

APPELLATE UPDATE

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A. Juvenile Court Jurisdiction “As To” One Parent

1. Cases

Dept. of Human Services v. W.A.C., 263 Or App 382, ___ P3d ___ (June 4, 2014) (Washington County). DHS filed a petition seeking to make two children wards of the juvenile court based on concerns about mother’s mental health and father’s pattern of domestic violence. In October 2012, mother admitted the allegations relating to her, including an allegation that she had been “subjected to domestic violence” by father and that she was “unable to protect the children from exposure to father’s domestic violence without DHS intervention.” The court then entered a judgment of jurisdiction “as to” mother. Several months later, a hearing was held on the allegations relating to father. The court found that the state proved two of the allegations, but found that the state had *not* proved the allegations relating to domestic violence. The court then entered a second judgment of jurisdiction, which included both the fact of mother’s admissions and the finding that the state had failed to prove the domestic violence allegations regarding father. Father appealed from that judgment. While the appeal was pending, father moved to set aside the judgment “as to” mother on the grounds that the juvenile court could not take jurisdiction without first adjudicating the allegations about father. That motion was denied, and father appealed that ruling.

Held: Reversed. First, the court held that “a juvenile court cannot assert jurisdiction over a child based on the admissions of one parent when the other parent has been served and summoned, appears, and contests the allegations in the petition.” *Id.* at 394. The court explained, “The proper procedure in those cases is for the court to receive the one parent’s admissions and delay making a jurisdictional determination until after the contested hearing.” *Id.* at 394-95. Second, the court held that in cases where the parents’ interests are “adverse,” the juvenile court “can consider the admission by one parent as a fact in determining whether DHS proved the admitted allegation, but it cannot conclusively establish that allegation.” *Id.* at 399.

Dept. of Human Services v. C.F., 258 Or App 50, 308 P3d 344, *rev den*, 354 Or 386 (2013) (Klamath County). Father appealed from a jurisdiction judgment entered “as to father.” In response, DHS argued that father’s appeal was not justiciable, because he did not appeal from an earlier jurisdiction judgment “as to mother” entered after mother admitted that she and father had engaged in domestic violence and that she had failed to protect the children from father.

Held: Affirmed. The court rejected the department’s justiciability argument, holding that the earlier jurisdiction judgment “as to mother” did not “deprive the juvenile court of authority to later determine jurisdiction as to father.” *Id.* at 54. Specifically, the court noted that the juvenile court had “expressly contemplated” another hearing to adjudicate the allegations relating to father, and that if the court “had decided that father did not present a threat of injury to the children, the juvenile court had the authority to set aside its earlier judgment or enter a judgment so stating.” *Id.*

2. Discussion Points

- Has *W.A.C.* effectively overruled *C.F.*?
- The holding in *W.A.C.* is expressly limited to situations where both parents have been served with summons and appeared, and one parent contests the allegations in the petition. What is the significance of this holding in cases where there is no legal parent, or a legal parent is absent?

B. Motions to Dismiss Jurisdiction

1. Cases

Dept. of Human Services v. A.R.S., 258 Or App 624, 310 P3d 1186 (2013) (*A.R.S. III*) (Washington County). Child and mother appealed from a juvenile court order denying their motion to dismiss jurisdiction. The hearing on the motion to dismiss was conducted along with a review hearing under ORS 419B.449. The juvenile court issued an order denying the motion to dismiss along with (but separate from) a review hearing judgment. The juvenile court denied mother’s motion to dismiss after finding that two of the conditions that led to the wardship still existed.

Held: Reversed and remanded. When a parent moves to dismiss jurisdiction in the context of a review hearing, the burden is on DHS (or “the proponent of continuing jurisdiction”) “to prove, by a preponderance of the evidence, that the factual bases for jurisdiction persist[] to a degree that they pose[] a current threat of serious loss or injury [to the child] that is likely to be realized.” *Id.* at 635. This does not require a “retrial” of the original allegations. *Id.* at 636.

Dept. of Human Services v. J.M., 260 Or App 261, 317 P3d 402 (2013) (Clackamas County). The court originally asserted jurisdiction over the father’s children because the father used

“inappropriate” physical discipline. At the subsequent permanency hearing, the father testified he would abstain from employing corporal punishment to avoid any further child welfare involvement. The department’s expert testified that he believed that the father was “likely to comply on the surface with rules and regulations as long as he is being watched but [would] regress to former patterns of behavior as soon as the spot light is turned off.” *Id.* at 264. At the conclusion of the hearing, the father moved to dismiss jurisdiction. The juvenile court denied the motion, and father appealed.

Held: Reversed and remanded. The court stated that the parent’s conduct, and not the parent’s belief system, is the proper subject of the court’s jurisdictional inquiry. “The dispositive question in this case is not what father believes, but what he—at the time of the hearing—is likely to do. Put another way, the state does not interfere with a parent’s right to raise his children on the basis of a person’s values unless and until those values manifest themselves in conduct, or are likely to do so.” *Id.* at 268-69. Following the holding in *A.R.S. III*, the court held that “the facts and inferences that DHS is entitled to rely on do not satisfy its burden of establishing that, at the time of the hearing, father * * * poses a current threat of serious loss or injury that is reasonably likely to be realized.” *Id.* at 269.

Dept. of Human Services v. D.A.S., Jr., 261 Or App 538, 323 P3d 484 (2014) (Coos County). Father lived in Washington and his child was a ward of the Oregon juvenile court. At a permanency hearing, father filed a written motion to dismiss jurisdiction. The juvenile court denied the motion, holding that “continued jurisdiction was warranted” because the state of Washington had denied father ICPC approval, father’s wife had open dependency cases involving her older children, and father did not have a custody order. **Held:** Reversed and remanded. The court held that “[B]ecause DHS failed to establish a current risk of serious loss or injury to [the child] for each of the bases on which the juvenile court concluded continued jurisdiction was warranted, we conclude that the record is legally insufficient to support the juvenile court’s continued jurisdiction.” *Id.* at 549.

Dept. of Human Services v. R.S., 261 Or App 815, 322 P3d 572 (2014) (Douglas County). The juvenile court asserted jurisdiction over mother’s child based upon mother’s admissions that she “may have” substance abuse and mental health problems and because the mother left the child in the grandmother’s care where the child was bitten by a dog. Approximately three years later, the mother appealed from a judgment establishing guardianship under ORS 419B.366. In her first assignment of error, mother argued that the juvenile court erred when it denied her motion to terminate the wardship.

Held: Affirmed. The court determined that the record did not reflect that mother had moved to terminate the wardship “or otherwise properly place the continuing jurisdiction of the court at issue.” Instead, the court viewed mother’s “motion” (which was set forth in two memoranda opposing the guardianship) as an attempt to “collaterally attack the initial jurisdictional determination, rather than to contest the continuing jurisdiction of the juvenile

court.” *Id.* at 816. The Court of Appeals held that the juvenile court’s initial jurisdictional determination is not subject to collateral attack: “Once the initial jurisdiction of the court is established, the issue in later proceedings--if jurisdiction is at issue--is whether jurisdiction continues.” *Id.* at 817.

2. Discussion Points

- The “context” of *A.R.S.* was a motion to dismiss made at a review hearing. Is continuing jurisdiction at issue in every review hearing?
- What is required to place continuing jurisdiction “at issue”?
- How do we reconcile the rule of *R.S.* (challenging the existence of the facts that gave rise to jurisdiction constitutes an impermissible “collateral attack”) with the *A.L.M.* and *A.R.S.* line of cases (“It is axiomatic that a juvenile court may not continue a wardship if the jurisdictional facts on which it is based have ceased to exist.”)? *Dept. of Human Services v. A.L.M.*, 232 Or App 13, 16, 220 P3d 449 (2009).
- If the burden of proof is on the proponent of continuing jurisdiction, does due process or the Juvenile Code require notice?

C. Admissibility of Evidence Under ORS 419B.325(2)

1. Cases

Dept. of Human Services v. J.B.V., 262 Or App 745, ___ P3d ___ (2014) (Douglas County). Father appealed from a judgment denying his motion to dismiss and changing the permanency plan for his two children to adoption. On appeal, father challenged the juvenile court’s consideration of exhibits that were hearsay or contained hearsay. Father argued that the relaxed evidentiary standard contained in ORS 419B.325(2) does not apply to motions to dismiss jurisdiction or to the “adjudicatory phase” of a permanency hearing. **Held:** Vacated and remanded for reconsideration. The Court held that ORS 419B.325(2) did not apply in the context of a motion to dismiss, stating that “[I]n the absence of an explicit indication to the contrary, it is not persuasive to suggest that the legislature intended for the juvenile court’s jurisdiction, once established with competent evidence, to be perpetuated with less-than-competent evidence. We therefore conclude that ORS 419B.325(2) cannot serve as the basis for the court to receive or consider evidence for the purpose of making a jurisdictional determination.” *Id.* at 752. The court rejected father’s arguments regarding ORS 419B.325’s application to permanency hearings, holding that there was nothing in the text or context of ORS 419B.476 to support father’s assertion that permanency hearings are bifurcated into separate adjudicatory and dispositional phases.

2. Discussion Point

- Would the outcome be different if the motion to dismiss was heard as part of a review hearing, because the review hearing statute expressly authorizes the court to determine if it “should continue jurisdiction”?

D. Right to Counsel

1. Cases

Dept. of Human Services v. S.C.P., 262 Or App 373, 324 P3d 633 (2014) (Clackamas County). Mother appealed from the juvenile court’s denial of her motion to set aside her relinquishments of parental rights to her children on the basis of duress. At the same time mother filed her motion, her attorney moved to withdraw, citing a complete breakdown in the attorney-client relationship as well as an ethical conflict based on the attorney’s involvement in obtaining mother’s agreement to relinquish. At the hearing on mother’s motion, the juvenile court engaged mother in a discussion regarding her assertion that she had been coerced into signing the relinquishments. Mother’s attorney did not participate in the discussion or make any arguments on mother’s behalf, even though the court had not ruled on the motion to withdraw. Mother asked for a new attorney, but that request was denied. On appeal, mother argued that she was denied adequate counsel at the hearing on her motion and, therefore, was denied a fundamentally fair hearing. **Held:** Vacated and remanded. The court held that due process requires that a proceeding “implicating mother’s parental rights” be fundamentally fair, and that depriving mother of the assistance of counsel caused the determination of mother’s motion to be “made without the procedural protections required for a fundamentally fair hearing.” *Id.* at 384.

2. Discussion Point

- In what circumstances are a parent’s due process rights affected by the absence of counsel? Can a parent be required to proceed pro se?

E. Judgments Entered Pursuant to ORS 419B.819

1. Cases

Dept. of Human Services v. A.D.G., 260 Or App 525, 317 P3d 950 (2014) (Douglas County). Mother appealed from a judgment denying her motions (based on ORS 419B.923(1) and (8)) to set aside two TPR judgments. Mother had failed to appear at earlier hearings, and the court entered orders of default and set a prima facie hearing for a later date. Mother appeared at the scheduled prima facie hearing, but the trial court did not allow her to participate in the hearing because she was “in default.” On appeal, mother contended that the trial court abused its discretion in denying her motion to set aside the TPR judgments, because ORS 419B.819(7) allowed the state to terminate parental rights only in a parent’s absence.

Held: Reversed. First, the court held that ORS 419B.923(1) “afforded the juvenile court the discretion to set aside the default TPR judgment in this case.” *Id.* at 534. In reaching that result, the court determined that “the legislature intended to provide a juvenile court with broad authority under ORS 419B.923(1) to modify or set aside a judgment or order”, beyond just the grounds enumerated in the statute. *Id.* at 539. Second, the court held that ORS 419B.819(7) has “only ever empowered courts to terminate parental rights by default as a result of a parent’s failure to appear at proceedings at which the parent is actually absent.” *Id.* at 546. Because mother appeared at the prima facie hearing in this case, the court erred in refusing to allow her to participate in the hearing, and consequently, abused its discretion in denying the motion to set aside the judgments.

2. Discussion Points

- May the juvenile court go forward with a prima facie case if counsel is present but the parent is not? If the court does so, does due process require that counsel remain and participate in the hearing?
- If a parent fails to appear for a hearing other than the termination trial itself, must the court proceed to a prima facie case at that time, or may the prima facie hearing be set for a later date?

F. Current Risk of Harm

1. Cases

Dept. of Human Services v. A.B., 264 Or App ___, ___ P3d ___ (July 23, 2014) (Multnomah County). Mother appealed from a judgment of the juvenile court assuming jurisdiction over three of her five children on allegations of mother’s substance abuse; mother’s neglect of the children’s medical, dental and educational neglect; and father’s failure to protect the children from mother’s neglect. Mother and her children had been the subject of a previous dependency proceeding, also based on allegations of medical, dental, and educational neglect, as well as allegations of an unsanitary home and substance abuse by father. That previous proceeding had been dismissed after DHS helped mother find a new home, mother engaged in services, and mother agreed to follow up on the children’s medical needs. Less than a year later, concerns were raised again about the children’s’ medical and educational needs. Children were removed from mother’s care, and placed with father pursuant to a safety plan. On appeal, mother argued that the evidence was insufficient to show that she had a substance abuse problem that placed the children at risk. She also argued that the children were not subject to a *current* risk of harm from her neglect, because their conditions had improved at the time of the hearing and she had been participating in services.

Held: The evidence in the record was insufficient to prove that mother had a substance abuse problem that placed the children at risk of harm at the time of the jurisdiction

hearing. (slip op at 6). Although mother had tested positive for methamphetamine on one occasion four months before the hearing, all her other UAs were negative and she had not been referred for treatment after a drug and alcohol assessment. The evidence was sufficient, however, to prove that the children were at risk of harm from neglect if they were returned to mother's care. The court rejected mother's argument that the juvenile court erred when it relied on mother's "lack of insight" into the children's needs, distinguishing *Dept. of Human Services v. J.M.*, 260 Or App 261 (2013), upon which mother relied, and explaining that the caseworker's testimony that mother continued to "minimize the severity of the circumstances" leading to DHS involvement provided the necessary link between mother's lack of insight and the risk of harm to the children. (slip op at 10).

Dept. of Human Services v. E.M., 264 Or App 76, ___ P3d ___ (July 2, 2014) (Lane County). Mother appealed from a juvenile court judgment taking jurisdiction based on mother's history of substance abuse. Mother had tested positive for amphetamine and THC at a prenatal medical appointment two months before child's birth, and again tested positive for THC 4 days before child's birth. Child did not test positive for drugs at birth. Mother admitted using marijuana while pregnant, to combat morning sickness, but denied any amphetamine use. After child was born, mother entered into a voluntary agreement with DHS, in which mother and child would reside with mother's grandmother. Mother submitted two voluntary UAs during the month after child's birth, both of which were clean. Mother failed to show up for a UA two weeks later, and DHS decided to file a dependency petition. In the meantime, mother and child moved to Alaska, requiring DHS to obtain a "pick up" warrant for child's return. The evidence about mother's substance abuse at the hearing was (1) mother's admission that she used marijuana while pregnant; (2) mother's admission that, four years previous to the hearing, she had used heroin for about a year; (3) mother could not explain the presence of amphetamine in her prenatal UA; (4) mother had not engaged in any drug or alcohol treatment; and (5) mother was still involved with child's father, who had substance abuse issues of his own.

Held: Reversed and remanded. The court held that "[T]he record lacks evidence that mother had a substance abuse problem at the time of the hearing." (slip op at 7). Although the court acknowledged that the record would support a determination that mother was not credible about her drug use, mother's credibility problem was not "affirmative evidence" that she was still using drugs. (slip op at 7). The court also held that even if mother was continuing to use drugs, there was no evidence that mother's drug use created a non-speculative risk of harm to child. (slip op at 8).

Dept. of Human Services v. S.R.C., 263 Or App 506, ___ P3d ___ (June 11, 2014) (Washington County). Mother appealed from a judgment in which the juvenile court determined additional bases for jurisdiction over mother's daughter, H. The court had previously taken jurisdiction over H based on findings related to mother's methamphetamine use, dangerous living conditions, and "overt rejection" of CPS intervention. After the court took jurisdiction, DHS filed an amended petition containing eight new allegations concerning the level of care mother provided

to H and her siblings; physical and verbal abuse; domestic violence; and the sexual abuse of H by H's stepfather. The juvenile court again took jurisdiction, and mother appealed. She challenged the sufficiency of the evidence to prove one of the allegations, and argued that the remaining allegations, although proven, were insufficient to support the juvenile court taking jurisdiction because they did not present a "current threat of harm" to H. Specifically, mother argued that because H had been removed from the home and placed in foster care and because mother was incarcerated, it was unlikely that mother would have the opportunity to inflict on H the type of harm addressed in the allegations.

Held: Affirmed. The Court of Appeals held that "the court's order removing H from the serious risk of harm posed by mother was predicated on its determination that mother's parenting had created a serious risk of harm for H. It having been determined that mother endangered H's welfare, mother cannot here be permitted to rely on that fact in an effort to prevent DHS from establishing that H's welfare was endangered for additional reasons." (slip op at 7).

2. Discussion Points

- The state is required to prove a current risk of harm at the time the petition is adjudicated. If there is a delay in adjudicating the allegations in the petition, how should the court evaluate the "current" risk of harm?
- The juvenile court may not order a parent to participate in services until jurisdiction is established. If a parent does not participate voluntarily, what evidence is required to prove a current risk of harm?