

Guardians *ad litem* in Juvenile Court Dependency Cases

Ethics Opinion No. 2005-159
Applicable Statutes
Appellate Court Decisions

Prepared and presented by Julie McFarlane, Jeff Carter, and Michael Livingston
August 15, 2011

Formal OSB Ethics Opinion No. 2005-159

In a juvenile court dependency proceeding:

Q: May a lawyer for a parent ethically request a GAL for the client?

A: **No, qualified.**

Q: When a lawyer acts as a GAL, does the lawyer have the same ethical duties, obligations, and powers as in a regular lawyer-client relationship?

A: **No, qualified.**

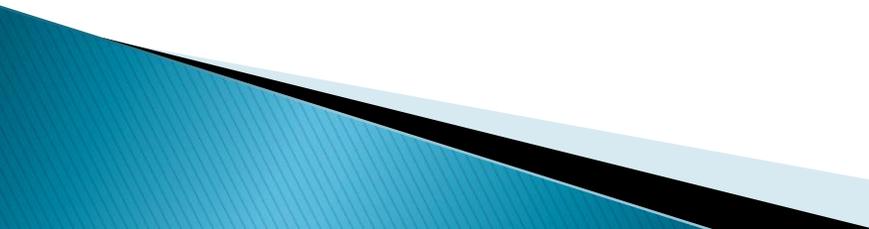
Q: After the appointment of the GAL for the mentally ill parent, is the lawyer obligated to take direction from the GAL?

A: **Yes.**

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(continued)

“* * * [I]n a juvenile dependency case or termination-of-parental-rights case, when a GAL is appointed for a parent the case proceeds to trial. Not only is the parent effectively deprived of counsel and authority to make decisions, but also the finding by the court that a GAL is required arguably establishes a parent’s unfitness.



- ▶ **“In determining whether the client can adequately act in his or her own interests, the lawyer needs to examine whether the client can give direction on the decisions that the lawyer must ethically defer to the client. Short of a client’s being totally noncommunicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed.”**

Statutes Governing Appointment of Guardians ad litem

- ORS 419B.231 – Appointment; hearing; findings.
- ORS 419B.234 – Qualifications; duties; privilege.
- ORS 419B.237 – Duration of appointment;
compensation.

ORS 419B.231 – *Appointment; hearing; findings.*

The juvenile court, on its own motion or that of a party, may appoint a guardian *ad litem* for a parent in a dependency proceeding, **if**

(1) the court holds a hearing on the proposed appointment **and**

(2) finds by a preponderance of the evidence presented at a hearing that:

- Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding.
- The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment.

ORS 419B.231 *(continued)*

At the hearing, the court may receive testimony, reports and other evidence without regard to whether the evidence is admissible under ORS 40.010 to 40.210 and 40.310 to 40.585, **if the evidence is:**

- Relevant to the findings required under this section.

and

- Of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

“Hearsay” is admissible, and the “privileges” established by ORS 40.225 to 40.295 apply.

ORS 419B.231 (continued)

The court **must** hold a hearing to determine whether a guardian *ad litem* should be appointed **if**

- The court has a reasonable belief that those circumstances exist.
- or**
- A party, by motion and supporting affidavit and/or representations, asserts facts that, if proved, would show that it is more probable than not that those circumstances exist.

The fact that a guardian *ad litem* has been appointed * * * may **not** be used as evidence of mental or emotional illness in any juvenile court proceeding, any civil commitment proceeding, or any other civil proceeding.

ORS 419B.234– *Qualifications; duties; privilege.*

A person appointed as a guardian *ad litem* for a parent in a juvenile court dependency proceeding:

- Must be a licensed mental health professional or attorney.
- Must be familiar with legal standards relating to competence.
- Must have skills and experience representing persons with mental and physical disabilities or impairments.
- May **not** be a member of the parent's family.

The guardian *ad litem* is **not** a party in the proceeding but is a representative of the parent.

ORS 419B.234 (continued)

The guardian *ad litem* 's duties are:

- To consult with the parent and the parent's attorney.
- To make legal decisions the parent would ordinarily make – *e.g.*, whether to admit/deny allegations in a petition , agree to or contest jurisdiction, wardship, or permanent commitment, *etc.*
- To make decisions concerning the adoption of the parent's child.
- To control the litigation and give directions to the parent's attorney that would ordinarily be given by the parent.
- To inform the court when the parent no longer needs a guardian *ad litem* .

ORS 419B.234 (continued)

- The decisions the guardian *ad litem* makes on behalf of the parent must be those the guardian believes the parent would make, if the parent were not incapacitated/disabled.
- The parent's attorney must follow the guardian *ad litem's* directions on the parent's behalf, but also must inquire at every critical stage in the proceeding whether the parent continues to require a guardian *ad litem* and, if appropriate, seek removal of the guardian *ad litem*.
- A parent for whom a guardian *ad litem* has been appointed has a privilege to refuse to disclose and to prevent others from disclosing confidential communications between the guardian *ad litem* and the parent's attorney and between the guardian *ad litem* and the parent.

ORS 419B.237 – *Duration of appointment; compensation.*

The appointment of a guardian *ad litem* continues until:

- The court terminates the appointment.
- The dependency proceeding is dismissed.
- The parent's parental rights are terminated, unless the court continues the appointment.

In addition, a party to the proceeding or the attorney for the parent for whom a guardian *ad litem* has been appointed may seek the guardian's removal, and the court must remove the guardian, if the court determines that the parent no longer lacks substantial capacity to understand the nature and consequences of the proceeding or to give directions to the parent's attorney. The court may remove the guardian on any other appropriate grounds.

ORS 419B.237 (continued)

The Public Defense Services Commission is required to compensate a guardian *ad litem* for the performance of the guardian's duties in the proceeding.

Appellate Court Decisions

- ▶ *State ex rel Juv. Dept. v. Cooper*, 188 Or App 588, 72 P3d 674 (2003)
- ▶ *State ex rel Dept. of Human Services v. Sumpter*, 201 Or App 79, 116 P3d 942 (2005)

***State ex rel Juv. Dept. v. Cooper*, 188 Or App 588, 72 P3d 674 (2003)**

“Although mother was served by publication and posting, she did not appear for the [initial hearing on the termination petition]. Mother’s guardian *ad litem* and the guardian *ad litem*’s attorney were also summoned and did appear. * * * .

“ * * * [N]otwithstanding the guardian ad litem’s appearance and objections on mother’s behalf, the court proceeded to summarily adjudicate the petition. By so proceeding, the court effectively nullified the procedural protections afforded by the appointment of a guardian *ad litem*. The court denied mother her statutory and constitutional entitlement to participate meaningfully in the termination proceedings. * * * .

State ex rel Juv. Dept. v. Cooper, 188 Or App 588, 72 P3d 674 (2003) – (continued)

“* * *Where a guardian *ad litem* has been appointed for a parent * * *, and the guardian *ad litem* appears on the parent’s behalf and objects to summary adjudication of a termination petition pursuant to ORS 419B.917(1), the juvenile court cannot summarily adjudicate the petition based on a *prima facie* presentation. Rather, the court must proceed with a full adversarial trial, ORS 419B.521, with the *guardian ad litem* appearing on behalf of, and representing the interests of, the incapacitated person.”

State ex rel Dept. of Human Services v. Sumpter, 201
Or App 79, 116 P3d 942 (2005)

“* * * Mother contends that neither she nor her guardian *ad litem* knowingly, voluntarily, and intelligently waived mother’s right to a trial concerning the termination of her parental rights. We agree. As an initial matter, we note that, because of the appointment of a guardian *ad litem* to represent her interests, mother *alone* could not waive her right to a trial. That is, under circumstances in which a guardian *ad litem* has been appointed for a parent, it is the guardian *ad litem* who has the legal authority to waive the right to a trial * * * .

State ex rel Dept. of Human Services v. Sumpter, 201
Or App 79, 116 P3d 942 (2005) – (continued)

“* * * [W]e cannot infer a waiver of mother’s rights from the guardian *ad litem*’s silence. Because the guardian *ad litem* steps into the shoes of the incapacitated party, we evaluate a guardian *ad litem*’s decision on waiver of the right to trial the same way we would evaluate the decision of a person acting on her own behalf. That is, we do not presume the guardian *ad litem* to have specific knowledge of the applicable law, and we cannot infer from her silence that she was agreeing to anything. * * * Accordingly, the record does not support a conclusion that mother’s guardian *ad litem* knowingly, intelligently, and voluntarily waived mother’s right to a trial. * * *.”

***Guardians Ad Litem* in Juvenile Court Dependency Cases**

Ethics Opinion No. 2005 – 159

Applicable Statutes

Appellate Court Decisions

Prepared and presented by Julie McFarlane, Jeff Carter, and Michael Livingston

August 15, 2011

FORMAL OPINION NO. 2005-159

Competence and Diligence: Requesting a Guardian ad Litem in a Juvenile Dependency Case

Facts:

The Juvenile Court appoints guardians ad litem (GALs), who are often lawyers, for mentally ill parents in some dependency cases and termination-of-parental-rights cases.

Questions:

1. May a lawyer for a parent ethically request a GAL for the client?
2. When a lawyer acts as a GAL, does the lawyer have the same ethical duties, obligations, and powers as in a regular lawyer-client relationship?
3. After the appointment of the GAL for the mentally ill parent, is the lawyer obligated to take direction from the GAL?

Conclusions:

1. No, qualified.
2. No, qualified.
3. Yes, qualified.

Discussion:

It is generally accepted that it is error for a court to proceed without appointment of a GAL for a party when facts strongly suggest a lack of mental competency. *United States v. 30.64 Acres*, 795 F2d 796, 806 (9th Cir 1986). Similarly, it is a violation of due process to fail to appoint a GAL for a mentally incompetent parent in a termination-of-parental-rights proceeding. *State ex rel Juv. Dept. v. Evjen*, 107 Or App 659, 813 P2d 1092 (1991).

1. *Seeking Appointment of a GAL.*

Although a marginally competent client can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and adjust representation to accommodate a client's limited capacity

before resorting to a request for a GAL. This is reflected, *inter alia*, in Oregon RPC 1.14, which provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Consequently, and as a general proposition, lawyers for parents should not invade a typical client's rights beyond the extent to which it reasonably appears necessary for the lawyer to do so. In other words, lawyers should request GALs for their clients only when a client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.¹

¹ It has been suggested that the parent's lawyer should seek a GAL only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and non-lawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1997 UTAH L REV 515, 566.

Counsel for other parties to the proceeding, however, may be obligated to advise the court of the parent's incompetence. In *United States v. 30.64 Acres*, 795 F2d 796, 806 (9th Cir 1986), the court stated:

Rather, if it should appear during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if *pro se*), to consult with his lawyer with a reasonable degree of rational understanding, *Dusky v. United States*, 362 US 402, 80 S Ct 788, 402 L Ed2d 824 (1960) (standard for competency to stand trial in criminal case); *Thomas v. Cunningham*, 424 F2d 934, 938 (4th Cir 1963), or otherwise to understand the nature of the proceedings, *cf. Dusky*, 362 US at 402; *Thomas*, 313 F2d at 938, that information should be brought to the attention of the court promptly.

Although often referred to as determinations of the client's ability to aid and assist in their case, requests for GALs for parents in dependency proceedings are not governed by ORS 161.360, which governs the determination of whether a defendant in a criminal proceeding is unfit to proceed to trial due to his or her mental illness. In a criminal proceeding, due process prohibits a mentally incompetent defendant, who is unable to aid and assist in the defense, from being tried until the defendant becomes competent.² Thus, while the aid-and-assist motion may have other undesirable effects for the mentally ill criminal client, it does not permanently deprive the client of his or her right to a trial or representation by counsel. In contrast, in a juvenile dependency case or termination-of-parental-rights case, when a GAL is appointed for a parent the case proceeds to trial. Not only is the parent effectively deprived of counsel and the authority to make case decisions, but also the finding by the court that a GAL is required arguably establishes a parent's unfitness.

In determining whether the client can adequately act in his or her own interests, the lawyer needs to examine whether the client can give direction on the decisions that the lawyer must ethically defer to the client. Short of a client's being totally noncommunicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation. Standards for representation in juvenile dependency cases and termination-of-parental-rights cases recognize that the lawyer should always seek the lawful objectives of the client and should not substitute the lawyer's judgment for the client's in decisions that are the responsibility of the client.³ However, the lawyer may make other necessary decisions consistent with the client's direction on these essential issues.

² In a juvenile dependency proceeding, a lesser degree of due process applies because the rights of the parent must be balanced against the best interests of the child. Thus, in a dependency proceeding, the required fundamental fairness is met by providing a GAL for the parent and proceeding with the case so that the child does not languish in foster care.

³ Indigent Defense Task Force Report, *Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases* (OSB 9/25/96). Standard 3.3 specifies the decisions that are the client's to make and includes whether to admit the allegations of the petition; whether to agree to jurisdiction, wardship, and temporary commitment to SOSCF; whether to accept a conditional postponement; or whether to agree to specific services or placements.

2. *Distinguishing the Role of GAL and Lawyer.*

There is no requirement that a GAL be a lawyer, and nonlawyers frequently serve as GALs. Thus, when a lawyer acts as a GAL, the lawyer is performing a nonlawyer function and does not have the same ethical duties, obligations, and powers in the guardian-ward relationship as in a lawyer-client relationship, although both a lawyer and a GAL have a fiduciary relationship with the client or ward.

Oregon courts have indicated that a GAL has authority to settle claims on behalf of an incapacitated person and, with prior court approval, a GAL may confess judgment on behalf of the incapacitated person. *Alvarez v. Salvation Army*, 89 Or App 63, 66, 747 P2d 379 (1987); see GUARDIANSHIPS, CONSERVATORSHIPS, AND TRANSFERS TO MINORS §3.13 (Oregon CLE 2004). The GAL's authority essentially substitutes for the incapacitated person's authority to make these decisions in the proceeding. "In the law of adult incompetents, the role of the GAL has sometimes been held to incorporate the concept of substituted judgment, whereby the GAL attempts to make decisions for the ward based on what the GAL thinks the particular ward would have wanted had the ward not been incompetent." Ann M. Haralambie, *The Child's Lawyer: A Guide to Representing Children in Custody, Adoption and Protection Cases* (ABA 1993).

3. *Taking Direction from Client's GAL.*

Because the rationale for the appointment of a GAL is to have someone who can make decisions for the incompetent client, after the appointment of the GAL the lawyer for the parent generally must take direction from the GAL and can make stipulations and agreements and do other acts at the GAL's direction that the parent could do if the parent were competent. It is improper for the parent's lawyer to act contrary to the direction of a GAL who is adequately asserting the client's interests. See, e.g., *Brode v. Brode*, 298 SE2d 443 (SC 1982) (improper and beyond scope of lawyer's authority for lawyer to appeal from decision authorizing sterilization of profoundly retarded handicapped minor, when GAL did not choose to appeal); *Developmental Disabilities Advocacy Ctr. Inc. v. Melton*, 521 F Supp 365 (DNH 1981), *vacated and remanded on other grounds*, 689 F2d 281 (1st Cir 1982) (lawyers in agency established by statute to advocate for rights of disabled persons may not act independently of incompetent client's GAL).

When a GAL is appointed for an incompetent client, "appointment of a parent or other adult does not absolve the lawyer of the duty to make an independent determination of the client's interests." Martha Matthews,

Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class Action Cases, 64 FORDHAM L REV 1435, 1446 (1996). Parents' lawyers should serve as a monitor to assure that the GAL adequately asserts the incapacitated client's interests. Furthermore, the lawyer has a responsibility to inquire periodically whether the client's competence has changed and, if appropriate, request removal of the GAL. Such inquiries should occur at every critical stage in the proceeding.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§18.12–18.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§20, 24 (2003); and ABA Model Rule 1.14.

Statutes Governing Appointment of Guardians Ad Litem

419B.231 Appointment; hearing; findings. (1) In a proceeding under this chapter, including a proceeding for the termination of parental rights, the court, on its own motion or on the written or oral motion of a party in the proceeding, may appoint a guardian ad litem for a parent involved in the proceeding as provided in this section.

(2) The court shall conduct a hearing to determine whether to appoint a guardian ad litem in a proceeding under this chapter if:

(a) A party moves for the appointment and the affidavit or oral representations submitted in support of the motion state facts that, if proved at a hearing under this section, would establish that it is more probable than not that:

(A) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and

(B) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment; or

(b) The court has a reasonable belief that:

(A) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and

(B) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment.

(3)(a) A court may not appoint a guardian ad litem under this section unless the court conducts a hearing. At the hearing, the court may receive testimony, reports and other evidence without regard to whether the evidence is admissible under ORS 40.010 to 40.210 and 40.310 to 40.585 if the evidence is:

(A) Relevant to the findings required under this section; and

(B) Of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

(b) For purposes of this subsection, evidence is relevant if it is "relevant evidence" as defined in ORS 40.150.

(4) A court may not appoint a guardian ad litem for a parent unless the court finds by a preponderance of the evidence presented at the hearing that:

(a) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and

(b) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment.

(5) The fact that a guardian ad litem has been appointed under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, any civil commitment proceeding or any other civil proceeding. [2005 c.450 §2]

419B.234 Qualifications; duties; privilege. (1) A person appointed as a guardian ad litem under ORS 419B.231:

(a) Must be a licensed mental health professional or attorney;

(b) Must be familiar with legal standards relating to competence;

(c) Must have skills and experience in representing persons with mental and physical disabilities or impairments; and

(d) May not be a member of the parent's family.

(2) The guardian ad litem is not a party in the proceeding but is a representative of the parent.

(3) The guardian ad litem shall:

(a) Consult with the parent, if the parent is able, and with the parent's attorney and make any other inquiries as are appropriate to assist the guardian ad litem in making decisions in the juvenile court proceeding.

(b) Make legal decisions that the parent would ordinarily make concerning the juvenile court proceeding including, but not limited to, whether to:

(A) Admit or deny the allegations of any petition;

(B) Agree to or contest jurisdiction, wardship, temporary commitment, guardianship or permanent commitment;

(C) Accept or decline a conditional postponement; or

(D) Agree to or contest specific services or placement.

(c) Make decisions concerning the adoption of a child of the parent including release or surrender, certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270 and agreements under ORS 109.305.

(d) Control the litigation and provide direction to the parent's attorney on the decisions that would ordinarily be made by the parent in the proceeding.

(e) Inform the court if the parent no longer needs a guardian ad litem.

(4) In making decisions under subsection (3) of this section, the guardian ad litem shall make the decisions consistent with what the guardian ad litem believes the parent would decide if the parent did not lack substantial capacity to either understand the nature and consequences of the proceeding or give direction or assistance to the parent's attorney on decisions the parent must make in the proceeding.

(5) The parent's attorney shall follow directions provided by the guardian ad litem on decisions that are ordinarily made by the parent in the proceeding. The parent's attorney shall inquire at every critical stage in the proceeding as to whether the parent's competence has changed and, if appropriate, shall request removal of the guardian ad litem.

(6)(a) A parent for whom a guardian ad litem has been appointed under ORS 419B.231 has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the parent:

- (A) Between the guardian ad litem and the parent's attorney or a representative of the attorney; or
- (B) Between the guardian ad litem and the parent.

(b) The privilege created by this subsection:

- (A) May be claimed by the parent or the guardian ad litem. The guardian ad litem may claim the privilege only on behalf of the parent.
- (B) Is subject to ORS 40.280, 40.285 and 40.290. [2005 c.450 §3]

419B.237 Duration of appointment; compensation. (1) The appointment of a guardian ad litem under ORS 419B.231 continues until:

- (a) The court terminates the appointment;
- (b) The juvenile court proceeding is dismissed; or
- (c) The parent's parental rights are terminated, unless the court continues the appointment.

(2) A party to the proceeding or the attorney for the parent for whom a guardian ad litem has been appointed may request removal of the guardian ad litem. The court:

- (a) Shall remove the guardian ad litem if the court determines that the parent no longer lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; or
- (b) May remove the guardian ad litem on other grounds as the court determines appropriate.

(3) The Public Defense Services Commission shall compensate a guardian ad litem for duties the guardian ad litem performs in the proceeding from funds appropriated to the commission.

Argued and submitted April 14, reversed and remanded July 16, 2003

In the Matter of Baby Boy Cooper,
aka Jahan Jamal Cooper,
aka Isaac Cooper, Minor Child.

STATE ex rel JUVENILE DEPARTMENT
OF MULTNOMAH COUNTY,
Respondent,

v.

Meisha Diane COOPER,
Appellant.

9903-804672; A119563

72 P3d 674

Mother appealed a judgment of the Circuit Court, Multnomah County, Elizabeth Welch, J., terminating her parental rights to her child and ordering permanent commitment of child to Department of Human Services (DHS) for adoption. The Court of Appeals, Haselton, P. J., held that: (1) trial court was not authorized to summarily adjudicate merits of termination petition against mother based on a *prima facie* presentation in mother's absence, where guardian *ad litem* appeared on mother's behalf, and (2) court's error in so proceeding required reversal.

Reversed and remanded.

1. Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Hearing in General — Judgment; Disposition of Child — Judgment or Order in General.

Juvenile court was not authorized by child dependency statutes to summarily adjudicate merits of termination of parental rights petition against mother based on a *prima facie* presentation, where mother was not present; mother, who had been properly summoned, did not personally appear at pretrial hearing, but her duly appointed guardian *ad litem* did appear at hearing on mother's behalf, objected, and asserted mother's entitlement to full adversarial trial on merits of petition. ORS 419B.521, 419B.875(2), 419B.917(1).

2. Infants — Dependent, Neglected, and Delinquent Children — Review — Harmless Error.

Trial court's error in summarily adjudicating merits of termination of parental rights petition against mother based on a *prima facie* presentation, where mother was not present, but her guardian *ad litem* was present, objected, and asserted mother's entitlement to full adversarial trial on merits of petition, required reversal; by proceeding summarily on petition, trial court effectively nullified procedural protections afforded by appointment of guardian. ORS 419B.521, 419B.875(2), 419B.917(1).

3. Statutes — Construction and Operation — General Rules of Construction — Meaning of Language — Statute as a Whole, and Intrinsic Aids to Construction — Context and Related Clauses.

In interpreting a statute, the court looks first to the text of the statute, read in context, as the best indicator of the legislature's intent.

4. Infants — Actions — Guardian Ad Litem or Next Friend — Duties and Liabilities — Dependent, Neglected, and Delinquent Children — Proceedings — Counsel or Guardian Ad Litem.

It is the function and responsibility of a guardian *ad litem* to appear on behalf of, and represent the interests of, the incapacitated person.

5. Constitutional Law — Due Process of Law — Deprivation of Personal Rights in General — Privacy; Marriage, Family, and Sexual Matters.

Due Process Clause requires that parents be provided with notice and an opportunity to be heard before being deprived of parental rights; termination proceeding must be fundamentally fair, that is, it must afford the parents an opportunity to be heard at a meaningful time and in a meaningful manner. US Const, Amend XIV.

6. Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Hearing in General — Judgment; Disposition of Child — Judgment or Order in General.

Where a guardian *ad litem* has been appointed for a parent pursuant to statute and the guardian *ad litem* appears on the parent's behalf and objects to summary adjudication of a termination of parental rights petition, the juvenile court cannot summarily adjudicate the petition based on a *prima facie* presentation; rather, the court must proceed to a full adversarial trial, with the guardian *ad litem* appearing on behalf of, and representing the interests of, the incapacitated person. ORS 419B.521, 419B.875(2), 419B.917(1).

CJS, Infants § 51.

Appeal from Circuit Court, Multnomah County.

Elizabeth Welch, Judge.

Peter Miller argued the cause and filed the brief for appellant.

Michael C. Livingston, Assistant Attorney General, argued the cause for respondent. With him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Kathryn Underhill argued the cause and filed the brief for the child.

Before Haselton, Presiding Judge, and Deits, Chief Judge, and Wollheim, Judge.

HASELTON, P. J.

Reversed and remanded.

HASELTON, P. J.

Mother appeals from a judgment terminating her parental rights and ordering the permanent commitment of her child to the Department of Human Services (DHS) for adoption. ORS 419B.500. Mother argues that the trial court erred in entering the termination judgment on the basis of the presentation of a *prima facie* case because, although she failed to personally appear for the initial hearing on the termination petition, *see* ORS 419B.917, her guardian *ad litem* did appear and requested that the court set dates for trial. We conclude that the guardian *ad litem*'s appearance and objection precluded the summary termination of mother's parental rights. Consequently, we reverse and remand.

Although we review the record *de novo*, ORS 419A.200(6)(b) and ORS 19.415(3), the material facts are uncontroverted. The child was born on October 19, 2001. On the same day, he was placed in protective custody due to concerns about mother's mental health and her ability to parent. On October 22, the state filed a petition alleging that, because "[t]he mother's mental health issues place the [child] at risk" and "[t]he whereabouts and legal status of the father are unknown," the child was properly within the jurisdiction of the juvenile court. Following a hearing on that same date, the court granted temporary custody of the child to DHS and ordered that the child be placed in shelter care. That determination was based on the court's findings that

"mother has serious mental health issues [and w]as placed on psychiatric hold. Older child in relative care—mother unable to provide care. * * * Mother made threats to harm child, demonstrating symptoms of psychosis."

On December 31, 2001, the child's attorney moved for an order appointing a guardian *ad litem* for mother, asserting that, because of mother's mental disabilities, she could not "adequately give direction to [her] counsel." In particular, as described by the child's attorney in her supporting affidavit, mother's mental status had "deteriorated while in custody pending criminal charges" and mother's criminal defense attorney was seeking an aid-and-assist evaluation on her behalf. The affidavit further represented that

"[mother's attorney] did not arrange transport of [mother] to the status hearing because [mother] was too unstable to participate in the hearing. [Mother] is not currently taking medication, which she has taken previously. Dr. Robert Basham has previously diagnosed [mother] with Schizophrenia, Paranoid Type, Rule Out Intermittent Explosive Disorder, and Paranoid Personality Disorder."

On January 2, 2002, the state filed an amended petition, alleging that the child remained within juvenile court's jurisdiction because (1) "[t]he mother's mental health issues place the [child] at risk"; (2) "[t]he whereabouts and legal status of the father are unknown"; (3) "[t]he mother's chaotic lifestyle and residential instability place the child at threat of harm"; and (4) "[t]he mother has anger control problems with violent propensities that place her child in threat of harm."

On January 28, after the status hearing on the amended petition, the juvenile court appointed a guardian *ad litem* for mother and scheduled a hearing to adjudicate the jurisdictional petition. Mother did not attend that hearing on April 2, because she was still in custody, but her attorney and guardian *ad litem* did appear and participate in the hearing. On April 12, the trial court entered a judgment establishing dependency jurisdiction over the child.

On April 17, 2002, the child's attorney filed a petition to terminate mother's parental rights. In an affidavit submitted in support of the termination petition, the child's attorney represented that,

"[a]t the time of the child's birth, a psychiatric hold was placed on the mother. The mother is diagnosed as schizophrenic, paranoid type. The mother is currently incarcerated awaiting an aid and assist evaluation at the Oregon State Hospital. The mother has another child not in her custody, to whom she relinquished her parental rights on February 23, 2000, due to her inability to provide that child with minimally adequate care. The conditions that led to mother's inability to care for that older sibling have not been ameliorated. In addition to chronic mental illness, mother suffers from an anger control problem, which places this child at risk of harm."

The initial hearing on the termination petition was scheduled for May 1. In April, the child's attorney sought a continuance because, due to jail overcrowding, mother had been released from custody before her transfer for the aid-and-assist evaluation and her location was unknown. The court granted that continuance. On August 16, 2002, because mother's whereabouts were still unknown, the court granted the child's attorney's motion for an order directing service of summons on mother by publication and posting. As determined by the court's order to show cause, the summons required that mother appear on October 2, 2002, for the initial hearing on the termination petition.

Although mother was served by publication and posting, she did not appear for the October 2 hearing. Mother's guardian *ad litem* and the guardian *ad litem*'s attorney were also summoned and did appear. Because of mother's absence, the child's attorney moved to proceed with the presentation of a *prima facie* case on the allegations of the termination petition. The guardian *ad litem* objected to the court going forward at that time with the adjudication of the petition, and the following colloquy ensued:

"[Guardian *ad litem*.] Well, I think, Your Honor, as her guardian *ad litem*, having been appointed in that capacity and the reason I was appointed was because at the time she was in custody pending an aid and assist evaluation that was ordered by the downtown department, it presumes, of course, she is not competent. So as her guardian *ad litem*, I am standing here in her shoes and having not had a chance to speak with her in the recent past I am requesting trial dates be set because I think appointing a guardian *ad litem*, the fact there was an aid and assist pending a criminal matter again presumes incompetence. * * * I as her guardian *ad litem* am here for the purposes of litigation, stand in her shoes. I am present and request trial dates be set.

"* * * * *

"[The court:] [W]hen is the last time you had contact with this mother?

"[Guardian *ad litem*.] Your Honor, the agency has not had any contact since her release from jail which was March of '02."

The guardian *ad litem* made no representations as to the nature of any evidence or defense to the petition that she believed could be advanced on mother's behalf at trial.

After that exchange, the court concluded that mother "was served and that the moving party has fulfilled their obligations, statutory obligations in this proceeding" and directed the child's attorney to "proceed on the petition today." Thus, notwithstanding the guardian *ad litem*'s request that the court schedule dates for a full adversarial trial of the petition to terminate parental rights, the juvenile court directed the child's attorney to proceed with the *prima facie* presentation. The court continued the appointments of the guardian *ad litem* and the guardian *ad litem*'s attorney for 31 days and then excused both for the remainder of the proceeding.

The child's attorney then presented the testimony of a DHS caseworker substantiating the allegations of the termination petition and asked the court to take judicial notice of the legal file. Based on that *prima facie* showing, the trial court determined that sufficient allegations of the petition had been proved by clear and convincing evidence and terminated mother's parental rights.¹

¹ The court based its decision to terminate mother's parental rights on its conclusion that the *prima facie* presentation by the child's attorney established the great majority of the allegations in the termination petition by clear and convincing evidence. Among those allegations were (1) "mother suffers from chronic mental illness, emotional illness, and mental deficiency which are of such a nature and duration as to render her incapable of providing proper care to the child for extended periods of time"; (2) mother's parenting ability is impaired by her long history of criminal activity, including periods of incarceration; (3) mother has another child who has been removed from her custody "due to her inability to provide that child with minimally adequate care"; (4) "mother has residential, employment and relationship instability which seriously impairs her ability to care for the child"; and (5) "mother has an anger management problem and engages in assaultive behaviors which place the child at risk of emotional and physical harm." The juvenile court dismissed the allegation that "there has been a lack of effort or an inability on the part of the mother to adjust her circumstances, conduct and conditions to make it possible for the child to safely return home within a reasonable time," because of mother's "severe and significant mental illness and the inability to [gauge] her capacity because of that mental illness." Lastly, the court held that as "[t]here is no legal father for this minor child[,] and as "[i]t is in the best interest of this child to have the parental rights of [mother] terminated[,] *** the parental rights of [mother] *** are herewith terminated ***."

1, 2. On appeal, mother does not challenge the adequacy of the summons requiring her appearance at the October 2, 2002, hearing or the sufficiency of the evidence to support termination of her parental rights. Instead, mother contends that the court erred in denying the guardian *ad litem's* request to schedule trial dates and by allowing the child's attorney to proceed with the *prima facie* hearing.² According to mother, although ORS 419B.917 allows the court to proceed in a parent's absence if the parent has been properly summoned, "the parent was present in this case through her [guardian *ad litem*]. Therefore, the court was not authorized to proceed over the [guardian *ad litem's*] request for contested trial dates." Mother further asserts that, because "[t]he purpose in appointing a [guardian *ad litem*] is to protect the due process rights of a parent who, due to mental illness, is incapable of appearing or comprehending court proceedings[,] the court's decision to proceed on the basis of the presentation of a *prima facie* case, notwithstanding the guardian *ad litem's* request to set dates for trial, denied mother "her fundamental liberty interest in her child and consequent due process right to a fair hearing in the termination proceeding."

The state³ responds that ORS 419B.917 requires personal appearance by a parent when properly summoned in a termination matter and authorizes the court, upon sufficient proof, to summarily adjudicate the merits of the termination petition as to the rights of any nonappearing parent. The state further asserts that a guardian *ad litem*

² The Supplementary Local Rules for Multnomah County do not describe the procedures that apply in the presentation of a *prima facie* case. In response to questions at oral argument on appeal, mother's attorney stated that the procedures governing *prima facie* presentations were a matter of practice and that the typical *prima facie* case consists of petitioner's offering of the legal file and the unchallenged testimony of the DHS caseworker. In response to similar questions, counsel for the state represented that, in cases in which the court has ruled that it will proceed on the basis of a *prima facie* presentation, the parent's attorney typically withdraws before the state presents its case. According to the state, there is no requirement that the attorney withdraw but that it is a matter of practice because of "an ethical responsibility on the part of the attorney who has had no contact with the parent and therefore cannot in good faith assert a position one way or another in response to the proceeding."

³ The child also submitted a brief challenging mother's appeal of the termination judgment, and the state incorporated and adopted the child's arguments by reference in its brief. For purposes of simplicity, we ascribe respondents' joint arguments generically to "the state."

represents the parent but does not “become the parent” for purposes of determining whether that parent has “appeared” for purposes of ORS 419B.917(1)—and, consequently, the court did not err in proceeding with the adjudication of the termination petition on the basis of a *prima facie* presentation in mother’s absence.

Thus, the parties’ dispute reduces to a single question: Does ORS 419B.917 authorize the juvenile court to summarily adjudicate the merits of a termination petition based on a *prima facie* presentation where (a) a parent who has been properly summoned, does not personally appear at a pretrial hearing, but (b) that parent’s duly appointed guardian *ad litem* does appear at the hearing and, on the parent’s behalf, objects and asserts an entitlement to a full adversarial trial on the merits of the petition?

The answer lies in the interplay of ORS 419B.917 and ORS 419B.875(2), pertaining to the appointment and rights of guardians *ad litem* in dependency proceedings. For the reasons that follow, we conclude that, under those statutes, a juvenile court cannot summarily adjudicate a termination petition over the guardian *ad litem*’s objections.

3. ORS 419B.917 provides:

“(1) If a child is before the court and a person who is required to be summoned has been summoned and has failed to appear for any dates, including but not limited to trial dates for which the person has been summoned, and the petitioner is ready to proceed, the court may proceed with the case in the person’s absence. If the summoned party seeks a change of the date for which the party is summoned, the party must appear at the time the request to change the date is made to receive service of summons for a new date or must authorize the party’s attorney to accept service of summons for the new date.

“(2) Except by express permission of the court, for a jurisdictional or termination of parental rights trial or related mandatory court appearances, summoned parties may not waive appearance or appear through counsel.”⁴

(Emphasis added.) Neither our court nor the Supreme Court has addressed that statute’s application to circumstances in

⁴ ORS 419B.917 was enacted in 2001 as part of House Bill 2611, which created a single set of procedural rules for use in juvenile dependency cases and in

which a guardian *ad litem* has been appointed for a “nonappearing” and incapacitated parent. We proceed, then, to employ the methodology prescribed in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), looking first to the text of the statute, read in context, as the best indicator of the legislature’s intent. *Id.* at 610-11.

ORS 419B.917(1) provides, in part, that, if a “person *who is required to be summoned* has been summoned and has failed to appear for any dates, * * * the court may proceed with the case in the person’s absence.” (Emphasis added.) ORS 419B.839, in turn, provides that summons “must be issued to be served” on (1) the legal parents of the child; (2) the legal guardian of the child; (3) the person with physical custody of the child; (4) under certain circumstances, the putative father of the child; and (5) if the child is 12 years of age or older, the child himself or herself.

Thus, mother, as a “legal parent of the child,” was a person “required to be summoned” within the meaning of ORS 419B.917(1). Given the statutory text, there is no question that—but for the appointment of the guardian *ad litem*—the juvenile court could have “proceeded with the case” in mother’s absence, including, as appropriate, summarily terminating mother’s parental rights upon a sufficient *prima facie* showing.⁵ But what effect does the appointment of a guardian *ad litem* and the guardian’s appearance

termination of parental rights proceedings. Or Laws 2001, ch 622, § 31. Before ORS 419B.917 was enacted, the authority of a trial court to terminate parental rights by default resided in *former* ORS 419B.515, *repealed by* Or Laws 2001, ch 622, § 57, which provided, in part, that service of summons on a parent

“shall contain a statement to the effect that the rights of the parent or parents are proposed to be terminated in the proceeding and that if the parent or parents fail to appear at the time and place specified in the summons, the court may terminate parental rights and take any other action that is authorized by law.”

See *State ex rel Juv. Dept. v. Mertes*, 162 Or App 530, 532-33, 986 P2d 682 (1999) (noting that “ORS 419B.515 * * * is the source of the juvenile court’s authority to terminate parental rights following a parent’s default”).

The amendments to ORS 419B.875, pertaining to the appointment and rights of guardians *ad litem* in dependency proceedings, were enacted concurrently under a separate section of HB 2611. Or Laws 2001, ch 622, §§ 39, 39a.

⁵ Here, as noted, mother does not argue that there was any deficiency in the method of service of summons or the content of summons. Cf. *State ex rel Juv. Dept. v. Kopp*, 180 Or App 566, 579-85, 43 P3d 1197 (2002) (reversing trial court’s denial of motion to set aside default termination judgment based on insufficiency of summons).

and objections at a pretrial hearing have on the application of ORS 419B.917(1)?

ORS 419B.875(2), which was enacted concurrently with ORS 419B.917, *see* 188 Or App at 595-96 n 4, provides:

“When a court determines that a parent or guardian, due to mental or physical disability, cannot adequately act in the parent’s or guardian’s interests or give direction to the parent’s or guardian’s counsel on decisions the parent or guardian must make, the court shall appoint some suitable person to act as guardian *ad litem* for the parent or guardian.”

Neither 419B.875 nor any other provision of the Juvenile Code—nor, remarkably, apparently any other Oregon statute—defines the term “guardian *ad litem*.”⁶

Nevertheless, as a legal term of art, the meaning of “guardian *ad litem*” is well settled. *Black’s Law Dictionary* 713 (7th ed 1999), gives the following definition:

“A guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.”

Similarly, *Webster’s Third New Int’l Dictionary* 1007 (unabridged ed 1993), defines “guardian *ad litem*” as “a guardian appointed by a court to represent in a particular lawsuit the interests of a party who is a minor or an incompetent person.” Both of those definitions comport with the only definition of guardian *ad litem* that we have been able to find in an Oregon appellate decision:

“A guardian *ad litem* is a special guardian appointed by the court to prosecute or defend in behalf of an infant a suit to which such infant is a party. His office is to represent the interests of the infant in the litigation. Although an infant is capable of suing or being sued, his incapacity requires

⁶ Several statutes and rules do, of course, refer to the appointment of guardians *ad litem*. For example, Rule 27 of the Oregon Rules of Civil Procedure provides that, if a minor or incapacitated person does not have a guardian, or there is no conservator for such a person’s estate, the person “shall appear by a guardian *ad litem* appointed by the court.” ORCP 27 A, B; *see also* ORCP 7 D(3)(a)(iii) (providing that, in certain circumstances, service upon an incapacitated person is to be affected upon that person as well as “upon a guardian *ad litem* appointed pursuant to Rule 27 B(2)”; *cf.* ORS 20.150 (providing for recovery of costs when a party “appears by * * * a guardian *ad litem*”). Under ORS 419B.800(1), the provisions of the Oregon Rules of Civil Procedure do not apply in juvenile court dependency proceedings.

that he be protected and to that end the statute requires that the infant litigant should be properly represented by some one who may adequately enforce or protect his rights."

Benson v. Birch, 139 Or 459, 461, 10 P2d 1050 (1932).

4. Thus, it is the function and responsibility of a guardian *ad litem* to appear on behalf of, and represent the interests of, the incapacitated person.⁷ That does not mean, of course, that the guardian *ad litem* "steps into the shoes" of the represented person *for all purposes*. See, e.g., *Christman v. Scott*, 183 Or 113, 117-18, 191 P2d 89 (1948) ("The action was properly prosecuted in the name of the deranged person. The cause of action was his; and he was not divested of it when he became incompetent. The cause did not belong to the guardian *ad litem*."). But, at least generally in the civil context, it does mean that an appearance by a duly appointed guardian *ad litem* constitutes an appearance by the represented person. Consequently—and most obviously—such an appearance would preclude the entry of a default on the grounds that the represented person had failed to appear.⁸

⁷ See generally 57 CJS 173-74, *Mental Health*, § 271 (1992):

"(T)he guardian *ad litem* * * * has the duty to determine the best interest of the ward, and he fully represents the rights and interests of his ward in the particular case, and his rights and powers generally extend to all matters in the particular litigation affecting the interest of his ward, in every stage of the action."

(Footnotes omitted.) In *People in Interest of M.M.*, 726 P2d 1108, 1120 (Colo 1986), which also involved the appointment of a guardian *ad litem* for a mentally incapacitated parent in a termination proceeding, the court cogently explained the difference between the obligations of counsel and of the guardian *ad litem* in this context:

"While it is the lawyer's duty to provide the parent with legal advice on such decisions as whether to contest the termination motion and whether to present particular defenses to the motion, it is the role and responsibility of the parent to make those decisions. If the parent is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding or incapable of making those critical decisions that are the parent's right to make, then a court would clearly abuse its discretion in not appointing a guardian *ad litem* to act for and in the interest of the parent."

⁸ Cf. *Bremner v. Charles*, 312 Or 274, 280-85, 821 P2d 1080 (1991), *adh'd to on recons*, 313 Or 339, 832 P2d 454, 506 US 975, 113 S Ct 467, 121 L Ed 2d 374 (1992) (where guardian *ad litem* had been appointed to appear on behalf of brain-damaged young child, it was not an abuse of discretion for trial court, notwithstanding the child's status as a party, to exclude the child from courtroom during liability phase of medical malpractice trial).

Any other result would frustrate and contravene the purpose of appointing the guardian *ad litem*.

If those general principles are imported into the dependency context by virtue of ORS 419B.875(2), then mother did not “fail to appear” for purposes of ORS 419B.917. That is, the guardian *ad litem*’s appearance and assertion of rights on mother’s behalf would constitute an appearance by mother.

We discern nothing in the context of the dependency statutes, particularly including ORS 419B.917 and ORS 419B.875(2), that demonstrates that the purpose and effect of appointing a guardian *ad litem* for an incapacitated parent in a dependency proceeding is any different than in other contexts. We are cognizant that ORS 419B.875(1), in identifying the “parties” to the “proceedings in the juvenile court,” lists “[t]he legal parents” and “[a] guardian *ad litem* appointed under subsection (2) of this section” separately. ORS 419B.875(1)(b), (i). However, “parties” as used in that connection refers generically to persons having an entitlement to participate in the proceedings and not, particularly, to persons against whom judgment may be rendered.⁹ Thus, nothing in the statutes, and particularly ORS 419B.875(1), contradicts the general principle that the function of the guardian *ad litem* is to appear on behalf of, and represent the interests of, the incapacitated parent.

5. We note, finally, that our understanding of the proper interaction between ORS 419B.917 and ORS 419B.875(2) comports with constitutional considerations. “The Due Process Clause of the Fourteenth Amendment

⁹ For example, ORS 419B.875(1) also identifies as a potential “party” a “court appointed special advocate, if appointed.” ORS 419B.875(1)(f). By direct analogy to a guardian *ad litem*, a court appointed special advocate has no personal substantive interest in the controversy. See ORS 419A.004(8); ORS 419A.170. Instead, as with a guardian *ad litem*, a court appointed special advocate’s “party” status is limited to acting on behalf of the represented person. See ORS 419A.170(2).

Any other construction of “parties” within the meaning of ORS 419B.875(1) could yield not only incongruous, but contradictory, results. For example, in the circumstances presented here, a parent could be subject to a default judgment pursuant to ORS 419B.917(1), but his or her guardian *ad litem* would be entitled, independently, to proceed to litigate the merits of the termination proceeding.

requires that parents be provided with notice and an opportunity to be heard before being deprived of parental rights." *State ex rel Juv. Dept. v. Bryant*, 84 Or App 571, 574, 735 P2d 5 (1987) (citing *Armstrong v. Manzo*, 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62 (1965)). The termination proceeding must be "fundamentally fair"; that is, it must afford the parents an "opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel Juv. Dept. v. Geist*, 310 Or 176, 189-90, 796 P2d 1193 (1990) (citing *Mathews v. Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed 2d 18 (1976)).

State ex rel Juv. Dept. v. Evjen, 107 Or App 659, 661, 813 P2d 1092, *rev den*, 312 Or 526 (1991), is directly analogous to this case. There, the mother's severe mental illness had resulted in her commitment to Dammasch State Hospital two weeks before the termination hearing. By the time of the hearing, the mother was in restraints and was too unstable to be transported. *Id.* at 662. The trial court denied the mother's counsel's request for a continuance and, ultimately, terminated the mother's parental rights. *Id.* On appeal, we held that the termination proceeding was not fundamentally fair because the mother's mental illness prevented her from attending the hearing and she had no guardian *ad litem* to appear on her behalf:

"It is elementary that mother has a fundamental liberty interest in her parental rights. Therefore, she must be given a meaningful opportunity to be heard before she is permanently deprived of her status as the mother of child. As [*State ex rel Juv. Dept. v. Stevens*, 100 Or App 481, 786 P2d 1296, *rev den*, 310 Or 71 (1990), *cert den*, 498 US 1119, 111 S Ct 1071, 112 L Ed 2d 1177 (1991),] and [*State v. Blum*, 1 Or App 409, 463 P2d 367 (1970),] suggest, the opportunity to be heard does not translate into an absolute right to be *physically* present at a parental rights termination hearing. However, it does mean that a parent must be allowed to participate in the hearing in *some* form. Here, mother was not capable of appearing in person and did not participate through a guardian *ad litem*. We hold that, under those circumstances, the termination proceeding was not fundamentally fair."

Id. at 663-64 (emphasis in original; footnote omitted).

Here, a guardian *ad litem* was appointed for mother to address precisely the sort of due process concerns that underlay *Evjen*. Nevertheless, and notwithstanding the guardian *ad litem's* appearance and objections on mother's behalf, the court proceeded to summarily adjudicate the petition. By so proceeding, the court effectively nullified the procedural protections afforded by the appointment of the guardian *ad litem*. The court denied mother her statutory and constitutional entitlement to participate meaningfully in the termination proceedings. See ORS 419B.875; *Evjen*. That was reversible error.

6. We reiterate: Where a guardian *ad litem* has been appointed for a parent pursuant to ORS 419B.875(2), and the guardian *ad litem* appears on the parent's behalf and objects to summary adjudication of a termination petition pursuant to ORS 419B.917(1), the juvenile court cannot summarily adjudicate the petition based on a *prima facie* presentation. Rather, the court must proceed to a full adversarial trial, ORS 419B.521, with the guardian *ad litem* appearing on behalf of, and representing the interests of, the incapacitated person. See, e.g., *Evjen*; *Blum*.

Reversed and remanded.

Argued and submitted May 10, reversed and remanded August 3, 2005

In the Matter of
 Amy Marie Carlin, a Minor Child.
 STATE ex rel DEPARTMENT OF
 HUMAN SERVICES
 and Amy Marie Carlin,
Respondents,

v.

Denise Marie SUMPTER,
Appellant.

021022J02; A126366

116 P3d 942

Background: Stipulated judgment terminating mother's parental rights was entered in the Circuit Court, Clackamas County, Patrick D. Gilroy, J. Mother appealed.

Holdings: The Court of Appeals, Ortega, J., held that: (1) neither mother nor her guardian ad litem voluntarily, knowingly, and intelligently waived her right to trial, and (2) error was subject to correction.

Reversed and remanded.

1. Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Hearing in General.

Neither mother nor her guardian ad litem voluntarily, knowingly, and intelligently waived her right to trial in child dependency proceeding, and thus stipulated judgment terminating her parental rights based on her agreement to comply with service agreement was invalid, notwithstanding guardian's presence at hearing and failure to object; court did not discuss on record information regarding trial right with mother or guardian, or ascertain that mother's attorney had explained service agreement.

2. Infants — Dependent, Neglected, and Delinquent Children — Review — Right of Review, Parties, and Decisions Reviewable.

"Stipulated Order After Hearing" in child dependency proceeding, setting forth parties' agreement that permanent plan for child would be changed from adoption to reunification and petition to terminate mother's parental rights would be dismissed if mother complied with service agreement for six months, was not appealable, since order was made prior to, not result of, final judgment. ORS 419A.205.

3. Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Hearing in General — Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Counsel or Guardian Ad Litem.

Under circumstances in which a guardian ad litem has been appointed for a parent in a dependency proceeding, it is the guardian ad litem who has the legal authority to waive the right to a trial.

4. Appeal and Error — Presentation and Reservation in Lower Court of Grounds of Review — Objections and Motions, and Rulings Thereon — Necessity of Objections in General — Appeal and Error — Record — Questions Presented for Review — Errors on Face of Record.

Where an issue was not preserved in the trial court, the Court of Appeals may consider it only if it involves an "error of law apparent on the face of the record,"

which occurs if the legal point is obvious and not reasonably in dispute. ORAP 5.45(1).

5. Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Hearing in General.

A court must ascertain that a parent waiving her right to trial in a child dependency proceeding understands that she has a right to trial at which the state has the burden of demonstrating by clear and convincing evidence the allegations in the petition to terminate parental rights.

6. Infants — Dependent, Neglected, and Delinquent Children — Proceedings — Hearing in General.

Because guardian ad litem for mother in dependency proceeding stepped into mother's shoes, guardian's decision on waiver of right to trial was evaluated in same way as decision of person acting on her own behalf; guardian was not presumed to have specific knowledge of applicable law, and guardian's agreement could not be inferred from her silence.

7. Infants — Dependent, Neglected, and Delinquent Children — Review — Review — Harmless Error.

Error apparent on face of record in entering stipulated judgment terminating mother's parental right with her waiver of right to trial was subject to correction; error was one of considerable gravity, as it involved constitutional safeguards applicable to parent's fundamental rights involving her child.

8. Appeal and Error — Presentation and Reservation in Lower Court of Grounds of Review — Objections and Motions, and Rulings Thereon — Necessity of Objections in General — Appeal and Error — Record — Questions Presented for Review — Errors on Face of Record.

In exercising discretion to correct error apparent on face of record, the Court of Appeals considers: competing interests of the parties, nature of the case; gravity of the error, ends of justice of particular case, how error came to court's attention, and whether policies behind general rule requiring preservation of error have been served in case in another way.

CJS, Infants § 51.

Appeal from Circuit Court, Clackamas County.

Patrick D. Gilroy, Judge.

Angela Sherbo argued the cause and filed the brief for appellant.

Judy C. Lucas, Assistant Attorney General, argued the cause for respondent State ex rel Department of Human Services. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

No appearance for respondent child.

Before Linder, Presiding Judge, and Haselton* and Ortega, Judges.

* Haselton, J., *vice* Cenicerros, S. J.

ORTEGA, J.

Mother appeals a stipulated judgment terminating her parental rights, arguing that she did not validly waive her right to a trial. *See Brown and Shiban*, 155 Or App 238, 240-41, 963 P2d 105 (1998), *rev den*, 328 Or 594 (1999) (although generally no appeal lies from a stipulated judgment, a party may challenge the validity of her consent to such a judgment); ORS 419A.205(1)(c) (any final disposition of a petition under the juvenile code is appealable). For the reasons set forth below, we reverse and remand.

The relevant facts in this case are procedural. In October 2003, the Department of Human Services (DHS) filed a petition to terminate mother's parental rights to her daughter, who had been in substitute care for 12 months, based on numerous allegations of unfitness and neglect. An attorney and a guardian *ad litem* had previously been appointed for mother, and those appointments were continued at all the hearings at issue in this appeal.¹ The trial set for March 2004 was continued in order to allow for a psychological evaluation of mother, who then entered a mental health and drug rehabilitation program in April 2004. At a status conference in May 2004, the court commented that mother was doing well, and the parties discussed mother's ongoing treatment and efforts to obtain housing. Mother continued to do well in her treatment program and attended a supervised visit with her daughter in June.

The termination trial was rescheduled for July 1, 2004. On that date, a conference was apparently held in chambers, after which counsel for DHS indicated on the record that the parties had agreed to what she described as a "deferred termination":

"The parties have gone over, extensively, a service agreement that I understand [mother] will sign today.
*** It details the requirements and expectations of

¹ The appointment of the guardian *ad litem* was made at the request of mother's attorney and on the stipulation of attorneys for DHS and the child. The record does not contain findings regarding mother's need for a guardian *ad litem* but, given our resolution of this case, we need not reach mother's arguments concerning whether the manner of that appointment was appropriate.

[mother] for the next six months to continue to work a reunification plan.”

The court then asked mother’s attorney if she had reviewed the document with mother. Mother’s attorney replied that she had and that mother “was actually involved in the interlineations of all of the changes” and was “well aware of what’s expected.” The following exchange then took place:

“THE COURT: Okay. Is that true, [mother]? You’ve read that over and understand it, do you?”

“THE MOTHER: Yes.

“THE COURT: Now you realize, [mother], the idea here—and really I was part of this solution, this, you know—I think of this as perhaps in part my suggestion, at least it’s a suggestion I certainly concurred in. The idea is this: you’re going to be given this opportunity to keep on with the progress you’ve shown, get yourself in good shape, in a position where you can mother this child, and so forth. Everyone is rooting for you in that respect. But you are agreeing that your rights, ultimately, would be terminated in the event this—you were unable to complete, or unwilling to complete, the plan that you have agreed to. Do you understand all that?”

“THE MOTHER: Yes.

“THE COURT: And the idea behind that is that rather than go ahead with the termination case today that might very well have drastic results—and certainly would not be final in the sense that either side could appeal the result and so forth—but all the parties involved felt it was wise to allow you an opportunity to completely rehabilitate yourself and pull this thing off that you are presently in the process of achieving. And if you can do that, then, of course, ultimately the termination case would be dismissed.

“But if you do not, then there would be—we wouldn’t start over again because the time periods involved here are very important. We’ve got to sort of ‘fish or cut bait’ and get to the end of this thing in some agreed way. And the idea here is that if you succeed on this thing that will be the end of the termination case. And if you don’t, you will have agreed that the termination can occur without any further hearing. Do you understand all that?”

“THE MOTHER: Yes.

"THE COURT: And that meets with your approval, does it?"

"THE MOTHER: Yes.

"THE COURT: And is that agreeable to you, Ms. Canady [mother's attorney]?"

"MS. CANADY: It is, Your Honor."

Mother's guardian *ad litem* was present but said nothing during the hearing.

The court then entered a "Stipulated Order After Hearing" setting forth the parties' agreement that, if mother complied with the terms of the attached service agreement for six months, DHS would change its permanent plan for child from adoption to reunification with mother and would dismiss the petition to terminate mother's parental rights. The order further provided that, if at any time during the six-month period the court found that mother had failed to comply with the service agreement, "a stipulated agreement terminating mother's parental rights to the child shall be entered, without further hearing on the allegations of the petition."

Among other things, the attached service agreement required mother to maintain a drug- and alcohol-free lifestyle, to keep DHS informed as to her current living situation, to participate in parent-child interaction and therapeutic visitation, and to complete her mental and substance abuse treatment program. The service agreement, which mother signed, indicated that completion of the agreement could result in DHS continuing to consider a reunification plan and that failure to complete the agreement could result in "DHS moving forward with a termination of parental rights trial." The order, with the service agreement attached, was entered on August 4, 2004.

At a further hearing on August 25, 2004, the state presented evidence that mother had stopped attending her mental health and drug treatment program and had tested positive for methamphetamine on two occasions. Based on that information, the court entered a "stipulated" judgment "voluntarily" terminating mother's parental rights to her

daughter.² That judgment indicated that mother and the guardian *ad litem* understood that mother had a right to trial, that petitioner would have to prove the allegations by clear and convincing evidence, and that mother had the right to call witnesses and present evidence. Neither mother nor her guardian *ad litem* spoke at that hearing.

1. On appeal, mother contends that the judgment should be set aside because neither she nor her guardian *ad litem* voluntarily, knowingly, and intelligently waived her right to a trial. She also argues that the guardian *ad litem*'s appointment did not comport with due process and that she received constitutionally inadequate assistance of counsel. We do not reach mother's second and third arguments because we agree with the first argument, as explained below.

2. Before turning to the merits, however, we address the state's preliminary argument that the judgment is not appealable "because consent is not being permissibly attacked." The gist of the state's argument is that mother's consent was given at the July hearing and that mother should have appealed the August 4 order that was issued as a result of that hearing. According to the state, the order was appealable under ORS 419A.205, mother failed to appeal it, and her appeal from the judgment terminating her parental rights is an impermissible collateral attack on the earlier order. The flaw in the state's argument is that the order entered by the court on August 4, entitled "Stipulated Order After Hearing," was not appealable under ORS 419A.205(1), which provides:

"For the purpose of being appealed, the following are judgments:

"(a) A judgment finding a child or youth to be within the jurisdiction of the court;

"(b) A judgment disposing of a petition including, but not limited to, a disposition under ORS 419B.325 or 419C.411;

² Although denominated a stipulated judgment, it was submitted by counsel for DHS and was signed only by the trial judge.

“(c) Any final disposition of a petition; and

“(d) A final order adversely affecting the rights or duties of a party and made in a proceeding after judgment including, but not limited to, a final order under ORS 419B.449 or 419B.476.”³

The state argues that the August 4 “Stipulated Order After Hearing” was appealable under paragraph (1)(d) of that statute, but offers no analysis or support for that argument. Even assuming that we were to agree that the August 4 order is a “final order” as that term is used in the statute, the state does not explain how that order, which was entered after the petition to terminate mother’s parental rights was filed but before mother’s parental rights were terminated, is an order “made in a proceeding *after judgment*.” ORS 419A.205(1)(d) (emphasis added). We conclude that the August 4 order was one made before, rather than after, judgment because a judgment in a termination case disposes of the petition. *See generally* ORS 419B.498-419B.530 (describing termination process). Moreover, the order in question does not fit within any of the other categories of appealable judgments listed in ORS 419A.205(1). We therefore conclude that mother is entitled to challenge the intermediate August 4 order in the context of an appeal of the final judgment of termination.

3. We turn now to the substance of mother’s arguments. Mother contends that neither she nor her guardian *ad litem* knowingly, voluntarily, and intelligently waived mother’s right to a trial concerning the termination of her parental rights. We agree. As an initial matter, we note that, because of the appointment of a guardian *ad litem* to represent her interests, mother *alone* could not waive her right to a trial. That is, under circumstances in which a guardian *ad litem* has been appointed for a parent, it is the guardian *ad litem* who has the legal authority to waive the right to a trial. *See generally State ex rel Juv. Dept. v. Cooper*, 188 Or App 588, 598, 72 P3d 674 (2003) (the function of a guardian *ad litem* in termination cases is “to appear on behalf of, and represent the interests of, the incapacitated person”).

³ ORS 419B.449 concerns review proceedings in guardianship cases, and ORS 419B.476 concerns orders resulting from permanency hearings. Neither of those statutes applies to the order at issue here.

4. The issue of whether there was a valid waiver of mother's right to a trial was not preserved in the trial court. Accordingly, we may consider it only if it involves "an error of law apparent on the face of the record." ORAP 5.45(1). An error is apparent on the face of the record if the legal point is obvious and "not reasonably in dispute." *State v. Brown*, 310 Or 347, 355-56, 800 P2d 259 (1990).

That a waiver of a right to trial must be made knowingly, voluntarily, and intelligently is not reasonably in dispute. In *State ex rel SOSCF v. Dennis*, 173 Or App 604, 615, 25 P3d 341, *rev den*, 332 Or 558 (2001), we addressed the due process requirements for waiver of the right to trial in the context of a termination case:

"[R]elying on the Due Process Clause, father argues that the trial court erred in denying his motion to set aside the stipulated judgment because he did not knowingly, voluntarily, and intelligently waive his parental rights. [The state] responds that the record of the * * * hearing clearly demonstrates a valid waiver of father's rights. Father's stipulation to termination of his parental rights was, in effect, a waiver of the constitutional safeguards available under the Due Process Clause to a parent whose rights the state seeks to terminate. *See State ex rel Juv. Dept. v. Geist*, 310 Or 176, 186, 796 P2d 1193 (1990) (because the permanent termination of parental rights is one of the most drastic actions a state can take against one of its inhabitants, the finality of a termination proceeding must be achieved consistently with due process). We therefore review as a matter of law to determine whether father's stipulation was voluntarily, knowingly and intelligently made. *See State v. Meyrick*, 313 Or 125, 132, 831 P2d 666 (1992) (waiver of a constitutional right must be voluntary, knowing, and intelligent). A waiver is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been a knowing and intelligent waiver of a constitutional right depends, in each case, on the particular circumstances surrounding that case."

In *Dennis*, we held that the waiver was constitutionally valid. There, the father's attorney told the court that he had discussed the basis of the termination petition with the father and had explained weaknesses in the state's case, but

that the father wished to stipulate to the termination because he believed it was in the child's best interests. 173 Or App at 615-16. The court then asked the father whether he understood the attorney's remarks, whether the father "freely and voluntarily" entered into the stipulation, whether the father was satisfied with his attorney's advice, and whether the father knew that he had a right to a "full-blown trial" in which the state "must prove the allegations in the petition by clear and convincing evidence * * *." *Id.* at 616-17. The father responded that he did. *Id.* The court then asked if the father knew that he had a right to testify, to call witnesses, to present evidence, and to have his attorney cross-examine the state's witnesses. The father replied that he did. Based on that record, we concluded that the father had "voluntarily, knowingly, and intelligently stipulated to termination of his parental rights." *Id.* at 618.

The state correctly points out that our decision in *Dennis* does not mean that every colloquy concerning waiver of trial rights needs to be as lengthy and explicit as the one we approved in that case. Rather, the state notes, the proper guide is *Meyrick*, on which *Dennis* is based. *Meyrick* actually concerned waiver of the right to counsel, so it is not directly applicable here. However, it does provide the necessary background for understanding our holding in *Dennis*, as discussed below.

In *Meyrick*, a criminal defendant indicated to the trial court that he wished to represent himself. 313 Or at 128. The trial court told the defendant that the implications of doing so were "pretty serious" and that there were "potential problems" with proceeding without counsel. *Id.* In evaluating the defendant's waiver, the Supreme Court began by noting that the right to counsel is a fundamental right and that a valid waiver will not be presumed from a silent record. *Id.* at 131-32. The court held that a colloquy on the record between the trial court and the defendant about the risks of self-representation was the "preferred means of assuring that the defendant understand[s] the risks of self-representation." *Id.* at 133. The court went on to note that the "more relevant information that a trial court provides to a defendant about the right to counsel and about the dangers and disadvantages of self-representation, the more likely it will be that a

defendant's decision to waive counsel is an intentional relinquishment or abandonment of a known right or privilege * * *." *Id.* The court emphasized that whether there has been an intentional relinquishment of a right "will depend on the particular circumstances of each case, including the defendant's age, education, experience, and mental capacity[.]" *Id.* at 132.

5. The state argues that mother validly waived her trial rights here because (a) mother had a guardian *ad litem* and thus was afforded an "added procedural protection," (b) the court informed mother that "termination may occur without any further hearing," and (c) the guardian *ad litem* did not object. We are not persuaded that those three factors add up to an intentional relinquishment of a known right. As noted above, it was mother's guardian *ad litem*, not mother alone, who would have needed to make a valid waiver under these circumstances. The mere fact that the guardian *ad litem* was present and did not object does not indicate that the guardian *ad litem* waived mother's right to a trial after being informed of the nature of that right. As the colloquy in *Dennis* demonstrates, the court must ascertain whether the person making the waiver understands exactly what she is giving up when waiving the right to a trial. At a bare minimum, the court must ascertain that the person understands that the party has a right to trial at which the state has the burden of demonstrating by clear and convincing evidence the allegations in the petition to terminate parental rights. *Cf. State ex rel Juv. Dept. v. Clements*, 95 Or App 640, 646, 770 P2d 937 (1989) (the child in a juvenile delinquency case did not adequately waive his right to a trial where the court failed to inform him that the state would be required at trial to establish his guilt beyond a reasonable doubt).

Here, it is not possible to infer from the above-quoted abbreviated colloquy between mother and the court during which the guardian *ad litem* was silent, or from the circumstances, that the guardian *ad litem* (a) understood that mother had a right to a trial at which the state has the burden of demonstrating by clear and convincing evidence the allegations in the petition to terminate her parental rights, and (b) wished to waive that right. First, as to her understanding of the rights being waived, we note that the court

did not discuss that information with mother or her guardian *ad litem* on the record, nor did it determine on the record that mother's attorney had discussed it with them.⁴ The court did ascertain that mother's attorney had discussed the *service agreement* with mother but, as noted, the service agreement outlined DHS's expectations of mother and indicated that failure to complete the agreement could result in "DHS moving forward to a termination of parental rights *trial*." (Emphasis added.) We cannot infer from mother's signature on the service agreement or from the fact that mother's attorney went over the service agreement with her that mother's guardian *ad litem* understood that mother had a right to a trial at which the state had the burden of demonstrating by clear and convincing evidence the allegations in the petition to terminate mother's parental rights.

6. Second, we cannot infer a waiver of mother's rights from the guardian *ad litem*'s silence. Because the guardian *ad litem* steps into the shoes of the incapacitated party, we evaluate a guardian *ad litem*'s decision on waiver of the right to trial the same way we would evaluate the decision of a person acting on her own behalf. That is, we do not presume the guardian *ad litem* to have specific knowledge of the applicable law,⁵ and we cannot infer from her silence that she was agreeing to anything. *See State v. Gornick*, 196 Or App 397, 407, 102 P3d 734 (2004) (a waiver of the constitutional right to a jury trial cannot be presumed from a silent record, but requires express consent). In addition, mother's attorney's assent to the stipulation is insufficient to establish the necessary waiver. *Cf. State v. Cordray*, 91 Or App 436, 438, 755 P2d 735 (1988) ("Although an attorney's statements are normally binding on a client, we decline to presume an express,

⁴ The trial court's statement in the judgment—that mother and her guardian *ad litem* had been advised and understood that mother had a right to trial, that petitioner would have to prove the allegations by clear and convincing evidence, and that mother had the right to call witnesses and present evidence—is not supported by any evidence in the record.

⁵ In this particular case, it appears that a great deal of important information may have been conveyed to mother and her guardian *ad litem* off the record in chambers. It also appears that mother's guardian *ad litem* may be very experienced in serving in that role in this type of case. Nonetheless, our decision must be based on the record, and the record here is insufficient to establish that either mother or her guardian *ad litem* was adequately informed of mother's rights.

knowing waiver of consent to be tried without a jury from defendant's failure to object to his attorney's actions."). Accordingly, the record does not support a conclusion that mother's guardian *ad litem* knowingly, intelligently, and voluntarily waived mother's right to a trial. The error is apparent on the face of the record.⁶

7, 8. Having found error apparent on the face of the record, the next question is whether we should exercise our discretion to correct the error. We give consideration to factors such as these:

"the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice of the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way."

Ailes v. Portland Meadows, Inc., 312 Or 376, 382 n 6, 823 P2d 956 (1991).

Weighing against correcting the error here is the undeniable conclusion that, had mother's attorney brought the error to the attention of the trial court, it most certainly could have been addressed. However, the nature of the error weighs heavily on the other side of the scale. The error is one of considerable gravity, as it involves the constitutional safeguards applicable to a parent's fundamental rights involving her child. For the same reasons that such an error is not easily susceptible to harmless error analysis, *see* 201 Or App at 90 n 6, it is difficult to speculate that the error is not one of

⁶ We further note that this type of error is not easily susceptible to a harmless error analysis. In *State v. Cole*, 323 Or 30, 912 P2d 907 (1996), the court declined to apply a harmless error analysis in the context of a waiver of counsel where the defendant was not sufficiently apprised of the risks of representing himself at a suppression hearing as required by *Meyrick*. The court rejected the state's argument that the defendant could not have prevailed at the suppression hearing even with representation of counsel, rejecting the notion that "the right of counsel would be applicable only when the court could say that defendant probably would win with the assistance of counsel." *Id.* at 36. The court concluded that it should not speculate about the outcome of such a hearing. *Id.* The same considerations apply with equal or greater force in the present context. Here, because the waiver was of the trial itself, we have no evidentiary basis for speculating how a trial would have come out had mother, through her guardian *ad litem*, exercised her right to go to trial.

considerable gravity. That is, we are confronted with a termination of parental rights, with no evidentiary record to support the allegations made in the petition to terminate parental rights and no valid waiver of a trial in which such an evidentiary record would have been developed. Given those circumstances, we exercise our discretion to correct the asserted error.

Reversed and remanded.