (*In re* C.P.), 287 P.3d 1281, 1281 (Or. Ct. App. 2012); Dep't of Human Servs. v. A.F. (*In re* T.F., K.F., and R.F.), 259 P.3d 957, 962 (Or. Ct. App. 2011).

⁹¹ *A.F.*, 259 P.3d at 961.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*; see also Dep't of Human Servs. v. R.V. (*In re* C.P.), 287 P.3d 1281, 1281 (Or. Ct. App. 2012) (holding that possession of pornography within reach of the child was not a basis for jurisdiction when the risk of exposure did not exist at the time of the hearing; on appeal, the state conceded this error).

⁹⁷ *A.F.*, 259 P.3d at 961.

⁹⁸ *Id.*; see State v. S.T.S. (*In re* R.T.S.), 238 P.3d 53 (Or. Ct. App. 2010); State *ex rel.* Juvenile Dep't of Jackson Cnty. v. S.A. (*In re* I.R.A.), 214 P.3d 851, 851 (Or. Ct. App.

These decisions show that in cases involving a risk of sex abuse, the court cannot infer current risk from acts of sex abuse many years prior, from a parent's failure to complete sex offender treatment, or from possession of pornography because these factors are insufficient on their own to create a risk of harm.

3. *A Child's Exposure to Domestic Violence*

The court of appeals has also considered other situations in which a child may be at risk because of a parent's conduct. Exposure to domestic violence is such a situation because a custodial parent who has been in a violent relationship may continue to be involved in violent relationships. The court of appeals addressed this issue in three recent cases, concluding that exposure to domestic violence can form the basis for jurisdiction over a child if the domestic violence is continuing or is very likely to continue in the future.⁹⁹

In a 2010 case, the juvenile court found that witnessing physical violence between parents can cause harm to children.¹⁰⁰ The court of appeals held that jurisdiction was justified over both a four-year-old child, who hid and was frightened during his parents' fights, and his infant brother, who was born after the parents separated.¹⁰¹ Although the parents were not living together at the time of the hearing, the on-again, off-again nature of the parents' relationship supported the juvenile court's decision to take jurisdiction because the court expected the couple to reunite, and there was a "reasonable likelihood that [the father's physical and verbal abuse] would continue were the couple to again reunite."¹⁰²

Similarly, in 2013, the court of appeals found sufficient evidence of a current threat of harm to two young children who were exposed to domestic violence even though the most recent incident had occurred eighteen months prior to the hearing.¹⁰³ The mother feared the father, had previously obtained a protective order against him, and

2009); State *ex rel.* Dep't of Human Servs. v. Shugars (*In re* K. Shugars, T. Shugars, and J. Shugars), 121 P.3d 702, 713 (Or. Ct. App. 2005).

⁹⁹ Dep't of Human Servs. v. L.G. (*In re* L.H.), 281 P.3d 681, 684 (Or. Ct. App.), *aff'd as modified*, 290 P.3d 19 (Or. Ct. App. 2012); *S.T.S.*, 238 P.3d at 57.

¹⁰⁰ *S.T.S.*, 238 P.3d at 57.

¹⁰¹ *Id.* at 57–58.

¹⁰² *Id.* at 57.

¹⁰³ Dep't of Human Servs. v. C.F. (*In re* E.F.), 308 P.3d 344, 346–47 (Or. Ct. App.), *review denied*, 314 P.3d 964 (Or. 2013).

allegedly could not leave the house at her will.¹⁰⁴ The court concluded that the mother's "behavior demonstrated a pattern that is common in domestic violence, which presents a risk to the children."¹⁰⁵ Therefore, the court upheld the juvenile court's order taking jurisdiction over the children.¹⁰⁶

In contrast, in a 2012 case, the court of appeals held that jurisdiction based on exposure to domestic violence is not proper when "there is no evidence . . . that mother is currently in a relationship with an individual who might pose a risk to [the child]."¹⁰⁷ In light of domestic violence between the mother and father, the juvenile court took jurisdiction of the couple's infant son.¹⁰⁸ In a later review hearing when the court considered whether the evidence supported contested jurisdiction over the child, the juvenile court continued jurisdiction even though the mother testified that the circumstances that originally justified jurisdiction no longer existed.¹⁰⁹ On appeal, the court found that the mother and child no longer had contact with the father and that the evidence suggested that the mother was unlikely to reconcile with him.¹¹⁰ Therefore, the court said, the evidence did not support the juvenile court's conclusion that the child was still at risk of harm from exposure to domestic violence.¹¹¹ Whereas the juvenile court determined that the mother's failure to recognize the potential harm to the child if the couple reconciled constituted a risk of harm, the court of appeals held that this potential risk did not satisfy the requirement for a current risk of harm.¹¹²

As demonstrated by these cases involving domestic violence, parental behavior can, but does not always, create an environment in which harm to a child is likely to occur. Similarly, a parent's substance abuse can potentially create a harmful environment.

¹⁰⁴ *Id.* at 347.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Dep't of Human Servs. v. L.G. (*In re* L.H.), 281 P.3d 681, 684 (Or. Ct. App.) (emphasis omitted), *aff'd as modified*, 290 P.3d 19 (Or. Ct. App. 2012).

¹⁰⁸ *Id.* at 682.

¹⁰⁹ *Id.* at 683.

¹¹⁰ *Id.* at 684.

¹¹¹ *Id.*

¹¹² *Id.*

4. A Parent's Substance Abuse

A parent's abuse of drugs or alcohol may endanger a child because the parent may actively harm the child or fail to provide adequate care to the child. A series of cases dating at least to 1989 addresses whether a parent's history of substance abuse or current abuse constitutes per se evidence that a child is at risk. In 1989, the court of appeals stated that while a parent's drug use is a proper consideration when determining jurisdiction, without specific allegations of how the drug use endangers the child, it is insufficient to establish jurisdiction.¹¹³ More recent cases have developed the principle that a parent's history of alcohol abuse is not a sufficient basis for juvenile dependency jurisdiction when there is no current danger to the child.¹¹⁴ The court explained, "[e]vidence of, *inter alia*, how recently and frequently the parent uses alcohol and the effects of that use on the parent's conduct would be necessary to determine whether the parent's alcohol use creates a 'reasonable likelihood of harm to the welfare' of his or her child."¹¹⁵ Similarly, evidence that a child has been exposed to an intoxicated parent is not alone sufficient for jurisdiction; the evidence must show how that exposure endangers the child.¹¹⁶

In two 2009 cases, the court of appeals reversed juvenile court orders taking jurisdiction based on a parent's history of alcohol abuse. In *State ex rel. Department of Human Services v. D.T.C.*, the father had a history of alcohol abuse and acting out when drinking, and he had not successfully completed treatment programs.¹¹⁷ Based on this evidence, the juvenile court found that alcohol abuse interfered with his ability to parent and that he was unable to provide a safe home for his children.¹¹⁸ The court of appeals disagreed.¹¹⁹ It said that a

¹¹³ *State ex rel. Juvenile Dep't of Marion Cnty. v. Randall (In re Rebecca and Michelle Randall)*, 773 P.2d 1348, 1349 (Or. Ct. App. 1989) ("Although we agree with the state that a parent's use of controlled substances is a proper consideration in determining whether a child should be made a ward of the state, that allegation is insufficient by itself to establish that the child's welfare is endangered.").

¹¹⁴ *State ex rel. Dep't of Human Servs. v. D.T.C. (In re D.A.C.)*, 219 P.3d 610, 615 (Or. Ct. App. 2009).

¹¹⁵ *Dep't of Human Servs. v. A.F. (In re T.F., K.F., and R.F.)*, 259 P.3d 957, 962 (Or. Ct. App. 2011) (citing *State ex rel. Juvenile Dep't of Deschutes Cnty. v. Vanbuskirk (In re Emily Wieskamp)*, 122 P.3d 116, 118 (Or. Ct. App. 2005)).

¹¹⁶ *Dep't of Human Servs. v. D.S.F. (In re M.R.F.)*, 266 P.3d 116, 122 (Or. Ct. App. 2011).

¹¹⁷ *D.T.C.*, 219 P.3d at 612–13.

¹¹⁸ *Id.*

parent's abuse of alcohol, "without more . . . is not inherently or necessarily more harmful or dangerous than other varieties of parenting that would, by no stretch of the imagination, justify state intervention into the parent-child relationship."¹²⁰ The court of appeals also held that the father's failure to complete recommended treatment programs did not justify jurisdiction because the State did not prove that the father was currently abusing alcohol, was currently at risk of relapsing, or even that relapse would endanger the children.¹²¹

In the second case, *State v. A.L.M.*, the father's history of alcoholism had been resolved by the time of a dependency review hearing.¹²² The juvenile court had originally ordered jurisdiction over the child because the mother, who had legal custody, left the child with unfit caregivers and because the father's alcoholism prevented him from protecting the child from their mother.¹²³ At the dependency review hearing, the juvenile court determined that continued jurisdiction was appropriate.¹²⁴ The court of appeals reversed, holding that the child was not within the courts' jurisdiction because the father was willing and able to care for the child.¹²⁵ It found no evidence in the record that the child's welfare was endangered at the time of the hearing because the father was not currently abusing alcohol, and the mother presented no current danger because she was no longer involved with the child.¹²⁶

The court of appeals has similarly and repeatedly held that a parent's history of drug abuse alone does not justify jurisdiction.¹²⁷ Most recently, the court of appeals held that a mother's history of marijuana use did not justify jurisdiction over her three children because there was no evidence of drug use in the three months leading up to the dependency review hearing.¹²⁸ The juvenile court erred in relying solely on the mother's past drug use: without evidence of

¹¹⁹ *Id.* at 615.

¹²⁰ *Id.*

¹²¹ *Id.* at 615–16.

¹²² *State v. A.L.M. (In re N.E.C.)*, 220 P.3d 449, 451 (Or. Ct. App. 2009).

¹²³ *Id.*

¹²⁴ *Id.* at 450.

¹²⁵ *Id.* at 451.

¹²⁶ *Id.* at 451–52.

¹²⁷ *See, e.g., Dep't of Human Servs. v. G.E. (In re N.E.)*, 265 P.3d 53, 54 (Or. Ct. App. 2011).

¹²⁸ *Dep't of Human Servs. v. C.J.T. (In re C.E.W.)*, 308 P.3d 307, 310–11 (Or. Ct. App. 2013).

current drug use, there was “no evidence in the record establishing a nexus between mother’s marijuana use and any current threat of harm to the children.”¹²⁹

Similarly, in *Department of Human Services v. G.E.*, the court of appeals reversed jurisdiction over a child whose mother, according to the juvenile court, had unresolved substance abuse problems.¹³⁰ The mother had a substance abuse problem in the past and, although she participated in treatment, she did not complete the program.¹³¹ The court of appeals reversed, finding that the evidence did not show that the mother currently suffered from substance abuse and that there was no evidence that a parent’s substance abuse alone endangers a child.¹³²

Likewise, in 2012, the court of appeals held that jurisdiction over a child was not properly supported when the juvenile court speculated that the father used drugs without actual evidence of such use.¹³³ The father had a history of drug abuse, but no evidence suggested that his drug use was ongoing at the time of the hearing.¹³⁴ Further, no evidence supported an inference that the father might relapse and use drugs in the future in such a way that would endanger the child.¹³⁵ The court of appeals held that “the juvenile court erred in asserting jurisdiction on the basis of any concern about [the father’s] potential for relapse.”¹³⁶

Similarly focusing on the need for evidence of a current risk of harm, the court of appeals reversed a juvenile court dependency order over children whose father allowed them to have contact with their mother, who had a substance abuse problem.¹³⁷ The juvenile court opined that as the children aged they would become more aware of their mother’s problems, and this knowledge could harm them

¹²⁹ *Id.* at 310.

¹³⁰ *G.E.*, 265 P.3d at 54.

¹³¹ *Id.*

¹³² *Id.*; see also *Dep’t of Human Servs. v. N.P. (In re T.P.)*, 296 P.3d 606, 609 (Or. Ct. App. 2013) (explaining that the evidence did not support jurisdiction over a child whose father had a history of drug and alcohol abuse but was clean at the time of the dependency hearing), *aff’d on reh’g*, 307 P.3d 444 (Or. Ct. App. 2013).

¹³³ *Dep’t of Human Servs. v. M.Q. (In re G.Q.)*, 292 P.3d 616, 623 (Or. Ct. App. 2012).

¹³⁴ *Id.* at 622.

¹³⁵ *Id.*

¹³⁶ *Id.* at 623.

¹³⁷ *Dep’t of Human Servs. v. D.S.F. (In re M.R.F.)*, 266 P.3d 116, 122–23 (Or. Ct. App. 2011).

psychologically.¹³⁸ The court of appeals, however, focused on the absence of evidence of any current danger to the children from their father's actions or from contact with their mother.¹³⁹ The father acted protective of the children, allowing the mother to stay with him and the children only when she was sober.¹⁴⁰ While acknowledging that the mother's substance abuse had an effect on the family, the court stated that "[m]any children face the reality of a parent's illness or death, and limited exposure to that reality—as the children here have had and will likely continue to have—does not constitute endangerment."¹⁴¹ The court also observed that, although the mother had a history of repeated substance abuse and treatments, there was no evidence that she had ever abused the children.¹⁴² Because there was no evidence that exposure to the mother put the children at risk of a serious loss or injury, the court of appeals determined that jurisdiction was not proper.¹⁴³

Finally, in a 2010 case, the court of appeals held that even proof of a parent's current use of marijuana did not support jurisdiction, standing alone.¹⁴⁴ The juvenile court had ordered jurisdiction because the mother's drug dependency made her unable to care for the children.¹⁴⁵ However, the court of appeals reversed because there was no evidence that the mother used marijuana around the children or otherwise made the home unsafe for them.¹⁴⁶ Because there was "no evidence that the mother's substance abuse was a 'condition or circumstance' that 'endanger[ed] the welfare' of her children," jurisdiction was not proper.¹⁴⁷ The court distinguished the mother's drug use in this case from the father's drug use in *Smith*, stating that "the juvenile court did not find that mother had used drugs in the presence of children, or in the home, or that her drug use created a harmful environment for the children."¹⁴⁸

¹³⁸ *Id.* at 123 ("Awareness of a parent's substance abuse problems does not, in and of itself, give rise to a risk of serious loss or injury.").

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 124.

¹⁴⁴ Dep't of Human Servs. v. C.Z. (*In re* K.A.M.), 236 P.3d 791, 794–95 (Or. Ct. App. 2010).

¹⁴⁵ *Id.* at 793.

¹⁴⁶ *Id.* at 794–95 (alteration in original).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 794.

While exposure to a parent's drug use alone is typically insufficient to warrant jurisdiction, it can form a basis for jurisdiction in combination with other risk factors. In the 2009 case of *State ex rel. Juvenile Department of Yamhill County v. N.W.*, the court of appeals affirmed a juvenile court decision ordering jurisdiction over a one-year-old child whose mother, who had a history of drug abuse, knowingly took him to a house where drug use was common and allowed him to have contact with a known registered sex offender.¹⁴⁹ The State presented evidence that the mother knew that drugs were actively being used in the house while they were there, and that she made no attempt to keep the child from having contact with the known sex offender.¹⁵⁰ The court of appeals held that although each of the mother's actions might not independently justify jurisdiction, taken in combination they did.¹⁵¹ The court stated that "the danger that is inherent in contact with untreated sex offenders is heightened by the use of controlled substances,"¹⁵² and the mother's complacency and willingness to put the child in this situation endangered the child.¹⁵³

These court of appeals decisions demonstrate that a parent's use of alcohol or drugs does not typically justify jurisdiction, although it can when combined with other risk factors.

5. Poor Parenting Decisions

The holding in *N.W.* does not mean, however, that parents who allow their children to be exposed to unsavory situations or who make other bad parenting decisions are necessarily putting their children at sufficient risk of harm to support juvenile court jurisdiction. The Oregon Court of Appeals has stated that a court cannot base jurisdiction simply on a theory that a child's parents have not been model parents, as being a model parent is not the standard.¹⁵⁴

¹⁴⁹ *State ex rel. Juvenile Dep't of Yamhill Cnty. v. N.W.* (*In re* L.W. and T.J.P.), 221 P.3d 174, 179–80 (Or. Ct. App. 2009).

¹⁵⁰ *Id.* at 179.

¹⁵¹ *Id.*

¹⁵² *Id.* at 178.

¹⁵³ *Id.* at 180.

¹⁵⁴ *State ex rel. Dep't of Human Servs. v. Shugars* (*In re* K. Shugars, T. Shugars, and J. Shugars), 121 P.3d 702, 710 (Or. Ct. App. 2005).

This point is illustrated by the 2012 case of *Department of Human Services v. D.M.*¹⁵⁵ The case concerned a child whose mother had a history of substance abuse, discussed being an escort and a dancer in front of the child, allowed the child to receive gifts from an adult man, and did not supervise the child's access to the Internet.¹⁵⁶ The mother did not contest the court's initial assertion of jurisdiction, but at a later review hearing she argued that the evidence did not support continuing jurisdiction because her substance abuse issues were resolved.¹⁵⁷ The juvenile court disagreed, holding that the mother's conduct and poor judgment regarding boundaries with men showed that she was not adequately supervising the child.¹⁵⁸ The court of appeals reversed, stating that "[e]xposure to a parent's unconventional but not unlawful lifestyle, receipt of lavish gifts from a parent's friends or relatives, and an unspecified amount of unsupervised access to the Internet do not justify state intervention into a parent's fundamental right to the care, control, and custody of her children."¹⁵⁹ The court discussed the failure of the State to provide sufficient evidence that the mother's supervision "exposed the girl to 'a reasonable likelihood of harm,' much less a current threat of serious loss or injury."¹⁶⁰

In other cases involving poor parenting decisions, the court of appeals has similarly found no basis for juvenile court jurisdiction. In two of the most interesting cases, juvenile courts based jurisdiction on a parent's failure to complete drug treatment programs, and in both the court of appeals reversed.¹⁶¹ The court concluded that although it may be beneficial for the parent to complete such programs, taking

¹⁵⁵ Dep't of Human Servs. v. D.M. (*In re* I.T. and A.C.), 275 P.3d 971, 973–74 (Or. Ct. App. 2012).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 972.

¹⁵⁸ *Id.* at 974.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; cf. Dep't of Human Servs. v. T.A.H. (*In re* D.H.), 306 P.3d 790, 791 (Or. Ct. App. 2013) (holding that jurisdiction was proper over children when a mother left an infant with unfit caregivers, resulting in fractures and serious injuries; failed to protect her children from domestic violence of the father; failed to supervise the children; and did not understand their basic needs).

¹⁶¹ See Dep't of Human Servs. v. B.B. (*In re* K.B.), 274 P.3d 242, 244–45 (Or. Ct. App. 2012) (explaining how a father's failure to complete sex offender treatment did not form a basis for jurisdiction over his children); State *ex rel.* Dep't of Human Servs. v. D.T.C. (*In re* D.A.C.), 219 P.3d 610, 615 (Or. Ct. App. 2009) (explaining how a father's failure to complete alcohol treatment program did not constitute evidence of current risk of harm to children).

jurisdiction because of a parent's failure to do so is not necessarily in line with the statutory requirement of basing jurisdiction on the *child's* condition or circumstance.¹⁶²

Another example in the context of continuing jurisdiction is seen in *Department of Human Services v. A.R.S.*¹⁶³ The juvenile court had originally taken jurisdiction of a child at birth because the mother displayed residential instability and had chosen unsafe partners, among other factors.¹⁶⁴ Five years and multiple appeals later, these two factors were the only remaining bases for jurisdiction.¹⁶⁵ The evidence showed that the mother had recently moved multiple times, but that her current residence was approved for visitation.¹⁶⁶ Additionally, the mother had recently lived with a partner who threatened violence against himself, but she moved out and ended the relationship immediately thereafter.¹⁶⁷ The court of appeals determined that although the evidence showed that the mother moved multiple times, "residential instability is not a sufficient basis for jurisdiction without a showing that it creates a risk of harm to the child," and the State failed to show such evidence.¹⁶⁸ Further, although the mother had lived with a partner who may have been unsafe, she reacted appropriately by immediately leaving that person, and "any conclusion that [the] child was at risk because of mother's choice of [boyfriend] is speculative."¹⁶⁹ Because there was insufficient evidence of a risk of harm from the mother's living situation, and because risk from her prior boyfriend was speculative at best, the court determined that jurisdiction was no longer warranted by law.¹⁷⁰

Also in 2013, the court of appeals determined that a mother's negative comments toward one child, which made the child feel less liked than her sibling, did not demonstrate a risk of serious injury or loss.¹⁷¹ While occasionally calling the child "stupid" or "brat" may

¹⁶² See *D.T.C.*, 219 P.3d at 614–15.

¹⁶³ Dep't of Human Servs. v. A.R.S. (*In re N.S.*), 310 P.3d 1186 (Or. Ct. App. 2013).

¹⁶⁴ *Id.* at 1189.

¹⁶⁵ *Id.* at 1187–88, 1190.

¹⁶⁶ *Id.* at 1190–91.

¹⁶⁷ *Id.* at 1191.

¹⁶⁸ *Id.* at 1194.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Dep't of Human Servs. v. M.E. (*In re M.S. and M.S.*), 297 P.3d 17, 26–27 (Or. Ct. App. 2013).

indicate that the mother was not an ideal parent, it did not alone support jurisdiction over the child.¹⁷² This principle is also seen in the court's decision in *A.F.*,¹⁷³ where a father's possession of pornography did not justify jurisdiction, and in the many cases in which the court has held that a parent's alcohol or drug use is not sufficient to justify jurisdiction.¹⁷⁴

6. *Inability to Parent Independently*

In another group of cases, juvenile courts have asserted jurisdiction over children whose parents were mentally disabled, based on findings that the parents, acting alone, could not adequately care for their children.¹⁷⁵ Because the evidence in these cases showed that the parents were not raising children alone, but instead had the support of other adults, the court of appeals reversed.

In the 2011 case of *Department of Human Services v. B.L.J.*, the mother had mild mental retardation and was not able to care for her young children alone.¹⁷⁶ The mother, however, lived with an adult couple who were willing and able to help raise the children.¹⁷⁷ The juvenile court held that the mother's cognitive problems impaired her ability to parent, and that her reliance on other adults did not alleviate this concern because her living arrangement with them could change.¹⁷⁸ The court of appeals reversed that decision because the law does not require that a parent be able to raise her children independently.¹⁷⁹ The court of appeals focused on the children's

¹⁷² *Id.*

¹⁷³ Dep't of Human Servs. v. A.F. (*In re* T.F., K.F., and R.F.), 259 P.3d 957, 961 (Or. Ct. App. 2011).

¹⁷⁴ See, e.g., Dep't of Human Servs. v. C.Z. (*In re* K.A.M.), 236 P.3d 791, 794–95 (Or. Ct. App. 2010).

¹⁷⁵ For more in-depth information on the implications of mental illness for mothers in dependency and custody proceedings, see Jennifer E. Spreng, *The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State*, 17 DUKE J. GENDER L. & POL'Y 189 (2010).

¹⁷⁶ Dep't of Human Servs. v. B.L.J. (*In re* N.E.F.-J.), 268 P.3d 696, 699 (Or. Ct. App. 2011).

¹⁷⁷ *Id.* at 698.

¹⁷⁸ *Id.* at 699.

¹⁷⁹ *Id.* The Court of Appeals has applied the same logic to permanency hearings. See Dep't of Human Servs. v. A.R.S. (*In re* N.S.), 278 P.3d 91, 92–93 (Or. Ct. App. 2012) (“In [*B.L.J.*], we held, relying on *Smith*, that the mother's inability to parent her children without the assistance of a couple with whom the mother was living and who were willing to support the mother in her parenting did not demonstrate a reasonable likelihood of harm to the welfare of the children sufficient to warrant juvenile court jurisdiction. It necessarily

condition and determined that the evidence did not show a current risk of harm to the children.¹⁸⁰ Not only were there other capable adults present and assisting with the children's care, there was no evidence that the mother would be on her own with the children.¹⁸¹ Further, the State failed to present sufficient evidence that the mother would harm the children even if she did live independently.¹⁸²

The court applied this reasoning again in 2012, in a case involving a mother who was mentally delayed and a father who was uneducated and had some mental health problems.¹⁸³ The mother received in-home assistance with daily living skills.¹⁸⁴ The mother and father initially did not know how to care for their newborn, but they received instruction from Healthy Start and from nurses at the hospital, and they had family members who were willing and able to assist them.¹⁸⁵ Despite the parents' access to assistance, the juvenile court ordered jurisdiction over the baby based on the mother's developmental delay, the father's mental health concerns and anger issues, and the father's failure to "present[] himself as a parenting resource" or "demonstrate that he is able to provide the infant with the necessary care."¹⁸⁶ The court of appeals, however, held that the evidence did not show that the father was unable to function as a parent or that he currently had mental health or anger issues.¹⁸⁷ Further, even though the mother was developmentally delayed, the court of appeals found that "the evidence [was] legally insufficient to support the trial court's finding that mother [was] 'not able to meet the basic needs of the child, due [to] her delays and medications.'"¹⁸⁸ Because the State did not show a risk of harm to the child as required by *Smith*, jurisdiction based on inadequate parenting experience and mental disabilities was not justified.¹⁸⁹

follows that the determination of a parent's progress toward reunification following the establishment of jurisdiction also may not be based on that requirement.").

¹⁸⁰ *B.L.J.*, 268 P.3d at 700 ("DHS must prove that there is a *current* risk of harm.").

¹⁸¹ *Id.* at 699–700.

¹⁸² *Id.*

¹⁸³ Dep't of Human Servs. v. S.P. (*In re K.P.*), 275 P.3d 979, 982 (Or. Ct. App. 2012).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 983–84.

¹⁸⁶ *Id.* at 983.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 989 (first two alterations added).

¹⁸⁹ *Id.* ("As we have recently emphasized, the burden is on the state to show that harm is, in fact, present, and the state failed to meet that burden here." (citation omitted) (internal quotation marks omitted)).

The court previously used this reasoning in a 2009 case, in which the State alleged that an alcoholic father was unable to care for his children adequately.¹⁹⁰ The evidence showed that the father was attempting to quit drinking, and more importantly, even if he did drink, his sober girlfriend was always present to ensure that the children were properly cared for.¹⁹¹ While the allegation that the father had, on occasion, passed out from drinking concerned the court of appeals, the father's sober girlfriend's consistent presence and assistance with caring for the children alleviated the concern that the father could not adequately care for the children alone.¹⁹²

These opinions demonstrate that the court of appeals is not willing to infer a risk of harm to a child simply because a parent has mental delays, particularly when others are available to help with the child rearing. The further application of this reasoning to an alcoholic parent shows that the court's focus is properly on the child's condition or circumstance, not the characteristics of the parent.

C. Analysis of Fact Patterns and Court Decisions

This review of cases demonstrates that the Oregon Court of Appeals has clarified the standard for determining jurisdiction, from the broad standard originally enunciated by *Smith*, to the more clear standard enunciated in *A.F.* The court's decisions since 2005 have further clarified the application of the governing statute in many different contexts. The court now analyzes whether there is a current risk of serious injury or loss in looking to see if there is a reasonable likelihood of harm to a child.

The court of appeals' decisions clarify when jurisdiction over one child is warranted based on jurisdiction over another child in the household and differentiate between cases in which there is a direct risk of serious harm and cases in which harm is inferred.¹⁹³

Focusing on the current risk of harm, the court of appeals properly questions the appropriateness of juvenile court jurisdiction based on past parental behavior.¹⁹⁴ Even when the type of behavior could

¹⁹⁰ *State ex rel. Dep't of Human Servs. v. D.T.C. (In re D.A.C.)*, 219 P.3d 610, 615 (Or. Ct. App. 2009).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Compare *State ex rel. Dep't of Human Servs. v. Shugars (In re K. Shugars, T. Shugars, and J. Shugars)*, 121 P.3d 702, 709 (Or. Ct. App. 2005), with *State ex rel. Dep't of Human Servs. v. Kamps (In re C.K.)*, 74 P.3d 1123, 1127 (Or. Ct. App. 2003).

¹⁹⁴ *Dep't of Human Servs. v. B.B. (In re K.B.)*, 274 P.3d 242, 246 (Or. Ct. App. 2012).

provide a valid basis for jurisdiction if it were ongoing, behavior that occurred years earlier does not justify jurisdiction absent indications of current risk.¹⁹⁵

The court of appeals also focuses its analyses on the conditions and circumstances affecting the children rather than the conditions or attributes of the parents. A parent's history of sexual abuse or possession of pornography does not in and of itself justify jurisdiction; there must be evidence of how the parent's conduct endangers the child.¹⁹⁶ Further, the mere potential for harm in the future is often not a valid basis for jurisdiction because the risk of harm is not current, as demonstrated by the recent decisions involving exposure to domestic violence.¹⁹⁷

As with other parental behavior, a history of drug or alcohol abuse, absent other factors, does not justify jurisdiction.¹⁹⁸ "The fact that a parent engages in behavior that could negatively affect his or her parenting does not necessarily mean that the behavior can serve as a basis for juvenile court jurisdiction over a child."¹⁹⁹ As long as a parent is caring for his child adequately, state intervention is not necessary and should not occur.²⁰⁰

Additionally, a parent's inability to parent independently is not a proper basis for jurisdiction when there is no evidence of a reasonable likelihood of harm to the child.²⁰¹ Rather than focusing on the personal challenges faced by a mentally deficient parent, the proper analysis is whether, "*under the totality of the circumstances*, there [is] a reasonable likelihood of harm to the welfare of the children."²⁰²

Taken together, the cases surveyed in Part II demonstrate how the Oregon Court of Appeals is working to clarify the standard for

¹⁹⁵ *Id.*

¹⁹⁶ Dep't of Human Servs. v. A.F. (*In re* T.F., K.F., and R.F.), 259 P.3d 957, 961 (Or. Ct. App. 2011).

¹⁹⁷ Dep't of Human Servs. v. L.G. (*In re* L.H.), 281 P.3d 681, 684 (Or. Ct. App.), *aff'd as modified*, 290 P.3d 19 (Or. Ct. App. 2012).

¹⁹⁸ Dep't of Human Servs. v. D.T.C. (*In re* D.A.C.), 219 P.3d 610, 614 (Or. Ct. App. 2009).

¹⁹⁹ *Id.*; *see also* Dep't of Human Servs. v. C.Z. (*In re* K.A.M.), 236 P.3d 791, 794–95 (Or. Ct. App. 2010).

²⁰⁰ *Troxel v. Granville*, 530 U.S. 57, 66 (2000); OR. REV. STAT. § 419B.090 (2011).

²⁰¹ Dep't of Human Servs. v. B.L.J. (*In re* N.E.F.-J.), 268 P.3d 696, 699–700 (Or. Ct. App. 2011).

²⁰² *Id.* at 700 (alteration omitted) (quoting *State ex rel. Juvenile Dep't v. Vanbuskirk (In re Emily Wieskamp)*, 122 P.3d 116, 118 (Or. Ct. App. 2005)) (internal quotation marks omitted).

juvenile dependency jurisdiction. While it is proper to infer risk of harm when there is a current danger of physical or sexual abuse to a child, the court clarified that it is often not proper to infer risk based on parental behavior or indirect harm. The cases surveyed in this Comment are exemplary of an ongoing trend in juvenile dependency law.

Although the court has not often enunciated this goal, by limiting dependency jurisdiction in cases such as those involving parents who have a history of substance abuse, parents who rely on other adults for parenting assistance, parents who possess pornography, and parents whose conduct may make their parenting less than ideal, the court of appeals is protecting parents' constitutional rights.

III

THE IMPACT OF RECENT COURT DECISIONS ON PARENTAL CONSTITUTIONAL RIGHTS

The recent Oregon Court of Appeals decisions have defined a delicate balance, protecting children while also protecting parents' constitutional rights. Although the court does not typically speak to constitutional rights in its opinions, the court undoubtedly weighs its decisions' impact on parental constitutional rights.

As discussed previously, parents have a fundamental right to make decisions regarding the care, custody, and control of their children, as well as to the companionship of their children.²⁰³ The "right to family integrity includes the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state."²⁰⁴ So long as a parent adequately cares for his or her children, the state should not get involved in private family matters.²⁰⁵ This fundamental interest does not evaporate simply because a parent is not a model parent.²⁰⁶

Because parents' interests in child rearing and relationships are fundamental, family rights are always implicated in dependency cases.²⁰⁷ Over half of the cases that the Oregon Court of Appeals has

²⁰³ *Troxel*, 530 U.S. at 66.

²⁰⁴ *In re Juvenile Appeal* (83-CD), 455 A.2d 1313, 1318 (Conn. 1983) (internal quotation marks omitted).

²⁰⁵ *Troxel*, 530 U.S. at 68.

²⁰⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

²⁰⁷ *Dep't of Human Servs. v. J.R.F. (In re D.S.)*, 273 P.3d 87, 91 (Or. Ct. App. 2012) ("[D]ue process rights of parents are always implicated in the construction and application

reviewed in the last twenty years resulted in reversal based on insufficient evidence. Even though an order of jurisdiction does not always result in removal of the child, a determination against jurisdiction prevents removal of the child. Taking jurisdiction over a child based on insufficient evidence unfairly intrudes into family privacy, and the appeals process is onerous and further intrusive. Moreover, unwarranted state interference with family integrity violates substantive due process.²⁰⁸ Even if due process is satisfied and there is no constitutional violation, the state's imposition still affects the family. Further, even if a dependency decision is reversed, parents can suffer consequences from the proceeding, such as employment restrictions, limitations on involvement with children's activities, and a negative bias in future interactions with the state.²⁰⁹

However, although the intrusion on parents' rights may end up being unwarranted, the state must look out for children's right to be free from abuse.²¹⁰ Children, like their parents, have the right to family integrity.²¹¹ When the juvenile court orders jurisdiction over a child based on insufficient evidence, the child's right to family integrity is violated. The dependency process can be damaging to a child, damage that should be avoided in the absence of sufficient cause to proceed.²¹² With such vital rights on the line, the state's

of the provisions of ORS chapter 419B.”). *See also* State *ex rel.* Juvenile Dep't of Lane Cnty. v. Brammer (*In re F.*), 892 P.2d 720, 722 n.5 (Or. Ct. App. 1995) (discussing how decisions regarding juvenile jurisdiction are just that—regarding jurisdiction; the decision whether to remove a child from the home is completely independent).

²⁰⁸ Crowe v. Cnty. of San Diego, 608 F.3d 406, 441 (9th Cir. 2010).

²⁰⁹ *See* State *ex rel.* Juvenile Dep't of Washington Cnty. v. L.B. (*In re A.B.*), 226 P.3d 66, 68–69 (Or. Ct. App. 2010) (“[The parents] argued, among other things, that father has suffered and will continue to suffer adverse employment consequences as a result of the finding of jurisdiction; that mother and father would be restricted in their involvement in child's life as far as activities at school, such as accompanying child on field trips; and that the jurisdictional finding and underlying DHS administrative findings would be used against them if there were any need in the future for DHS to intervene.”).

²¹⁰ OR. REV. STAT. § 419B.090(a) (2011).

²¹¹ *Id.*

²¹² *See* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 417 (2005) (discussing that through investigations of child abuse, “in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help”).

decision regarding dependency jurisdiction has a potentially tremendous impact on both the parents and the child.²¹³

One can certainly understand the juvenile court's tendency to err on the side of caution for the benefit of protecting children, but the impact on children and their parents from erroneous decisions cannot be ignored. To protect the rights of families, the focus of the jurisdiction analysis must remain on the conditions or circumstances of *the child*. Poor parental choices or less than ideal parental behavior do not equate to endangering a child's welfare without sufficient evidence, and only *current* risks of harm should be considered in determining jurisdiction. The court of appeals' recent trend to limit the cases in which jurisdiction can be based on an inferred risk of harm protects families' constitutional rights.

CONCLUSION

The Oregon Court of Appeals has actively worked to clarify the proper standard for taking jurisdiction over a child on the basis of risk of abuse or neglect, as exemplified in the preceding sample of cases. The standard evolved case-by-case from the broad "reasonable likelihood of harm" rule in *Smith*, to the "current risk of serious loss or injury" rule crystalized in *A.F.* In further clarifying this standard, the court has limited the juvenile courts' reach when jurisdiction is based on an inferred risk. By doing so, the court of appeals is protecting parental rights while ensuring that the state can continue to effectively protect children.

As more juvenile court dependency orders are successfully appealed, parents will have even greater incentive to appeal aggressively, particularly in cases without evidence of past or current physical or sexual abuse and where the court is relying on an inference of risk or is basing jurisdiction on a parent's conduct. The juvenile courts must be cognizant of this and should evaluate each case very closely to determine whether there truly is sufficient evidence to warrant jurisdiction over a child before intruding into a family. The court of appeals' recent clarification of the law should provide the juvenile courts with helpful instruction regarding the amount and type of evidence required in various circumstances.

²¹³ See *Emerson v. City of New York*, 740 F. Supp. 2d 385 (S.D.N.Y. 2010); Nicole Stednitz, *Ending Family Trauma Without Compensation: Drafting § 1983 Complaints for Victims of Wrongful Child Abuse Investigations*, 90 OR. L. REV. 1423, 1432–33 (2012).