

APPELLATE UPDATE SUPPLEMENT

(1) Dept. of Human Services v. R.D., 257 Or App ---, --- P3d --- (issued July 10, 2013) (affirming permanency judgment continuing plan of reunification and rejecting the child's argument that, regardless whether DHS's reunification efforts were "reasonable," the mother would never be able to adequately parent the child and the child will not be able to safely return home within a reasonable time)

THE COURT OF APPEALS' SUMMARY:

Child appeals from a permanency judgment, asserting that the juvenile court erred in continuing a plan to return child to mother and father instead of changing the plan to adoption. Child argues that, based on the evidence at the hearing, even if the Department of Human Services (DHS) provided reasonable services to mother with regard to sex offender treatment, mother will never be able to adequately parent child and child will not be able to safely return home. Held: The court will not change a plan from reunification to adoption if DHS fails to prove at the permanency hearing that it made reasonable efforts to make it possible for the child to return home safely. Because DHS failed to secure a sex offender treatment provider to mother for 16 months after jurisdiction was established, DHS failed to make reasonable efforts to provide services to mother. Affirmed.

COMMENTS:

(1) Having determined that DHS's reunification efforts with respect to the mother were not "reasonable" and that the parents had not made "sufficient progress" to permit the safe return of the child to their care, the juvenile court found that "further efforts can and will make it possible for the child to safely return home *within a reasonable period of time*," "ordered the parents to participate in services and make progress," continued the reunification plan in effect and "scheduled another permanency hearing for *one year later*." But, the Court of Appeals (and apparently the juvenile court) effectively ignored the "reasonable time" requirements of ORS 419B.476(4)(c) and (5)(c), and there is no reference in the opinion to what evidence, if any, supported the juvenile court's finding that one year is a "reasonable time" for this child. A juvenile court simply can not make a finding that further efforts will permit the safe return home of a child "within a reasonable time" without knowing/considering what the "reasonable time" is for the specific child. See *generally, e.g.*, ORS 419A.004(20) (defining "reasonable time"); *State ex rel SOSCF v. Stillman*, 333 Or 135, 146, 35 P3d 490 (2001) (explaining that the "reasonable time" "inquiry is child-specific" and "calls for testimony in psychological and developmental terms regarding the specific child's requirements").

(2) For reasons that are not explained in the Court of Appeals' decision, the jurisdiction judgment in *R.D.* was not entered until *11 months* after the child (then one day old) was taken into protective custody and placed in substitute care, and the

permanency hearing was not held until *18 months* after jurisdiction was established. ORS 419B.305(1) requires that, absent a judicial finding of "good cause," the juvenile court must hold a hearing on the petition and enter a dispositional order "no later than 60 days" after the filing of the petition, and ORS 419B.470(2) requires that, "when a child or ward is in substitute care, the court shall conduct a permanency hearing no later than 12 months after the ward was found within the jurisdiction of the court under ORS 419B.100 or 14 months after the child or ward was placed in substitute care."

(3) The record in this case also showed that, as a result of DHS's "delay in obtaining the services of a provider for mother's sex offender treatment[,] * * * the mother's treatment did not begin until April 2012" -- *i.e.*, 16 months after the dispositional order was entered and one month before the permanency hearing. ORS 419B.343 requires that a DHS case plan for reunification be rationally related to the bases for jurisdiction *and* provide "[a]ppropriate services to allow the parent the opportunity to adjust the parent's circumstances or condition to make it possible for the ward to safely return home *within a reasonable time.*"

(2) *Dept. of Human Services v. T.A.H., 257 Or App ---, --- P3d --- (issued July 10, 2013) (per curiam opinion affirming jurisdictional judgments with respect to 4 children because the evidence established a current threat of harm to the children)*

THE COURT OF APPEALS' PER CURIAM OPINION:

Mother appeals judgments establishing jurisdiction and disposition as to her four children. DHS alleged that the youngest, infant T, suffered severe injuries; mother left T with unsafe caregivers and failed to protect her from abuse; mother does not adequately supervise children; mother was unable to protect them from domestic violence by father of the youngest three; and mother does not understand basic needs of children and lacks parenting skills. The juvenile court ruled that DHS had proved the allegations and placed children in substitute care. In two of her assignments of error, mother contends that the court erred by taking jurisdiction over children, and, in a third assignment, contends that the court's disposition, out-of-home placement of children, was error.

After briefing was complete, children were placed with mother. Accordingly, mother's assignment of error to the court's out-of-home placement of children is now moot. *See Brumnett v. PSRB*, 351 Or 402, 405, 848 P2d 1194 (1993) (A case is moot when the "court's decision no longer will have a practical effect on or concerning" the parties' rights). As for mother's other assignments of error challenging jurisdiction, we affirm.

Mother left T and her two boys, ages 5 and 6, in the care of a friend, Adams, who was living with her, while she went out and while D, her teenaged daughter, 19, went to a school dance. Mother did not come home that night, and in the morning, D discovered that T had a bump on her head and did not appear normal. D, who often babysat her

siblings, called mother, crying, but mother thought D was overreacting. When mother got home, it was evident that T needed emergency care. T had a skull fracture, a broken arm and ribs, and a liver laceration. Mother argues that children were not at risk and did not need the court's protection at the time of the hearing because the abuse of T was unforeseeable; Adams was no longer in her life and she cooperated with authorities in his criminal prosecution; and, after moving in with her brother, mother had more assistance with children. Mother also notes that she sought a restraining order against the father of the three younger children. Without further discussion, we agree with DHS that the record supports the juvenile court's jurisdiction over children under ORS 19B.100(1)(c) (the court has jurisdiction if the child's "condition or circumstances are such as to endanger the welfare" of the child) given the injuries to T, mother's conduct in response, and evidence that mother failed to provide adequate supervision for children. Affirmed.

COMMENTS:

The rather sparse discussion of the sufficiency of the evidence to support jurisdiction in this case could make this decision hard to reconcile with other recent "current-risk-of-harm" decisions. See generally, e.g., *State v. S.T.S.*, 236 Or App 646, 654, 238 P3d 53 (2010) (in order to establish jurisdiction under ORS 419B.100(1) (the petitioner must prove "that there is a current risk of harm and not simply that the child's welfare was endangered at some point in the past").

(3) *Dept. of Human Services v. M.K.*, 257 Or App ---, --- P3d --- (issued July 10, 2013) (reversing permanency judgment because, in determining that DHS's reunification efforts had been reasonable even though the agency had declined to provide father with a psychosexual evaluation, the juvenile court had not considered the pertinent circumstances and the record did not support the juvenile court's determination that the agency's efforts were reasonable)

THE COURT OF APPEALS' SUMMARY:

This juvenile dependency case involves a plan for reunifying a young child, R, with his father, who was, at the pertinent times, incarcerated on convictions related to his sexual abuse of a minor. Father appeals from a permanency judgment in which the juvenile court (1) continued the permanency plan for reunifying father and R and (2) determined that father had not made sufficient progress for R to safely return home, despite reasonable efforts by the Department of Human Services (DHS). The court determined that DHS's reunification efforts had been reasonable even though the agency had declined to provide father with a psychosexual evaluation, which it required in order to determine whether father presented a danger to R. On appeal, father challenges both the juvenile court's "reasonable efforts" and "sufficient progress" determinations. Held: The juvenile court erred because it did not consider all pertinent circumstances when it evaluated whether DHS had made reasonable efforts to reunite father and R. Moreover, the record does not include evidence that would support a "reasonable efforts" determination based on the totality of the circumstances. Reversed.

EXCERPTS FROM OPINION:

This juvenile dependency case involves a plan for reunifying a young child, R, with his father, who was, at the pertinent times, incarcerated on convictions related to his sexual abuse of a minor. Father appeals from a permanency judgment in which the juvenile court (1) continued the permanency plan for reunifying father and R and (2) determined that father had not made sufficient progress for R to safely return home, despite reasonable efforts by the Department of Human Services (DHS). The court determined that DHS's reunification efforts had been reasonable even though the agency had declined to provide father with a psychosexual evaluation, which was needed "to determine whether he present[ed] a danger" to R. On appeal, father challenges both the juvenile court's "reasonable efforts" and "sufficient progress" determinations. We conclude that the juvenile court did not consider all pertinent circumstances when it evaluated whether DHS had made reasonable efforts to reunite father and R and, moreover, that the record does not include evidence that would support a "reasonable efforts" determination based on the totality of the circumstances. Accordingly, we reverse.

* * * * *

At the time of the permanency hearing, father was incarcerated at the Warner Creek Correctional Facility in Lakeview on convictions related to sexual contact he had with a minor female over two years, beginning when she was 15 years old and he was 25. Father expected to be released in November 2013. While in prison, father had completed courses on parenting and anger management, and he also had enrolled in a "cognitive thinking errors" group. DHS had allowed father to write to R while he was incarcerated, and father had sent "a couple" of letters by the time of the hearing. A DHS caseworker testified at the permanency hearing that R had met father when R was an infant, but did not remember him at the time of the hearing. Consequently, the caseworker agreed, services aimed at developing a relationship between the two would "be a good thing." DHS wanted father to visit with R, but the agency "would ask that [father] complete [a psychosexual evaluation] prior to engaging in visitation * * * because [it] would want to determine whether or not he would be a threat of harm to [R's] safety." According to the caseworker, the results of that evaluation would determine whether father could safely have visitation with R -- either in prison or after his release -- or would first need services: "If the psychosexual recommends that there are no risk factors, that there is no worry of * * * any kind of threat of harm to [R], then * * * we'd look at visitation at that time; however, * * * if [the evaluation] says that there is a risk factor, then we would have to, based on the recommendations of that evaluation, if there's services that [might] eradicate the risk, then we would definitely ask [father] to do services at that point." The caseworker also testified that, given R's attachment issues and "sexualized behaviors," R might need his own assessment before DHS could approve visitation. The caseworker opined that undergoing a psychosexual evaluation was the "key element" in father progressing toward reunification with R. Nonetheless, the caseworker acknowledged, father had not yet been evaluated. Although the caseworker had found one doctor who was willing to evaluate father at the Lakeview prison, that doctor wanted to perform the evaluation on a Saturday, and, according to the caseworker, father's prison counselor "didn't know if that was feasible."

In addition, the caseworker explained, the doctor with whom she had spoken would charge \$5,000 to perform the psychosexual evaluation while father was incarcerated, in comparison to the "less than \$1,000" that DHS usually would pay for such an evaluation. The caseworker speculated that the higher cost might relate to the doctor's travel expenses or to his desire to perform the evaluation on a weekend. Because of the high proposed charge, the caseworker still was searching for other doctors and thus was "still looking into the logistics of making a psychosexual happen here[.]"

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* * * In his first assignment of error, father argues that the court erred in determining that DHS had made reasonable efforts to make reunification possible. According to father, because DHS had made the psychosexual evaluation a prerequisite for visitation with R, it should have arranged for father to be

evaluated "within a reasonable time" -- i.e. while he was incarcerated -- and, because the timing of the evaluation was critical, "regardless of cost." In response, DHS asserts that its postponement of the evaluation was reasonable because the only doctor who had expressed willingness to evaluate father at the Lakeview prison had demanded payment of "more than five times the amount that DHS usually pays for evaluations outside of prison[.]" so the caseworker had continued to search for a provider willing to evaluate father at a lower cost. * * * As we have explained, "[t]he type and sufficiency efforts that the state is required to make and whether the types of actions it requires parents to make are reasonable depends on the particular circumstances." State ex rel SOSCF v. Frazier, 152 Or App 568, 582, 955 P2d 272, rev den, 327 Or 305 (1998).[.] * * *. The difficulty with both parties' positions on appeal, as well as with the juvenile court's analysis, is that they do not grapple with all of the pertinent circumstances. Certainly the expense associated with provision of services is a factor that DHS and the courts reasonably may consider, we reject without further discussion father's suggestion that DHS must "fund the services it required, regardless of cost." However, we also reject DHS's suggestion that evidence of a greater-than-usual cost in providing services aimed at reunification is enough, standing alone, to justify a decision not to provide those services. Rather, when a parent complains that DHS has not provided adequate services, a court making a "reasonable efforts" determination must consider not only the burdens that the state would shoulder in providing those services, but also what benefit might reasonably be expected to flow from them.

* * * [E]xcept in specific circumstances not applicable here, DHS must at least "attempt[] to engage and work with" parents, even those who are incarcerated. State ex rel Juv. Dept. v. Williams, 204 Or App 496, 508, 130 P3d 801 (2006). In doing so, DHS must give the parents a reasonable opportunity "to demonstrate their ability to adjust their conduct and become minimally adequate parents * * *." State ex rel Dept. of Human Services v. Shugars, 208 Or App 694, 717 -18, 145 P3d 354 (2006). And, in general, that is true even when the agency will bear the expense of providing the necessary services. See State ex rel SOSCF v. Burke, 164 Or App 178, 191, 990 P2d 922 (1999), rev den, 330 Or 138 (2000) (DHS's efforts were unreasonable where it declined to pay for ongoing sex offender treatment that was "a requirement for family reunification" and the cost of which "present[ed] an insurmountable barrier to the integration of children into father's home").

DHS's obligation to make reasonable efforts toward reunification does not, of course, mean that the agency must provide every service that conceivably could benefit a parent, regardless of expense or other burdens. [Citation omitted.] The ultimate question remains, instead, whether DHS's efforts have been reasonable under the circumstances. [Citation omitted.] question, a court must consider the totality of the circumstances, including both the costs associated with providing services and whether the parent is likely to benefit from services in a way that would increase the chances of family reunification. Put bluntly, when a parent contends that DHS's efforts have not been reasonable because the agency has declined to provide a particular service, the court's "reasonable efforts" determination should include something resembling a cost-benefit analysis, at least when -- as here -- the agency itself has deemed that service to be "key" to the reunification plan.

* * * * *

Given the importance of the psychosexual evaluation to the reunification plan, the juvenile court should have considered the extent to which the family might benefit if father received a psychosexual evaluation promptly, instead of waiting a year to be evaluated after his release. In other words, the court should have considered the totality of the circumstances related to the reasonableness of DHS's reunification efforts, including both the potential benefits of providing services and the burden of associated costs. The record does not reflect such an analysis. Moreover, the parties did not proffer any evidence regarding the potential benefits (or lack thereof) of promptly providing father with a psychosexual evaluation that would support a determination, properly based on the totality of the circumstances, that DHS had made "reasonable efforts" to make it possible for R to return home. Accordingly, we reverse.