

# **APPELLATE CASE LAW UPDATE**

Summaries of Oregon Appellate Court Decisions in  
Juvenile Court Cases

**July 2013 to July 2014**

Oregon Judicial Department  
Juvenile Court Improvement Project

# Juvenile Delinquency

## 1. [State of Oregon v. N.R.L., 354 Or 222 \(2013\).](#)

### Facts:

Youth was adjudicated delinquent after admitting that he unlawfully entered a warehouse and damaged property – acts that, if committed by an adult, would constitute second-degree burglary and first-degree criminal mischief. Before the dispositional hearing, youth moved for a jury trial, arguing that, under Article I, section 17, he was entitled to have a jury determine the amount of restitution he should be required to pay. The juvenile court denied youth’s motion and entered a judgment ordering youth to pay \$114,071.13 in restitution.

Youth appealed arguing that he was entitled to a jury trial on the issue of the amount of restitution that he should be required to pay. Holding that a juvenile offender’s obligation to pay restitution is penal, not civil, in nature, the Court of Appeals affirmed the trial court’s determination. The Oregon Supreme Court allowed review on the question of whether Article I, Section 17, applies to a juvenile restitution determination under ORS 419C.450.

### Held:

A restitution determination pursuant to ORS 419C.450 is not civil in nature. Article 1, section 17, did not grant a right to jury trial in this case.

## 2. [State of Oregon v. J.N.S., 258 Or App 310 \(2013\).](#)

### Facts:

Youth and a companion entered a vacant house after throwing a rock through a back door window and unlocking the door. Once inside, they took a key. Upon being detained by police, youth said he thought the house “would be a cool place to hang out” and that “it was okay since no one lived there and no one owned it.” Officers searched youth’s bag and found a modified tennis ball filled with smokeless gunpowder with an improvised fuse and a magnesium fire starter. Youth told police he was going to set it off later outside.

After the delinquency hearing, the juvenile court found the youth within the jurisdiction of the court for committing acts that, if committed by an adult, would constitute burglary in the second degree, ORS 164.215, unlawful possession of a destructive device, ORS 166.382, unlawful manufacture of a destructive device, ORS 166.384, criminal mischief in the third degree, ORS 164.345, and theft in the third degree, ORS 164.043.

Youth appealed, arguing (1) the juvenile court erred in concluding that youth’s intent to steal the key, formed after youth unlawfully entered the vacant house, was sufficient to establish the

specific intent element of burglary; (2) the court erred in failing to hold that the tennis ball device fell within the exclusion for “pyrotechnic” device in ORS 166.382(2)(a); and (3) the court erred in adjudicating youth delinquent for theft in the third degree because the state failed to prove that the key had any value (the Court of Appeals rejected this without discussion).

Held:

Second-degree burglary may be committed in two alternative ways: (1) entering a building unlawfully with the intent to commit a crime therein; or (2) entering a building lawfully, but then remaining unlawfully – viz., failing to leave after authorization to be present expires or is revoked- with the intent to commit a crime therein. The focus of the question is on youth’s intent at the initiation of the trespass. In this case, the only evidence of the youth’s intent to commit a crime when he entered the premises unlawfully was youth’s possession of the key. The Court of Appeals found the juvenile court erred in adjudicating the youth delinquent for burglary in the second degree, but found the court’s factual findings were sufficient to support an adjudication for criminal trespass in the second degree, ORS 164.245. With respect to jurisdiction on unlawful possession of a destructive device and unlawful manufacture of a destructive device, the juvenile court’s judgment was reversed and remanded for consideration of whether the tennis ball device fell under the statutory exclusion for “pyrotechnic” devices.

## **Juvenile Dependency**

### **Guardianship**

1. *Dept. of Human Services v. K.H.*, [256 Or App 242 \(2013\)](#), *adhered to as modified*, [258 Or App 532 \(2013\)](#).

Facts:

In the initial Court of Appeals opinion, the court found the trial court had conducted a sufficient hearing under ORS 419B.366 (establishment of durable guardianship), where mother was allowed to submit an offer of proof, and the trial court denied her request for a further evidentiary hearing based on a finding that the evidence would not affect its conclusion as to the findings required by ORS 419B.366. The Court of Appeals found it permissible for the trial court to limit mother’s submission to an offer of proof regarding the “reasonable time” determination where the permanency hearing and guardianship hearing were held within a four-month span and the trial court made a finding regarding “reasonable time” in the permanency judgment. On petition for reconsideration, mother challenges the Court of Appeals “factual findings” that (1) the juvenile court took judicial notice of the record of the permanency hearing

in denying mother's request for a hearing, and (2) the juvenile court relied upon the record of the prior permanency hearing in ruling that DHS had met its evidentiary burden under ORS 419B.366. Mother also requested reconsideration that the hearing satisfied the hearing requirement in ORS 419B.366 and that DHS had met its evidentiary burden to prove all four elements of guardianship.

Held:

The Court of Appeals disavowed its statement that the juvenile court took judicial notice of the permanency hearing record, and instead clarified the trial court "considered" the court record of the contested permanency proceedings. The trial court's determination that the child could not be returned to mother in a reasonable time was not just based on the affidavit of DHS counsel, but also on mother's offer of proof and the trial court file, which included the determinations incorporated in the permanency judgment as to reasonable time. The former opinion was adhered to as modified.

2. [\*Dept. of Human Services. v. J.G.\*, 260 Or App \\_\\_\\_\\_\\_, \(2014\).](#)

AFFIRMED, KLAMATH COUNTY

Facts:

Mother, a member of the Klamath Tribe, appealed the granting of a durable guardianship under ORS 419B.366, arguing that the juvenile court's failure to make an 'active efforts' finding in the proceeding establishing the guardianship was reversible error. The court made such a finding at the permanency hearing but not at the proceeding in which the guardianship was established.

Held:

**(1) Allegation of ICWA violation may be raised for the first time on appeal even though Oregon rule requires preservation of error.** 25 USC Section 1914 of ICWA preempts Oregon's preservation rule as "obstacle preemption." Section 1914 allows parties to challenge "in any court of competent jurisdiction" any action for foster care placement or TPR that violates certain sections of ICWA. The effect of Oregon's preservation rule would be an obstacle to the execution of the full purposes and objectives of Congress because Mother would be precluded, by her failure to preserve, from enforcing her right to invoke section 1914 as a means of enforcing ICWA in a challenge in the appellate court.

**(2) The court was not required under ICWA to make an "active efforts" finding in the guardianship judgment where it had made the finding in the permanency judgment.** A guardianship is a "foster care placement" under ICWA but the court is not required to make an active efforts finding in the guardianship judgment because the court satisfied that requirement by making an active efforts finding at the permanency hearing. The court is not required to make that finding again at a later hearing when it actually orders that placement.

## **Jurisdiction**

**1. [Dept. of Human Services v. N.P., 257 Or App 633 \(2013\).](#)**

**Facts:**

The circuit court established jurisdiction over father in August, 2011 based on “..father’s use of controlled substances made him incompetent to parent.” Father successfully completed drug and alcohol counseling in December, 2011. DHS filed an amended petition in February 2012 alleging the child was within the jurisdiction of the court because “[t]he father has ongoing mental health and/or anger and frustration problems that impair his ability to competently parent the child.” At a hearing on the petition in April, 2012, the court found father no longer had a substance abuse problem and that his mental health did not impair his ability to parent, but that jurisdiction was justified because, “[v]iewed in light of the risk that is represented by his use of controlled substances, father’s anger and frustration represent a condition that, without treatment, impairs his ability to parent.” Father appealed, arguing the court erred in denying his motion to terminate wardship and to dismiss jurisdiction.

**Held:**

The 2011 judgment establishing wardship is no longer sustained because father’s substance abuse was no longer an issue. The trial court could not rely on father’s past substance abuse and his risk of relapse to support jurisdiction based on the second petition since those facts ceased to exist and for which there was no evidence. Since the court did not base jurisdiction on father’s anger and frustration issues, the Court of Appeals reversed the trial court’s determination.

In addition, the Court of Appeals clarified its standard of review as follows. The Court of Appeals may decline to review the juvenile court’s determination of jurisdiction predicated on ORS 419B.100(1)(c) de novo. The court has discretion to review “non-de novo”, allowing the court to view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court’s disposition and assess whether the record was legally sufficient to permit that outcome. The opinion sets forth a three part analysis for reviewing the trial court’s determination.

**2. [Dept. of Human Services v. C.J.T., 258 Or App 57 \(2013\).](#)**

**Facts:**

Three children were taken into protective custody and DHS filed a petition with four circumstances and conditions that endangered the child’s welfare under ORS 419B.100(1)(c). Following a jurisdictional hearing on July 30, 2012, the juvenile court found sufficient evidence to established jurisdiction based on one allegation concerning mother’s use of alcohol and/or controlled substances. The following testimony was presented at the hearing: (1) the children

smelled marijuana in the house and believed they had seen mother using it, and (2) the children's fathers smelled marijuana in mother's house in March or April of 2012. Mother took three drug tests in July, 2012, two of which came back negative, and one she failed because the specimen was too dilute. On appeal, mother argued the trial court erred in determining the children were within the court's jurisdiction under ORS 419B.100(1)(c) when DHS failed to prove the children's welfare was at risk of serious loss or injury or to present any evidence that mother was using marijuana at the time of the hearing.

**Held:**

Juvenile court jurisdiction is appropriate under ORS 419B.100(1)(c) when a child's condition or circumstances endanger the welfare of the child. To "endanger" the welfare of a child means to expose the child to conditions or circumstances that present a current threat of serious loss or injury. The key inquiry in determining whether conditions or circumstances warrant jurisdiction is whether, under the totality of circumstances, there is a reasonable likelihood of harm to the welfare of the child, and DHS has the burden to demonstrate a nexus between the allegedly risk-causing conduct and the harm to the child. DHS must also show the risk of harm is present at the time of the hearing.

In this case, the record lacked legally sufficient evidence to establish that mother used marijuana after April, 2012. There is no evidence in the record establishing a nexus between mother's marijuana use and any current threat of harm to the children. There is no evidence in the record establishing that mother abused alcohol. The trial court's decision was reversed.

3. [\*Dept. of Human Services v. T.A.H., 257 Or App 526 \(2013\).\*](#)

**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").

#### **4. [Dept. of Human Services v. R.L.F., Jr., 260 Or App \\_\\_\\_\\_\\_, \(2013\).](#)**

##### Facts:

The juvenile court took jurisdiction over the child pursuant to ORS 419B.100(1)(c), on the following bases relating to father: (1) The father was subjected to domestic violence by the mother and the father is unable to protect the child from exposure to mother's violence; (2) The father of the child does not have sole legal custody of the child and is unable to protect the child from the mother's abusive and neglectful behavior; (3) The father's substance abuse interferes with his ability to safely parent the child; and (4) [The father] is said child's legal father as he is listed on said child's birth certificate.

After the child was taken into protective custody, and prior to the jurisdictional hearing, father ended his relationship with mother and obtained a restraining order against her. After he obtained the restraining order, father called police to enforce it during a confrontation with mother. He also initiated proceedings to obtain sole legal custody of the child, but his petition had not yet been granted by the time of the jurisdictional hearing. In addition, he moved from mother's residence to a friend's house. When DHS determined the residence was unsuitable due to the presence of marijuana, he arranged to move to a sober housing facility where he could live

with the child. Finally, he participated in drug and alcohol assessments, weekly outpatient treatment meetings and random urinalysis.

At the jurisdictional hearing, DHS presented evidence of prior instances of domestic violence, the child's exposure to domestic violence, the status of the restraining order against mother and whether father had acted to enforce the restraining order. Father presented evidence of his petition for sole legal custody, mentioning the terms of the petition would require mother to have supervised parenting time with the child if she could demonstrate she was receiving treatment for her mental health conditions. DHS presented no evidence of current drug or alcohol use. Urinalysis tests were negative for alcohol and showed declining levels of THC. Finally, evidence showed father was not yet living in the sober-housing facility because a unit was not available at the time of the jurisdictional hearing, however, father was willing to check into a hotel if the child was returned to his care, until a unit became available. On appeal, father argues the trial court erred in taking jurisdiction over the child because DHS failed to prove the child was exposed to a current threat of serious loss or injury due to father's conditions or circumstances.

Held:

Juvenile dependency jurisdiction is appropriate when a child's condition or circumstances are such as to endanger the welfare of the child. To determine if the child is endangered the court looks to whether the child is exposed to conditions or circumstances that present a *current* threat of serious loss or injury. DHS must prove there is a nexus between the allegedly risk-causing conduct and harm to the child. Without evidence that father is unable to protect the child, or that the child will suffer some actual harm because father lacks sole legal custody, lack of a custody order alone is not sufficient for jurisdiction pursuant to ORS 419B.100. In this case, the state failed to establish there was a current, nonspeculative threat of serious loss or injury to the child at the time of the jurisdictional hearing.

**5. [Dept. of Human Services v. J.G., 258 Or App 118 \(2013\).](#)**

**Facts:**

Mother and father have one child, A, together, who was three years old at the time of trial. Mother had four children (“stepchildren”) from a previous relationship. DHS took custody of all of the children on the basis of abuse and alleged, pursuant to ORS 419B.100(1)(c), the children were under threat of harm from father to A based on father’s physical and emotional abuse of the stepchildren. At the jurisdictional hearing, DHS presented testimony about the abuse from a DHS caseworker, who had interviewed the children. Father’s attorney objected to this on hearsay grounds. DHS relied on OEC 801(4)(b)(A), admission by a party-opponent, for admissibility of the evidence. The children’s attorney presented evidence from a medical examiner from Child Abuse Response and Evaluation Services (CARES), who conducted a physical examination of stepchildren. As part of the examination, the medical examiner

observed a CARES forensic examiner interview each child. The medical examiner testified to statements made by the stepchildren to her and the forensic examiner during the trial. Father's attorney objected based on hearsay, and DHS and the children's attorney argued the medical exception to the hearsay rule in OEC 803(4), allowed the stepchildren's statements to be admitted. The juvenile court ruled the statements were admissions of a party-opponent and were also admissible under the medical care hearsay exception. Father appealed.

**Held:**

The stepchildren's statements were not admissions of a party opponent in this case. DHS must show the child who is the subject of the juvenile dependency proceeding has declared a position on the issues before the court that is adverse to the allegations in the dependency petition, and then DHS, as the proponent of these allegations, may offer the child's out-of-court statements against the child under OEC 801(4)(b)(A). DHS did not make the required showing in this case.

With respect to the medical care hearsay exception, a declarant's out-of-court statement is admissible under OEC 803(4) if it (a) is made for purposes of medical diagnosis or treatment; (b) describes or relates medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof; and (c) is reasonably pertinent to diagnosis or treatment. In this case, the record supported the juvenile court's conclusion that the statements were made for the purpose of medical diagnosis or treatment where the medical examiner testified that she explained to each child the examination and interview is for purposes of the medical diagnosis and treatment of any medical problems that are found and the physical examination and interviews took place at the same time in the same medical facility.

In sum, the Court of Appeals affirmed the juvenile court's jurisdictional judgment based on allegations that father's emotional and physical abuse toward his stepchildren presented a danger to his biological son, holding the stepchildren's out of court statements were admissible under the medical hearsay exception in OEC 803(4).

**[6. Dept. of Human Services v. C.F., 258 Or App 50 \(2013\).](#)**

**Facts:**

DHS filed a petition alleging that mother and father had engaged in incidents of domestic violence, some of which occurred in the presence of the children, placing the children under a threat of harm for physical abuse and mental injury, and that mother did not believe that father presents a safety risk to the children and failed to protect them. Mother admitted the allegations. The court heard testimony from a number of witnesses concerning past acts of domestic violence by father. Father didn't deny the acts, but testified it had been at least a year and a half since the last physical altercation between the parents. The court found jurisdiction based on the domestic

violence issue, stating orally, “[D]omestic violence is something that can-people can learn to give in to the other party over and over again in order to avoid a confrontation once there’s-it’s escalated to that point it affects the relationship negatively always in the future until there’s been an adjustment so that that person never has to be afraid again. There’s always the threat there to control the other person.”

Father appealed, arguing DHS failed to prove the history of domestic violence between father and mother created a current threat of serious loss or injury to the children, since there was no evidence of domestic violence within 18 months before the hearing. DHS argued that because father did not appeal from the judgment establishing jurisdiction as to mother but only appealed the judgment as to father, his appeal is not justiciable. DHS also argued father’s claim failed on the merits.

Held:

The Court of Appeals found the appeal justiciable. Considering the following evidence in the record: (1) mother expressed fear of father, (2) in December, 2011 (six months prior to jurisdiction), mother obtained a protective order against father based on the allegations of domestic violence and sought help from the Women’s Crisis Center; (3) mother told a DHS investigator that she was not able to leave the house on a frequent basis, and was not able to go to the library, her parenting classes, or WIC appointments; and (4) mother’s behavior demonstrated a pattern that is common in domestic violence, which presents a risk to the children; the court found the evidence was legally sufficient to permit the trial court’s ruling there was a current threat of serious injury to the children.

[6. Dept. of Human Services v. S.D.I., 259 Or App 116 \(2013\).](#)

Facts:

Mother gave birth to A in Washington state in 1999. Mother and father divorced a few years later, and father assumed legal custody of A due to mother’s methamphetamine addiction. Mother participated in some supervised visits with A but stopped visiting her in 2003 or 2004. Some time thereafter, father moved to Oregon. In 2006, mother gave birth to J. J was removed from mother’s care in 2009 due to her methamphetamine use. After completing drug treatment, parenting and counseling services, and obtaining stable housing, J was returned to mother’s care in June, 2012. In February, 2012, the state removed A from father’s care and placed her with local paternal relatives whom she has known her entire life. On November 9, 2012, the state filed a second amended dependency petition requesting that the juvenile court take jurisdiction over A with respect to mother, alleging a history of substance abuse and lack of a relationship with A. At the hearing, mother testified, if allowed to do so, she would immediately assume physical custody of A and move her to mother’s home in Washington. She also testified she would research counselors to help A with the transition, and would use her huge family support

system for help with A's care. The caseworker testified that the transition would likely be damaging to A psychologically.

The juvenile court took jurisdiction over mother's daughter A, pursuant to ORS 419B.100(1)(c), on the ground that, because mother had been absent from A's life for several years, there was a risk that A would be psychologically damaged if she were immediately transferred to mother's custody without a transition process. The court declined to take jurisdiction on the substance abuse issue.

Held:

On appeal, the issue was whether the state presented sufficient evidence to establish that A's condition and circumstances were such as to endanger her welfare. ORS 419B.100(1)(c). Specifically, the question was whether A's immediate transfer to mother's custody created a risk of "serious loss or injury" to A that was reasonably likely to be realized. The Court of Appeals found the state failed to establish the severity of the potential harm was such that juvenile court jurisdiction was justified. The caseworker did not testify as to what she meant by "psychological damage", or explain how, to what extent, or for how long A would be "psychologically damaged" by immediately moving into mother's home.

## **Permanency Hearings**

### **Reasonable Efforts**

**1. [Dept. of Human Services v. M.K., 257 Or App 409 \(2013\).](#)**

**Facts:**

Father was incarcerated and had not had regular contact with child. Jurisdiction was established based on father's incarceration and his status as a convicted, untreated sex offender. While in prison, father had completed courses on parenting and anger management and had enrolled in a "cognitive thinking errors" group. He had also written letters to the child. DHS wanted the father to visit with child, however, required him to complete a psychosexual evaluation prior to engaging in visits. The results of the evaluation would determine whether father could safely have visitation with the child – either in prison or after his release. The caseworker testified that undergoing the psychosexual evaluation was the "key element" in father progressing towards reunification with child. DHS found an evaluator who would conduct the evaluation in prison for \$5,000. According to the caseworker, DHS typically pays less than \$1,000 for an evaluation. Due to the high cost of the evaluation, the caseworker was still looking for another doctor who

could conduct it at a more reasonable price. Father argued that a clean evaluation was likely, and that he would be a resource shortly after his release in a year. In finding DHS had made reasonable efforts, the court found DHS was not required to pay \$5,000 to have father evaluated in prison.

**Held:**

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 the agency itself has deemed that service to be "key" to the reunification plan. In this case, 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. 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. Since the record did not reflect this analysis, the juvenile court's decision was reversed.

[2. Dept. of Human Services v. R.D., 257 Or App 427 \(2013\).](#)

**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*."

3. [\*Dept. of Human Services v. M.H., 258 Or App 83 \(2013\).\*](#)

**Facts:**

Mother and father had child A, who was placed in DHS custody shortly after birth in May, 2010. The court established jurisdiction in September, 2010, and the parents subsequently stopped attending visits in April, 2011. In July, 2011, the court held a permanency hearing and changed the permanency plan to adoption. In August 2012, the court held another permanency hearing and continued the plan of adoption. On appeal, the parents argued the juvenile court failed to comply with the requirement in ORS 419B.476(5)(d) to include in the August 2012 permanency judgment its determination of whether there were any compelling reasons under ORS 419B.498(2) to defer the filing of petitions to terminate parental rights. In particular, the parents

argued that the order was required to include a determination that parents were not participating in services that would enable reunification within a reasonable time. ORS 419B.498(2)(b)(A).

Mother and father had another child V, who was born in June, 2011 and a few days later, placed into DHS care. The court held jurisdictional hearings in November, 2011 and April and May of 2012 involving testimony from multiple expert witnesses, and entered a jurisdictional judgment in July, 2012. In August 2012, the juvenile court held a permanency hearing and found DHS had made reasonable efforts. In the court's findings, the court found that DHS had assisted the parents to: (1) determine ICWA eligibility, (2) engage in services; (3) fully participate in the case plan; (4) identify relatives as possible placement resources; (5) maintain a connection with their daughter, and (6) attend visitation, services, meetings and court hearings related to the case. The parents' argued these efforts weren't reasonable, as visits had been reduced when the child was moved to a relative placement in a different city, and parents had to travel to attend visits, and because father was not timely referred to a required psychosexual evaluation or parenting classes.

**Held:**

With respect to the reasonable efforts determination, the juvenile court's determination was supported by the evidence in the record, and the court did not err.

With respect to continuing the plan of adoption for A, the court must enter an order within 20 days of the permanency hearing and must include, *if the plan is continued or changed to adoption*, "the court's determination of whether one of the circumstances in ORS 419B.498(2) is applicable." ORS 419B.476(5)(d) (emphasis added). One of the circumstances in ORS 419B.498(2) is whether "there is a compelling reason" not to file a petition to terminate parental rights, ORS 419B.498(2)(b), and one of the "compelling reasons" is that the parent is "successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time" ORS 419B.498(2)(b)(A) (emphasis added). Failure to include the "no compelling reason" determination was reversible error.

**Comments:**

*The required findings by ORS 419B.476(5)(d) and ORS 419B.498(2) are included in JCIP's model forms for local court use. This reversal could have been avoided by checking the appropriate boxes.*

**5. FINDINGS AND ORDERS SUPPORTING THE COURT'S DETERMINATION OF A PERMANENT PLAN OTHER THAN REUNIFICATION:**

**ADOPTION**

None of the circumstances described in ORS 419B.498(2) applies because:  the child is **not** currently being cared for by relative in a placement that is intended to be permanent, as provided in

ORS 419B.498(2)(a),  there is **not** a “compelling reason” within the meaning of that term in ORS 419B.498(2)(b) for determining that filing a petition to terminate the parent’s/parents’ parental rights would not be in the child’s best interests, **and**  the circumstances described in ORS 419B.498(2)(c) are **not** present.  Additional findings:\_\_\_\_\_

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**This judgment continues the current plan of ADOPTION. The termination-of-parental-rights petition was/will be filed on/by \_\_\_\_\_, 20\_\_\_\_, and the child was/will be placed for adoption on/by \_\_\_\_\_, 20\_\_\_\_\_.**

**This judgment changes the current plan to ADOPTION, and, **THEREFORE**, the court orders that the termination-of-parental-rights petition be filed not later than \_\_\_\_\_, 20\_\_\_\_, and the child placed for adoption not later than \_\_\_\_\_, 20\_\_\_\_\_.**

### **Right to Participate**

**1. [Dept. of Human Services v. D.J., 259 Or App 638 \(2013\).](#)**

Facts:

The child was placed in protective custody in December, 2011, and the juvenile court established jurisdiction in February, 2012. In June, 2012, father was arrested, his probation was revoked and he was incarcerated with an expected release date of early August, 2013. The juvenile court held a permanency hearing in March, 2013. The two issues under consideration were whether to change to the permanency plan from reunification, and if so, whether to change it to adoption or guardianship. The court attempted to call the prison so father could participate in the hearing telephonically, but the prison telephone was busy. After the second attempt, the court announced the hearing would proceed. Father’s counsel objected to proceeding in father’s absence, but the objection was overruled. Father’s counsel told the court in general terms about father’s participation in services and his plans following his release. At the end of the hearing, the juvenile court found that it was not possible for the child to be returned to either parent within a reasonable time, and changed the plan to adoption. Father argued on appeal the juvenile court erred in holding the permanency hearing in his absence.

Held:

Reversed. The Court of Appeals found the right to “participate in hearings” in ORS 419B.875(2)(c) includes the right to testify in the party’s own behalf. In finding the juvenile court’s error was prejudicial, the court considered the following factors: (1) father’s counsel’s statement was not evidence and nothing in the record suggests the juvenile court gave it any weight; (2) if father had been given an opportunity to testify, he might have been able to persuade the court he could be united with M within a reasonable time, and whether a compelling reason existed under ORS 419B.498(2)(b)(A), and (3) in the context of a permanency hearing, especially when a parent hopes to convince a court to adopt guardianship as

the plan, rather than adoption, it is critical for the court to hear the parent's personal account of his or her participation in services, plans for the future, and reasons for wanting to maintain contact with the child.

### **Sufficient Progress**

**1. [Dept. of Human Services v. D.W.C, 258 Or App 163 \(2013\).](#)**

Facts:

Child entered foster care in May, 2010 at age seven. Father had never met her and was living in Oklahoma. Jurisdiction was established based on mother's infliction of injuries on the child, mother's use of controlled substances and alcohol, mother's chaotic and unstable lifestyle, and father's failure to protect the child as well as his limited contact with the child for an extended period of time. In November 2010, DHS requested an ICPC evaluation. Father was approved as a placement contingent on establishment of a relationship with the child. In April 2011, DHS communicated this to him. Father visited the child in Oregon in June, 2011 and occasionally called her on the telephone between June and October, 2011. For the following eight months, he had no contact with the child. He was court ordered to complete a psychological evaluation based on a previous head injury and resulting disability but failed to attend the two evaluations that were scheduled. The juvenile court held a permanency hearing in July, 2012 and DHS sought to change the permanency plan from reunification to guardianship. The hearing was continued to September, 2012. In the interim, father again traveled to Oregon to visit the child. At the permanency hearing in September, 2012, the juvenile court found the child could not be returned to father based on his lack of connection with his daughter, and changed the permanency plan to guardianship. The court's findings were based on lack of contact (two visits over two years, and limited phone contact) and resulting lack of connection and understanding of the child's needs. Father challenges the juvenile court's determination that he had not made sufficient progress in ameliorating the barrier to reunification identified in the jurisdictional judgment to make it possible for the child to return home.

Held:

The record was legally sufficient to support the juvenile court's determination that father had made insufficient progress in ameliorating the jurisdictional basis of limited contact.

**2. [Dept. of Human Services v. D.A.N., 258 Or App 64 \(2013\).](#)**

Facts:

Child was born on 8/12/11 and placed in foster care in November, 2011. The court established jurisdiction in January, 2012 based on mother's substance abuse. Father was incarcerated just prior to the child's birth. In May, 2012, the court changed the permanency plan to adoption. Father had not yet been identified as the child's father, but he notified DHS he believed he was the father. In August, 2012, his paternity was established. In September and November, 2012, he stipulated to allegations of a jurisdictional petition that he was incarcerated and unable to be a custodial resource for the child and that his substance abuse impairs his judgment and interferes with his ability to safely parent the child.

Following father's incarceration and prior to the establishment of paternity, father was disciplined six times in prison. After paternity was established, he entered into an action agreement and agreed to engage in any remedial services available in prison, to comply with prison conduct requirements, and to maintain contact with DHS. He participated in Narcotics Anonymous meetings and took a certification course to become a flagger, but he was not able to enroll in parenting or drug treatment programs due to the brevity of his remaining prison term. Father's release date was scheduled for March 16, 2013.

On November 27, 2012, the juvenile court held a hearing on DHS's motion to change the child's permanency plan to adoption (the court determined that since father had not yet been identified at the May permanency hearing, the permanency plan at the time of the November hearing was reunification). In addressing whether father had made sufficient progress under ORS 419B.476(2), the court noted father was not able to access parenting classes and substance abuse treatment due to the brevity of his remaining prison term, and that those services would be necessary to his ability to parent the child. Therefore, father would have to wait until his release to undergo an evaluation, address his parenting skills and substance issues, and to complete the action agreement, in addition to finding housing and employment. The juvenile court determined the delay was partially attributable to father's disciplinary record in prison. At the earliest, the juvenile court found, reunification would be at least nine months from the November, 2012 permanency hearing, leaving the child in care for at least 21 months. The juvenile court found that was too long for the child to wait. Father argued the trial court erred in ruling that he failed to make sufficient progress, and the trial court erred in failing to find the child could not be returned to him within a reasonable time.

Held:

The juvenile court's finding that father had not made sufficient progress was supported by evidence in the record. The juvenile court's findings implicitly include a determination that a minimum of an additional nine months from the date of the permanency hearing was not a "reasonable time". The Court of Appeals did not decide if the juvenile court is required to make a "reasonable time" determination pursuant to ORS 419B.476 and ORS 419B.498(2)(b)(A) as a prerequisite to changing the plan from reunification to adoption.

Comments:

The court's opinion provides a summary of the findings required at a permanency hearing. The findings are integrated into [JCIP's Model Court Forms](#) to provide juvenile court's a vehicle for ensuring appropriate findings are made.

See also, [Dept. of Human Services v. D.L.H., 251 Or App 787 \(2012\)](#) for a discussion on whether the court is required to make a "reasonable time" determination before changing a permanency plan from reunification to adoption.

3. [Dept. of Human Services and J.H., a Child v. G.L.H., 260 Or App \\_\\_\\_\\_\\_, \(2013\).](#)

Facts:

The Circuit Court established jurisdiction over mother in March, 2012 based on mother's mental health problems and borderline intellectual functioning, use of methamphetamine and impulsive and angry behavior. At the first permanency hearing in March, 2013, the court made extensive written findings on a form attached to the judgment, concluding that DHS had made reasonable efforts and mother had not made sufficient progress to enable the child to go home. The court ordered DHS to staff the case with the AG within 45 days. At the second permanency hearing in May, 2013, the court heard no testimony but allowed those present to make statements. The only evidence submitted was the caseworker's report which documented that mother's mental health problems and borderline intellectual functioning continued to interfere with her ability to care for the child. No party advocated for a dismissal. Nonetheless, the court dismissed the case stating that mother had made "some progress." The court made an express finding that mother had made sufficient progress with respect to the service agreement and also attached to the judgment the March findings, to support a finding of reasonable efforts. DHS and the child appealed asserting that the court's return of the child home was not supported by sufficient evidence.

Held:

The Court of Appeals used the three part analysis for assessing whether the record was legally sufficient to support the outcome, recently discussed in *Department of Human Services v. N.P.*, 257 Or App 633 (2013). The court determined that while the trial court did not expressly find that mother had made sufficient progress to make it possible for the child to go home, that finding was implicit in the court's decision to terminate wardship. The implicit finding was not supported by legally sufficient evidence given that the only evidence was the caseworker report which came to a contrary conclusion. The judgment to dismiss was inconsistent with the March findings which were attached as a whole to the May judgment and addressed not just reasonable efforts but also included why DHS custody was in the child's best interests.

4. [Dept. of Human Services v. J.M., 260 Or App \\_\\_\\_\\_ , \(2013\).](#)

Facts:

Father disciplined his child several times by hitting him on the legs with one-quarter-inch diameter rubber tubing. At the time of his arrest, he told police that physical discipline is supported by scripture. His two children were placed into protective custody and the juvenile court assumed jurisdiction based in part on: (a) Father uses inappropriate discipline to respond to the child's misbehavior, which places the child at risk of harm, and (b) Father needs the assistance of a child welfare agency to learn safe and appropriate parenting techniques without which the child is at risk of harm.

After jurisdiction was established, father completed a parent education course with a grade of 105.3 percent. Although he regularly attended visits with the children, DHS noted father did not discipline his child, instead allowing DHS or the foster parent to intervene. Father participated in a psychological evaluation by Dr. Miller, who provided an opinion that father would likely regress to former patterns of behavior once DHS was no longer involved. He recommended father participate in Dialectic Behavior Therapy (DBT), although he was not optimistic about father's ability to change. Father participated in DBT for approximately three months until he was terminated from the service because "there was a lack of insight and appeared to be an inability to take the material and to use it in his life." At the permanency hearing, father testified that his views on discipline had changed and although he believed that some physical discipline is allowed under scripture, he would not use it. He further testified his discipline strategy would include patience, talking and redirection. The juvenile court rejected father's motion to dismiss, found DHS had made reasonable efforts, found the evidence did not support a determination under ORS 419B.476(4)(c) and (5)(c) that further efforts would make is possible for the children to safely return home within a reasonable time, and changed the permanency plan to adoption, finding that none of the circumstances in ORS 419B.498(2) applied. The juvenile court's findings appeared on a check-the-box form, and did not include any oral or written explanations of its reasoning. Father appealed the denial of his motion to dismiss, as well as the determinations relevant to the change of the permanency plan to adoption.

Held:

Reviewing the evidence according to the standard set forth in *Department of Human Services v. N.P.*, 257 Or App 633, 639, 307 P3d 444 (2013), the Court of Appeals found the evidence did not support the inference that father, despite his assertions, would resume the infliction of inappropriate corporal punishment on the child, and for that reason posed a risk of harm. The court found the important inquiry in the case was not what father believes, but what he is likely to do at the time of the hearing. The court found DHS did not satisfy its burden of establishing that father posed a current threat of serious loss or injury that is reasonably likely to be realized, and that the evidence was legally insufficient to support the juvenile court's finding that father had not made sufficient progress to allow the children to be returned home safely.

5. *Dept. of Human Services v. L.A.S.*, 259 Or App 125 (2013).

Facts:

The juvenile court took jurisdiction over the children in February, 2012, primarily because of mother's "use of alcohol and/or controlled substances." At the time of the permanency hearing a year later, W was seven and had been in foster care for nearly half his life and A, who was 14 months old, had been in foster care all of his life. The juvenile court found mother had not made sufficient progress and the case plan should be changed from reunification to a different plan. The court also found the evidence did not support a determination under ORS 419B.476(4)(c) and (5)(c) that further efforts by the agency would make it possible for the child to safely return home within a reasonable time.

On appeal, mother argued the state failed to prove she had not made sufficient progress for the children to safely return home, and failed to prove she had not made sufficient progress for the children to return home within a reasonable time.

Held:

The Court of Appeals rejected mother's challenge to the court's finding regarding her progress because it was not preserved. Rather, she asked for a "90-day extension" to show that she could continue to make progress.

Regarding mother's "reasonable time" argument, previously in *Dept. of Human Services v. D.L.H.*, 251 Or App 787, 284 P3d 1233, *adh'd to on recons*, 253 Or App 600, 292 P3d 565, *rev den*, 351 Or 649 (2012), the court held there is no statutory requirement under ORS 419B.476 or any other authority that requires the juvenile court to find that parent cannot be reunited with the child within a "reasonable time" before the court changes the plan from reunification to adoption. The court did not revisit *D.L.H.*, because the trial court's determination the children could not be returned home within a reasonable time was supported by the record, including evidence of mother's history of substance abuse combined with her belated and incomplete progress through treatment.

## **Review Hearings**

### **Motion to Dismiss**

1. *Dept. of Human Services v. A.R.S.*, 258 Or App 624 (2013) (*ARS III*).

Facts:

This is the third appeal involving this juvenile dependency case. The child came into care in 2009 and was placed with maternal grandmother. Jurisdiction as to mother was established in

2010, and included among other bases, residential instability and choosing unsafe partners. The first permanency judgment was reversed because the trial court incorrectly determined that mother's ability to parent independently was a legal requirement for parental fitness. In the second appeal, the Court of Appeals reversed and remanded another permanency judgment because the trial court had relied on a circumstance that was not alleged or established as a basis for jurisdiction in assessing mother's progress towards reunification. While the second appeal was pending, the trial court held a review hearing, in which both mother and child moved to dismiss jurisdiction. In her motion, mother stated she was living in a home with a roommate, however, she would like to live in the "family home" but for the court's order prohibiting her from living with grandmother and child. A month prior to the hearing, mother was living with a boyfriend, however, subsequently moved out because of his threats of self-harm and concerns about his parenting style. She told DHS she did not want to expose her child to an unstable person and she would no longer be around her boyfriend. She moved and rented a room, which DHS inspected. The caseworker indicated the home was safe and appropriate and allowed unsupervised daytime visits. Overnight visits were not allowed until mother obtained a bed for her and her child. Mother indicated the grandmother would help her provide a bed for the child.

The trial court denied the motions to dismiss, finding mother made insufficient progress based on lack of confirmation she was participating in counseling, residential instability and inability to assess safety risks. Mother and child appealed trial court's refusal to dismiss the wardship arguing the facts that gave rise to jurisdiction have been ameliorated.

Held:

DHS has the burden 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 that is reasonably likely to be realized. Residential instability is not a sufficient basis for jurisdiction without a showing that it creates a risk of harm to the child. No evidence was presented in this case as to why mother's home posed a risk of harm to the child. There was also no evidence that mother's ex-boyfriend had a history of violence or that mother should have foreseen that he presented a safety risk. To the contrary, mother ended the relationship and immediately left the home. Reviewing the evidence according to the standard provided in *Department of Human Services v. N.P.*, 257 Or App 633 (2013), the Court of Appeals found the record contained insufficient evidence from which a reasonable factfinder could conclude, by a preponderance of the evidence, that those circumstances exposed the child to a current risk of serious loss or injury that was reasonably likely to occur.

## **Reviewability**

1. [\*Dept. of Human Services v. C.W.J.\*, 260 Or App \\_\\_\\_\\_ , \(2013\).](#)

### Facts:

The juvenile court denied father's motion to dismiss a petition alleging jurisdiction over the child on the ground that father did not have a custody order, and, therefore, could not protect the child from the child's mother. The court assumed jurisdiction and father appealed, asserting that lack of a custody order is not a basis for jurisdiction. After oral argument on appeal, the juvenile court entered a judgment terminating the wardship.

### Held:

The appeal is moot. The court distinguished this case with past cases in which the court found sufficient collateral, practical effects on the parents' rights to withstand a motion to dismiss on the ground of mootness. In *State v. S.T.S.*, 236 Or App 646, 238 P3d 53 (2010), and in *State ex rel Juv. Dept. v. L.B.*, 233 Or App 360, 226 P3d 66 (2010), the Court of Appeals considered: (1) the adverse effect of the original judgment on the parent's employment opportunities; (2) the negative effect of the original judgment on the parent's record with DHS in the event further abuse reports were received; and (3) the social stigma that results from a determination based on abuse or neglect, in determining whether sufficient collateral practical effects gave rise to a live controversy.

## Termination of Parental Rights

### [1. Dept. of Human Services v. J.L.H., 258 Or App 92 \(2013\).](#)

#### Facts:

Mother had two daughters at age 16 and 17 who were taken into DHS custody in 2008 due to domestic violence and drug use. Mother voluntarily relinquished her parental rights to them in 2009. In October, 2010, she had a third child who was placed in DHS custody at birth. The child is a member of the Alaska Native Village of St. Michael, and the case is therefore subject to ICWA. The court established jurisdiction based on mother's chemical abuse problem and mental health issues. She had a history of relationships with unsafe men, and lying to DHS about her involvement with them. In December, 2011, she was diagnosed with PTSD, a depressive disorder, cannabis and opiate abuse and a narcissistic personality disorder. Mother's attendance and follow through at drug treatment services, and Fostering Attachment Treatment Court (FATC), were inconsistent. Mother was terminated from FATC due to her deception regarding her ongoing relationship with father and her lack of consistency and follow through. The state filed a petition to terminate her parental rights in June, 2012 based on unfitness,

ORS 419B.504. After a two day trial, the trial court terminated mother's rights, citing mother's untrustworthiness and lack of participation in services. Mother appealed, arguing she had ameliorated all of the circumstances that formed the bases of the termination petition, that termination was not in the child's best interests, and that the juvenile court erred to the extent it relied on factual circumstances not alleged in the termination petition.

Held:

On de novo review, the Court of Appeals affirmed the trial court's decision, finding, beyond a reasonable doubt, mother's long time emotional and mental condition and her continued inability to engage in healthy relationships or disassociate herself from father and unsafe men, made it improbable she would be able to adjust her life circumstances to make her able to safely parent the child within a reasonable time. The court also found termination of mother's parental rights was in the child's best interests, relying largely on a tribal expert's testimony that the child would suffer serious emotional and physical harm if placed with mother.

2. [\*Dept. of Human Services v. K.M.M., 260 Or App\*](#), (2013).

Facts:

In May, 2011, the child was taken into protective custody based on mother's mental health issues. In February, 2013, DHS petitioned for termination of parental rights based on, "mother is unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into mother's home is improbable within a reasonable time due to conduct or conditions not likely to change, including, but not limited to the following: An emotional illness, mental illness or mental deficiency of such nature and duration as to render the parent incapable of providing care for extended periods of time." At the time of trial, the child was 10 years old, had been in foster care for 21 months, and her grandparents had been selected as the adoptive placement.

At trial, expert evidence was presented that mother was diagnosed with schizophrenia and that she would need to take antipsychotic medication for a period of four to six months before the child could be returned to her care. Expert testimony also established mother's refusal to take medication was not going to change. Also, if her schizophrenia remained untreated, her mental health issues would have a huge impact on her parenting and would be detrimental to the child. The child would have anxiety issues that would be detrimental to her and would be at risk of emotional neglect if placed in her mother's care. Mother testified that she disputed her diagnosis and stated she would not take her medication. A psychologist who evaluated the child testified that if the child remained in foster care, there would be a risk she would continue to have anxiety issues, and it would be beneficial for the child to have permanency established as soon as possible. Session notes from the child's counselor also opined that delaying permanency would be detrimental because it would affect the child's ability to form age-appropriate relationships with others.

The juvenile court terminated mother's parental rights. Mother appealed, arguing the court erred in finding mother was unfit at the time of the proceeding by reason of conduct or condition that was seriously detrimental to the child, in determining that integration of the child into mother's home was improbable within a reasonable time and in determining that termination of parental rights was in the best interests of the child.

Held:

ORS 419B.504 provides a two part test regarding unfitness: (1) whether mother has engaged in some conduct or is characterized by some condition, that is seriously detrimental to the child, and (2) whether it is improbable that the child can be integrated into mother's home within a reasonable time because the conduct or condition is unlikely to change. A "reasonable time" is defined as period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments. If the test is satisfied, the court must decide whether termination is in the child's best interest.

The parties did not dispute that mother is "characterized by some condition," i.e., schizophrenia. In looking at whether mother's condition was seriously detrimental to the child, the court examined the child's needs (citing *State ex rel Juv. Dept. v. F.W.*, 218 Or App 436, 456, 180 P3d 69 *rev den*, 344 Or 670 (2008))("The inquiry of whether a parent's conduct or condition has had a seriously detrimental effect on the child is meant to be child-specific and calls for testimony in psychological and developmental terms regarding the particular child's requirements"), and concluded there was clear and convincing evidence mother's untreated schizophrenia has a detrimental impact on the child.

On de novo review, the Court of Appeals found the record demonstrated by clear and convincing evidence that mother's untreated schizophrenia is harmful to the child and mother is unable to provide the child with proper care. and that because she continues to refuse to take medication, her condition is unlikely to change so as to allow the child to be integrated into her home within a reasonable time. The court further concluded termination was in the child's best interest due to her need for permanency and stability, and her preference to live permanently with her adoptive parents.

**3. [\*Dept. of Human Services v. F.J.S., 259 Or App 565 \(2013\).\*](#)**

Facts:

The children had two entries into foster care, from October 2009 through April, 2010 and from September, 2010 forward. By the time of the termination trial in July and August of 2012, father had completed drug and alcohol treatment, parenting classes and DBT, but failed to complete anger management treatment. The juvenile court terminated father's parental rights based on unfitness pursuant to ORS 419B.504. Father challenged the trial court's determination that he was unfit at the time of trial and that F could not be returned to him within a reasonable time.

Held:

On de novo review, the Court of Appeals considered father's failure to meaningfully participate in his anger management course in 2010, his assault of one of the children after they were returned home in 2010, and his failure to complete a second anger management class after the children's re-entry into foster care. The court noted his failures to complete the classes were not enough to demonstrate he continued to have anger management issues, however, the failures when considered in light of his history of anger and violence issues, the psychological evaluation that recommended intensive anger management treatment and his continued aggressive conduct toward others up to the time of trial, demonstrated father continued to suffer from that condition that was seriously detrimental to F. Further, in concluding that there was clear and convincing evidence that F could not be integrated into father's home within a reasonable time, the court considered father's failure to complete treatment within almost three years, and F's psychological evaluation indicating F had multiple placements over the first year of his life and although he is doing well now, he was at risk for attachment issues and needed permanency.

4. [Dept. of Human Services v A.D.G., 260 Or App \\_\\_\\_\\_\\_, \(2014\).](#)  
REVERSED, DOUGLAS COUNTY)

Facts:

DHS initiated TPR proceedings for mother's two children in two cases on two different schedules. In each case, the mother failed to appear after being issued a summons requiring her appearance. Based on her nonappearance, the court entered default orders in both cases and set one date for a *prima facie* hearing as to both cases for December 18. Mother appeared on that date and requested to be heard. Based on the prior default orders, the court treated her as a nonparty, and after the *prima facie* hearing, the court terminated mother's parental rights. Mother moved to set aside the default judgment under ORS 419B.923.

Held:

**(1)** ORS 419B.923(1) grants the juvenile court broad discretion to set aside any order or judgment made by the court. **(2)** The trial court abused its discretion when it denied mother's motion to set aside the default judgment. ORS 419B.819(7) does not allow a default when the parent is not "absent" at the hearing in which the default judgment is entered. The court expressly found that the words "on a future date" in ORS 419B.819(7) apply only to the granting of a guardianship petition and not to the termination of parental rights. The court rejected DHS's contention that the statute allows the juvenile court to terminate a parent's rights without further notice and without the parent's participation once the parent fails to appear, regardless of when the hearing occurs and whether the parent appears at a later date. The court found that construction inconsistent with the language and history of the statute and with due process. Under ORS 419B.090(4), a parent's due process rights are always implicated in the construction of and application of ORS chapter 419B.

**COMMENT:**

**JUDGES TAKE HEED. IN A TPR, IF A PARENT SHOWS UP FOR THE FINAL *PRIMA FACIE* HEARING, EVEN AFTER PRIOR FTA'S, THE COURT IS NOT ALLOWED TO ENTER A DEFAULT.**