Appellate Update 2015

Pamela L. Abernethy, Judge in Residence

503.986.5422 ◆ Pamela.L.Abernethy@ojd.state.or.us

Megan E. Hassen, J.D., Law and Policy Analyst

503.986.6403 ◆ Megan.E.Hassen@ojd.state.or.us

Pass out Bench Cards

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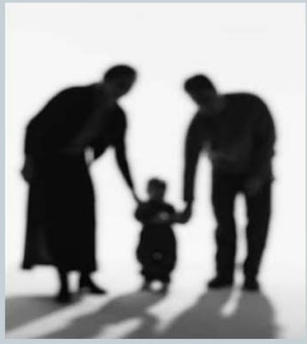
MOTIONS TO DISMISS

Jurisdiction: Timing

- *Dept. of Human Services v. W.A.C., 263 Or App 382 (2014).*
  - *When parent served, appears and contests allegations, court must resolve allegations before entering jurisdictional judgment.*
    - *Court may not proceed on one parent's admissions in these circumstances.*



With that background, let's look at a couple of cases that have changed the timing of the entry of the jurisdictional judgment.

In W.A.C., mother admitted to the allegations, while father contested the allegations. The court took jurisdiction based on mother's allegations, and set a trial date to hear the allegations against father.

The case was appealed and the Court of Appeals reversed, ruling that it is not appropriate to enter a jurisdictional judgment if there is a parent who has been served, appears and contests jurisdiction, until those allegations as to that parent are resolved.

W.A.C. made clear jurisdiction is over the child. Rationale of the court: "If it were otherwise, a juvenile court could assert jurisdiction over a child and make the child a ward of the court, depriving one parent of legal and physical custody of the child, without a determination that that parent cannot safely parent the child."

Significant change in practice in some counties – not a change in others.

Jurisdiction: Timing

- *Dept. of Human Services v. A.F.*, 268 Or App 340 (2014).
  - Admitted allegations must continue to exist at the time jurisdiction judgment is entered.

1/13 – petition against Mom and Dad alleging jurisdiction over five children based in part on allegations that father sexually abused the oldest child and other relatives.

The jurisdictional hearing was postponed pending father's criminal trial. **Father was convicted of multiple counts of sexual abuse in September, 2013.**

12/13 - Mother stipulated to facts relating to the sex abuse convictions and the need to protect the children in an amended petition, which the court accepted in December, 2013.

4/14 - Father contested jurisdiction, and **a jurisdictional hearing took place in April, 2014**. Although the trial was set for allegations as to the father only, mother and children were present, represented by respective counsel, and introduced on the record**. One of the children presented evidence that mother was actively involved in counseling, attended weekly meetings and that she made consistently protective statements about the children. Counselors for the mother and the children recommended increased autonomy from DHS.** Mother did not make arguments or call witnesses at the hearing. Following the hearing, the court entered a jurisdictional judgment, based in part on a finding that the court previously found the children within the jurisdiction as to mother in December, 2013, and that the previous finding was not challenged at the hearing.

Vacated and remanded.

1. State has to show that harm is present at the time of the hearing nder ORS 419B.100(1)(c) (conditions and circumstances jurisdiction), requiring the state to show that harm is present at the time of the hearing.

2. The court found it **permissible for the juvenile court to make findings about one parent and then make findings about the other parent at a different time before taking jurisdiction based on the totality of the evidence. However, the conditions and circumstances that give rise to jurisdiction *must exist at the time of the hearing.*** In this case, evidence was presented that the conditions and circumstances in mother's stipulations did not exist at the time of the hearing.

Jurisdiction: Timing

- Cases that fall outside of *W.A.C.*:
  - "Diligent efforts failed to reveal the identity or the whereabouts" of the parent. ORS 419B.914
    - Agency must show diligent efforts to locate.
  - Parent has been served but does not appear. ORS 419B.815(7)
- *In these situations, the court has statutory authority to resolve the allegations of the non-appearing parent, take the admissions or hold a trial as to the appearing parent, and enter a jurisdictional judgment.*

I want to talk briefly about the applicability of W.A.C.

Remember, it lays out the general rule that a court must wait to enter the jurisdictional judgment when a parent has been served and contests the petition, until those allegations can be resolved.

There are circumstances that fall outside the confines of W.A.C., outlined on the slide:

-if a parent can't be identified and found to be served. DHS must show they have exercised diligent efforts to locate.

-also, if a parent has been served but does not appear.

In these circumstances, Oregon law allows the court to resolve the allegations of the non-appearing parent (without that parent), take admissions or hold a trial as to the appearing parent, and enter a jurisdictional judgment.

Jurisdiction: Conditions and Circumstances

- Conditions and circumstances jurisdiction. ORS 419B.100(1)(c)
  - State must show:
    - A current threat of serious loss or injury to the child.
    - A nexus between the allegedly risk-causing conduct and the harm to the child.
    - The risk is present at the time of the hearing.

Jurisdiction: Mental Health

- *Dept. of Human Services v. M.A.H.*, 272 Or App 75 (2015).
  - Asserted bases:
    - Mother's mental health issues
    - Mother's behavior of subjecting the child to mental, verbal and emotional abuse.
    - Father's lack of custody order
  - Reversed:
    - Past mental health issues not sufficient to support inference of current condition. Testimony at hearing from mental health professionals indicated mother's mental health was being managed at the time of the hearing.
    - Since mother is no risk, father's lack of custody order not an issue.

Juvenile court found mother did not have motivation or intent to harm M. Mother's phone messages four months prior to hearing combined with historical facts didn't permit conclusion there was a threat at the time of the hearing.

Jurisdiction: Sex Offender, Mental Health

- *Dept. of Human Services v. D.H.*, 269 Or App 863 (2015).
  - Asserted bases:
    - Mother's husband convicted, untreated sex offender and mother does not believe he poses a risk to the child
    - Mother unwilling to protect child from contact with husband
    - Mother's mental health
  - Reversed
    - Child not within class of victims
    - No testimony regarding risk
    - Husband has had contact with child and no evidence of harm
    - Mother's suicide attempt was after child's removal

D.H. case involved a mother who was living with her husband who had a 2005 conviction for the attempted first degree rape of an 18 year old woman. He had not completed treatment. He was subject to conditions of probation or post-prison supervision that had a no contact with minors provision, however, some contact was allowed with nieces and nephews under a safety plan. The child was removed from mother's care, and subsequently, mother attempted to commit suicide.

The trial court found jurisdiction based on - husband was a convicted, untreated sex offender and mother did not believe he posed a risk to the child and was not willing to protect the child from contact with husband, and mother's mental health.

The Court of Appeals reversed, finding

The child was not within the class of the husband's victims

There was no testimony at trial regarding the risk of the husband to the child

The husband had contact with the child, and there was no evidence of harm, in fact, child was happy and healthy at the time of removal

Mother's suicide attempt did not occur until after the child was removed from the home.

(1) Regarding the risk posed by mother's husband, there was no evidence that he had harmed J or any children. Although he had a **2005 conviction for the attempted first-degree rape of an 18-year old woman and had not completed required treatment**, those facts do not permit the conclusion he posed a risk to J because they do not show that J fits within the class of mother's husband's victims. Although mother's husband was subject to a no-contact-with-minors condition of probation or post-prison supervision, some contact was allowed with nieces and nephews under a safety plan. **The DHS caseworker testified that DHS did not know what risk mother's husband posed to J. At the time of removal, J was a happy and healthy child with no signs of injury, even though he had contact with mother's husband**. Finally, the record didn't reflect whether the no contact provision was imposed as a result of the statutory package of post-prison supervision conditions applicable to all sex offenders, or whether it was imposed based on a particular finding that he poses a risk to minors.

(2) Regarding the risk posed by mother's mental health, the record contained no evidence that mother's mental health issues harmed J, or risked harming J, while J was in her care**. The suicide attempt was a singular act in response to having J removed from her care, and did not pose a risk to J because he was not in her care at the time.**

Jurisdiction: Injuries to Child

- *Dept. of Human Services v. H.H.*, 266 Or App 196 (2014).
  - Asserted bases:
    - Father caused a non-accidental injury to H that amounted to child abuse and resulted in significant adverse consequences to H;
    - Mother refused to acknowledge father's role in injuring H, and was incapable of protecting the children from father.
  - Affirmed:
    - Evidence that child's injuries were caused by father;
    - Mother did not believe father played a role in harming child; and
    - Mother didn't perceive need to protect child from father created reasonable likelihood of harm.

Let's look at the H.H. case, where the Court of Appeals upheld the trial court decision.

In this case, H suffered a broken femur while in father's care, and three and a half months later, suffered from an acute subdural hemorrhage, brain injuries and retinal hemorrhages. Conflicting expert testimony was presented at trial as to the cause of the injuries.

The juvenile court took jurisdiction over S and H, finding

(1) father had caused a nonaccidental injury to H that amounted to child abuse and resulted in "significant adverse consequences" for H; and

(2) mother refused to acknowledge father's role in injuring H and, for that reason, was not capable of protecting the children from father.

The court of appeals found the standard for jurisdiction was met even though there was evidence in the record that mother was an engaged and caring parent. The court found the juvenile court's findings that the injuries were caused by father's abuse were supported by evidence in the record, including testimony from a number of medical professionals that H's injuries resulted from nonaccidental trauma. That evidence, combined with the following circumstances:

(1) mother did not believe that father played a role in harming H and

(2) she did not perceive the need to take steps to protect her children from father,

created a "reasonable likelihood of harm" to the children.

Jurisdiction: Removal from Grandparent's Home

- *Dept. of Human Services v. A.B.*, 271 Or App 354 (2015).
  - Facts:
    - Child, N, had been in grandmother's primary care.
    - Parent arrested on drug charge while sibling, K, was in the car
    - Juvenile court took jurisdiction based on parent's substance abuse and judgment issues – found parenting decisions extended to N.
    - Child couldn't be placed with grandma due to certification problem
  - Reversed:
    - No nexus between parent's risk-causing conduct and serious loss or injury to N.

Jurisdiction: Removal from Grandparents Home

- *Dept. of Human Services v. A.L.*, 268 Or App 391 (2015)
  - Asserted bases:
    - Parents' substance abuse
    - Lack of necessary parenting skills
    - Leaving the children with unsafe persons
    - Father's impulse control
  - Reversed:
    - Indictment against grandparents not enough
    - No evidence grandfather's founded disposition created risk
    - One breach of safety plan not enough when children not threatened

Let's look at one more example – the A.L. case. This is an interesting case, as it involves a situation in which the parents had made a plan for their children to live with grandparents. The parents were also living in the home at times, but it was the grandparents who were primarily responsible for the kids.

The juvenile court asserted jurisdiction over the three children based on the parents' substance abuse, lack of necessary parenting skills, leaving the children with unsafe persons, and father's impulse control problems.

In doing so, the juvenile court noted:

(1) the primary caregivers for the children, the paternal grandparents, were under indictment for drug trafficking, evidence regarding drug trafficking in the home, and concern about the increased risk of unsafe people in the home;

(2) concern about the number of firearms in the home;

(3) the grandparents' violation of a safety plan and that DHS was unable to certify the grandparents due to grandfather's founded allegation for physical abuse.

Parents argued they had demonstrated protective capacity by arranging for extended family members to serve as primary caregivers. They also argued that even if the factual allegations were proven, there was no nexus between their parental deficits and any harm to the children, because the evidence demonstrated that the children were happy, healthy, and on target physically and emotionally.

Reversed

In this case, the court of appeals found the evidence presented at trial showed only the potential for speculative harm rather than a current, specific harm to the children:

(1) The indictment without more is not sufficient to show current and non-speculative risk of harm. A search of the grandparents' home revealed no specific evidence of criminal activity that would create a risk of harm to the children; rather, the detective's testimony was of speculative harm from potential criminal activity. The firearms on the property were legal and locked securely.

(2) Grandfather's 10-year-old founded disposition of physical abuse wasn't enough to show a current risk of harm. This was a case where DHS chose not to present evidence about the nature of the abuse due to confidentiality concerns. Without that, the court found there insufficient evidence to demonstrate a nexus (relationship) between the prior physical abuse and a current risk of harm.

(3) One breach of a safety plan does not rise to a current risk of harm when the children were not endangered or threatened with serious loss or injury.

Jurisdiction: Grandparents

- *Dept. of Human Services v. A.L.*, 268 Or App 391 (2015) (continued)
  - "….DHS's arguments rest on a mistaken assumption that parents cannot give custody of their children who are not DHS-certified. To the contrary, the court must have jurisdiction for DHS to change the placement of children, and for jurisdiction to be warranted, there must be a current threat of harm to the children. ORS 419C.100(1)(c). Because parents have entrusted the primary care of the children to the paternal grandparents, who do not pose a current threat of harm, the court did not have a basis for asserting jurisdiction over the children."

Another interesting part of this opinion was the court noting that the inability of DHS to certify the grandparent. The court clearly says this, by itself, does not create a "current threat of harm" under the statute that would allow the court to take jurisdiction.

In other words, if the parent has made a plan for the child to be with someone else, the state is required to show that there is a current threat of harm to the child in that setting. An inability to certify that caregiver is not enough to show that threat of harm without additional evidence.

Motions to Dismiss

- General rule: juvenile court jurisdiction can't continue if jurisdictional facts have ceased to exist.
  - DHS must prove the factual bases for jurisdiction persist to a degree that they post a current threat of serious loss or injury that is reasonably likely to be realized. *Dept. of Human Services v. D.M.H.*, 272 Or App 327 (2015)
  - If jurisdiction based on parent's past conduct, it must be reasonably likely the parent will engage in that conduct again and will do so in a way that will put the child at risk of serious loss or injury. *Dept. of Human Services v. L.C.*, 267 Or App 731 (2014)
  - The facts must continue to exist at the time of the hearing on the motion to dismiss, and be made part of the record. *Dept. of Human Services v. D.M.H.*, 272 Or App 327 (2015).

Motions to Dismiss

- *In Dept. of Human Services v. L.C,*
  - Children were living with mother, the apartment was clean, children well cared for, mother demonstrated strong parenting skills, had attended dv support group and counselor testified she could protect, psych eval said risk of child abuse low.
    - DHS wanted to wait until father finished batterer's intervention, and monitor his visits before he was allowed to reunite
  - Juvenile court denied mother's motion to dismiss.
  - Reversed because no evidence was presented that mother's past endangering conduct would make it likely she will engage in the conduct again.

Permanency Hearings

REASONABLE EFFORTS

FINDINGS REQUIRED TO CONTINUE THE PERMANENCY PLAN

PARENT'S PROGRESS

Reasonable Efforts: The Basics

- General rules:
  - Are to be evaluated under a "totality of the circumstances."
  - Services must have a rational relationship to the basis of jurisdiction.
  - Efforts must be made as to each parent, even if one is incarcerated or out of state.
  - If service is "key" to reunification and DHS has declined to pay for it, the court must weigh the benefits of DHS providing the service and the burden of associated costs when deciding whether DHS made reasonable efforts.

Reasonable Efforts: Parent's Conduct

- *Dept. of Human Services v. S.W.*, 267 Or App 277 (2014).
  - Reasonable efforts to be judged in light of the particular circumstances of the child and the parent.
  - The juvenile court is required to make the child's health and safety the paramount concern.
  - A parent's conduct and responses to DHS efforts factor into the analysis.
    - Evaluation of reasonable efforts requires the court to consider not only the burdens of providing the services, *but also what benefit* might reasonably be expected to flow from them.

With that framework in mind, there are two cases – SW and TS, that were very similar factually. In SW, the court found DHS made reasonable efforts. In TS, the court found DHS did not . Both cases involved fathers that were in and out of jail over several years while DHS focused its primary efforts on mother.

Let's take a look at each.

SW: Facts:

A was born with severe physical problems and placed in foster care when she was eight months old. She moved between foster care and her mother's care over the next several years. At the time of the first removal, DHS arranged for father to participate in residential treatment, and arranged for three visits with A. Forty days after graduating from treatment, father committed additional crimes and was incarcerated. Over the next 33 months, father remained incarcerated, and DHS sent father letters of expectation, had two telephone calls and one meeting with father, encouraged him to write letters to A and delivered those letters, and arranged for a psychological evaluation. No visits were provided and lengthy periods elapsed without any contact from DHS. Father made only one request for a visit with the child.

When A was four years old, the juvenile court changed the permanency plan to adoption. At the time of the hearing, father was due to be released from OSP in three months, and was to be transferred to Washington for substance abuse treatment and 19 months of post prison supervision Father appealed, arguing DHS did not make reasonable efforts to reunify him with A during his most recent period of incarceration.

Held:

Affirmed the record supported the juvenile court's conclusion that DHS made reasonable efforts. DHS provided father with many services in the early stages of this case, and father subsequently declined to participate in AA/NA services. The court can consider father's conduct in response to DHS efforts in evaluating the reasonableness of DHS efforts over the life of the case. The length and circumstances of a parent's incarceration are factors that the juvenile court may consider in relationship to the child's stage of development and particular needs, in determining whether DHS efforts were reasonable. **The agency's decision not to provide visits was reasonable in light of the long drive (six hours round trip), the stress of**

the prison environment in light of A's physical, behavioral and emotional problems; the lack of a relationship with father; and a psychological evaluation which questioned whether father was a viable visitation resource.

TS Facts:

Six months after T entered care, father was incarcerated for possession of methamphetamine. Over the next one and a half years, father was in and out of jail, participated in some services, and tried to make regular contact with T. DHS failed to have any contact with father for about 12 months. For part of that time, mother progressed and T was returned to her care. However, the child entered care a second time, and three months later, the court held a permanency hearing. The court changed the plan to adoption.

Held.

Reversed. The court stated the general rule that the type and sufficiency of efforts required by the state depends on the particular circumstances of the case. Father's incarceration does not excuse DHS from providing reasonable efforts towards reunification. However, the court may consider whether a parent has attempted to make changes, or ignored or refused to participate in plans required by DHS. DHS must make reasonable efforts to reunify the child with both parents, even when one parent is more accessible than the other.

In this case, DHS worked extensively with mother but made little efforts to reunify T with father. For about half of the time T was in care, DHS "..essentially ignored father based on an apparent rationale that T was more likely to reunify with mother and that father and mother would never reunite." Meanwhile, father repeatedly asked DHS about visits with T, and sought out and participated in services that were available.

Reasonable Efforts: Parent's Conduct

- *Dept. of Human Services v. S.W.*, 267 Or App 277 (2014) (continued)
  - The *length and circumstances of a parent's incarceration* are factors the juvenile court may consider in determining reasonable efforts. The prospect for a child's safe return to a parent who is incarcerated depends, among other variables, on the length of time the parent will be incarcerated, juxtaposed against the *child's stage of development and particular needs*.

The court noted in S.W. that the length and circumstances of a parent's incarceration can be considered by the juvenile court in determining reasonable efforts, and that this should be considered in relation to the child's stage of development and particular needs.

So, for example, in S.W., the child had significant special needs, father made little effort to establish a relationship with the child, and the psychological evaluation for the father questioned his ability to be a visitation or a long term resource. The court found the primary impediment to reunification was father's pattern of criminal conduct making it so he wouldn't be available to the child at least until 22 months following the permanency hearing, when the child would be six. The court of appeals found it is appropriate for the juvenile court to consider this when determining whether DHS made reasonable efforts.

Reasonable Efforts: Scope of Inquiry

- Timeframe for judging reasonable efforts is not the "period under review", but rather, efforts over the life of the case. *Dept. of Human Services v. T.S.*, 267 Or App 301 (2014).

Finally, in T.S., the court considered father's argument that DHS efforts should be evaluated in terms of the review period (the time between the last review hearing and the permanency hearing). The court of appeals held that reasonable efforts are to be evaluated under a "totality of the circumstances", which includes efforts over the life of the case.

This principle has less application to cases involving one parent because once that parent stops trying to make progress, DHS does not normally let the case languish, but instead will continue to offer service and move for a change in plan.

Findings Required to Continue Plan

- *Dept. of Human Services v. M.H.*, 266 Or App 361 (2014)
  - Facts:
    - 7/11: Court changed permanency plan to adoption
    - 8/12: Court continued plan at next perm (appealed)
    - Parents' rights terminated
    - Five months later: Court of Appeals reversed 8/12 permanency judgment due to lack of compelling reasons findings
    - Parents moved court to set aside TPR judgments
    - Juvenile court granted the motions (can't proceed with termination based on invalid permanent judgment)
  - Affirmed:
    - **Juvenile court must make determination in ORS 419B.498(2) at every permanency hearing to support termination.**

Permanency : Parent's Progress

- *Dept. of Human Services v. R.S.* 270 Or App 522 (2015).
- Court checking box on Model Form that parent made "sufficient progress" not inconsistent with decision to change the permanency plan from reunification to APPLA where court made findings that despite a parent's progress in meeting DHS plans and goals, after 2 years it remained unlikely that the parent was capable of making sufficient continuing progress to allow the child to safely return home
- Consequently, a parent's "sufficient progress" may be legally insufficient under ORS 419B.476(2)(a); inquiry centered on *ward's* health and safety.

FN 3

Mother's confusion may stem from the judgment form's use of "sufficient progress toward meeting the expectations set forth in the service agreement, letter of expectation and/or case plan," which does not track the statutorily required determination in ORS 419B.476(2)(a) of whether the parent has made sufficient progress to make it possible for the child to return home safely. Although, as we explain, the judgment form is consistent with the change in permanency plan here, we understand how the form's use of "sufficient progress" in that context can be confusing.

Conclusion: "the record establishes that the court considered and rejected mother's claim that she had made sufficient progress for the K to safely return to her care, as a result of a lack of "parenting skills necessary to understand the child's behavioral needs and mental health needs" and that that determination was supported by legally sufficient evidence."

Termination of Parental Rights

INCARCERATED PARENTS

BEST INTEREST FINDINGS

Termination of Parental Rights

- Basic test for termination under ORS 419B.504 (unfitness):
  - (1) the parent has engaged in conduct or is characterized by a condition that is seriously detrimental to the child;
  - (2) integration of the child into the parent's care is improbable within a reasonable time due to conduct or conditions not likely to change; and
  - (3) termination is in the best interests of the child.
- What if the parent is incarcerated? Is this a condition that is seriously detrimental to the child *at the time of trial*?

Termination of Parental Rights

- *Dept. of Human Services v. R.K.*, 271 Or App 83 (2015):
  - In this case, father had 36 months left on his sentence at the time of trial.
  - Generalized expert testimony about the impact on the child not enough to show detriment (no psych eval). *X was well adjusted and doing well in his placement.*
  - Focus on father's behavior *as a parent*. *Before he was incarcerated, he took care of X and continued to express love and a desire to care for him after he was incarcerated. At the TPR trial, DHS had no concerns about father's risk of dv or drug/alcohol abuse. Father had family who would help him at discharge.*

Juvenile court:

Finally, the juvenile court terminated XZF's rights under ORS 419B.504, and focused primarily on XZF's criminal conduct, resulting incarceration, a fighting incident he had in prison, his failure to take responsibility for his criminal behavior, and his lack of a sufficient plan for return of X after his release from prison.

On appeal:

The court stated incarceration is a condition that can be considered under ORS 419B.504, and the question in this case is whether father's incarceration was detrimental to X *at the time of trial. State ex rel. SOSCF v. Stillman*, 333 Or 135 (2001). At the time of trial, XZF was incarcerated and had 36 months remaining on his sentence. While in prison, he completed his GED and cooperated with DHS. XZF testified he has family who will help him when he is discharged. DHS did not have any concerns regarding his risk of domestic violence or drug or alcohol abuse. Before his arrest, he had a relationship with X and took care of him regularly. They had little contact with each other after father was incarcerated, however, there was evidence father loved X and wanted to parent him after his release from prison. The evidence showed X was well adjusted and doing well in his foster placement. There was no psychological evaluation of X, only testimony by a DHS witness that young children need to be forming attachments and have stability.

The court rejected the state's argument that father's continued incarceration and inability to care for X place X at further risk of harm due to changing placements and a lack of permanency. The court explained that placement moves are not the type of serious detriment that provides a basis for terminating parental rights. The court found the generalized testimony by the DHS witness that a lack of permanency could result in emotional distress did not constitute detriment under the statute. Finally, citing *Stillman*, the court found there was no evidence of unfitness based on father's conduct *as a parent*. (In *Stillman,* the court described father's personal relationship with his children as loving, strong and positive and no psychological reports or evaluations of the children's mental health were presented).

Termination of Parental Rights: Best Interests

- *Dept. of Human Services v. M. P.-P.*, 272 Or App 502 (2015)
  - On appeal, court found termination not in child's best interests:
    - Mother unfit but had not committed child abuse.
    - Child, almost 10, identifies mother as most important person in the world.
    - Caseworker observed positive and nurturing relationship between mother and J.
    - Testimony from psychologist that child's ability to attach to another family at risk if contact from mother is cut off due to his continued mourning for her.

Mother appealed a judgment terminating her parental rights, based on findings that mother was unfit and integration of the child into her home was improbable within a reasonable time due to conduct and conditions not likely to change. On appeal, the primary issue was whether the state established by clear and convincing evidence that it was in J's best interest to terminate mother's parental rights.

At the of the termination trial, J was almost 10 years old. Prior to trial, he told his caseworker that, if he could not live with his mother, he would like to live with his adult sister. About three weeks prior to trial, DHS changed J's placement to his sister's home. However, there was insufficient time before trial for the state to evaluate the sister as a permanent adoptive placement. During J's Parent Attachment Structured Interview with a psychologist, he identified his mother as the most important person in the world.

Held:

Reversed.

On de novo review, the Court of Appeals found the evidence was not clear and convincing that it was in J's best interests to terminate mother's parental rights. The court noted that the facts establishing mother's unfitness did not include abuse. In addition, the caseworker testified that he observed a positive and nurturing relationship between mother and J. Finally, according to the psychologist, the risk of not returning the child to mother was that he would continue to mourn the loss in an extended manner which could interfere with his ability to attach to another family.

Special Issues

APPOINTMENT OF GAL

INADEQUATE ASSISTANCE OF COUNSEL

PROCEEDING WITHOUT A PARENT

MOTION TO SET ASIDE GUARDIANSHIP

Appointment of GAL

- *Dept. of Human Services v. A.S.-M*, 270 Or App 728 (2015)
  - Juvenile court appointed GAL for mother before termination trial, and then terminated her rights at the TPR.
  - Reversed – insufficient evidence to appoint GAL:
    - Mother did not testify (judge could not observe her demeanor)
    - Testimony related to the neuropsychological was of limited value because the evaluation was conducted six months prior and was written for another purpose;
    - Testimony that mother couldn't contain her emotions, remain focused, coherent and on track did not establish mother lacked substantial capacity to give direction and assistance;

Mother argued the appointment of the GAL rendered the proceeding fundamentally unfair. The disputed issue was whether mother lacked the substantial capacity to give direction and assistance to her attorney. The court found the evidence was insufficient because: (1) mother did not testify at the GAL hearing, so neither the juvenile judge nor the doctor was able to observe her demeanor or interactions with her attorney; (2) testimony related to the neuropsychological evaluation was of limited value because it was six months old and was written for the purpose of assessing whether mother could reunite with her children, rather than determine whether she could assist her attorney in the termination proceeding; (3) testimony that mother couldn't contain her emotions, remain focused, coherent and on track during conversations, and maintain appropriate demeanor did not establish that mother lacked substantial capacity to give direction and assistance to her attorney; and (4) Dr. Kolbell's testimony that mother was delusional was not based on his own observations. Finally, the court noted the fact that mother requested her attorney to withdraw after she found out about his letter to Dr. Kolbell, and later directed her attorney to object to the appointment of the GAL, provide some evidence that mother was able to provide direction regarding her representation.

Appointment of GAL

- *A.S.-M* continued:
  - The doctor's testimony that mother was delusional was not based on his own observations.
  - Mother's request to her attorney that s/he withdraw, and her direction to object to the appointment of the GAL show mother was able to provide direction regarding her representation.

Inadequate Assistance of Counsel

- *Dept of Human Services v. T.L.*, 269 Or App 454 (2015), *rev allowed, (S063204, 06/04/15)*
  - Facts:
    - Father's attorney failed to appear at permanency hearing
    - Father appeared near the end of the hearing.
    - Father did not say anything about the absence of his attorney, nor indicate he was opposed to changing the plans for the children, but said he thought he was doing what DHS asked.
    - Court changed the plans from reunification to APPLA and guardianship.
    - Father argued he received inadequate assistance of counsel on appeal for first time.

Inadequate Assistance of Counsel

- *T.L.* (continued)
  - Affirmed
    - *Geist* doesn't apply since ORS 419B.923 was enacted, providing procedures for modifying or setting aside an order/judgment at the trial court level.
    - Parent must first seek to resolve issue in juvenile court by moving to modify or set aside order.
    - Father failed to preserve claim.
- On appeal – stay tuned.

On appeal, father seeks to have those judgments reversed. He purports to assert nine separate assignments of error; however, he presents a single combined argument in which he contends that, because his counsel failed to appear at the permanency hearing, he received inadequate assistance of counsel, was consequently denied a fundamentally fair hearing, and, under *Geist, is entitled to reversal of the* permanency judgments.4 Father acknowledges that he failed to preserve that argument, but contends, quoting *Geist, 310* Or at 184 n 9, that he is "not required to have preserved his claim because 'the general rule that appellate courts will only consider error that has been preserved at trial need not be strictly applied to the issue of appointed counsel's adequacy in a parental rights termination proceeding.' " We disagree.
A close reading of *Geist, in light of the enactment of* ORS 419B.923 and our cases construing that statute, leads to the as to the inadequacy of his appointed trial counsel must be made in the first instance in the juvenile court.
We begin with *Geist. Geist involved the reviewability* on direct appeal of a judgment terminating the mother's parental rights. The Supreme Court held that the statutory right to counsel for indigent parents in termination cases included the right to adequate counsel, and that, "*[a]bsent an express legislative procedure for vindicating the statutory right to adequate counsel, this court may* fashion an appropriate procedure." 310 Or at 185 (emphasis added). Emphasizing the importance of finality in termination cases, the court noted that "a procedure that allows a

terminated parent to make a claim of inadequate counsel
only after all direct statutory appeals have been exhausted
would only further delay the finality of the termination
decisions." *Id. at 187. Because of that concern and in the*
absence of statutes prohibiting it, the court concluded that
challenges to the adequacy of appointed trial counsel in termination
proceedings were reviewable on direct appeal, notwithstanding
the lack of preservation. *Id. at 184 n 9 (noting*
that, "[b]ecause of the important timeliness considerations,"
the general rule that appellate courts will not consider error
that has not been preserved at trial "need not be strictly
applied to the issue of appointed trial counsel's adequacy in
a parental rights termination proceeding"). The court also
determined that the standard of adequacy required was one
that ensured "fundamental fairness" and that the parent
making the challenge has the burden of proving that that
standard has not been satisfied. *Id. at 191.5*conclusion that, as the state contends, father's claim

Proceeding Without a Parent: Service

- *General rule*: Summons must be served in a manner reasonably calculated to apprise the person of the proceeding and to give the person an opportunity to appear. ORS 419B.823
  - *Dept. of Human Services v. K.L.*, 272 Or App 216 (2015):
    - Service does not have to be made using one of the service methods listed in ORS 419B.823 in order to be valid.
    - The notice required varies according to circumstances and conditions.

In this case, a combination of posting, e-mail and service by mail was acceptable.

Proceeding Without a Parent: Jurisdiction

- *Dept. of Human Services v. M.E.M*, 271 Or App 856 (2015).
  - Status hearing:
    - Mother's attorney present
    - Mother FTA in person, but is joined on the telephone
    - Court enters jurisdictional judgment noting mother in default
    - Motion to set aside – mother had participated in person at several prior hearings, but had been mistaken about the date of the hearing in question.
    - Juvenile court denies mother's motion to set aside
  - Reversed and remanded
  - Compare to ORS 419B.815-.816; ORS 419B.923(1)(b)

419B.815 Summons for proceeding to establish jurisdiction under ORS 419B.100; contents; failure to appear. (1) A court may make an order establishing jurisdiction under ORS 419B.100 only after service of summons and a true copy of the petition as provided in ORS 419B.812, 419B.823, 419B.824, 419B.827, 419B.830, 419B.833 and 419B.839.

(2) A summons under this section must require one of the following:

(a) That the person appear personally before the court at the time and place specified in the summons for a hearing on the allegations of the petition;

(b) That the person appear personally before the court at the time and place specified in the summons to admit or deny the allegations of the petition; or

(c) That the person file a written answer to the petition within 30 days from the date on which the person is served with the summons.

(3) If the court does not direct the type of response to be required by the summons under subsection (2) of this section, the summons shall require the person being summoned to respond in the manner authorized by subsection (2)(c) of this section.

(4) A summons under this section must contain:

(a) A statement that the petition seeks to establish jurisdiction under ORS 419B.100 and that, if the person fails to appear at the time and place specified in the summons or an order under ORS 419B.816 or, if the summons requires the filing of a written answer, fails to file the answer within the time provided, the court may establish jurisdiction without further notice either on the date specified in the summons or order or on a future date, and may take any other action that is authorized by law including, but not limited to, making the child a ward of the court and removing the child from the legal and physical custody of the parent or other person having legal or physical custody of the child.

(b) A notice that the person has the right to be represented by an attorney. The notice must be in substantially the following form:

_____

You have a right to be represented by an attorney. If you wish to be represented by an attorney, please retain one as soon as possible to represent you in this proceeding. If you are the child or the parent or legal guardian of the child and you cannot afford to hire an attorney and you meet the state's financial guidelines, you are entitled to have an attorney appointed for you at state expense. To request appointment of an attorney to represent you at state expense, you must contact the juvenile court immediately. Phone _____ for further information.

_____

(c) A statement that, if the person is represented by an attorney, the person has the responsibility to maintain contact with the person's attorney and to keep the attorney advised of the person's whereabouts.

(d) A statement that, if the person is represented by an attorney, the person must appear personally at any hearing where the person is required to appear, unless the person is the child at issue in the proceeding who must be served with summons in accordance with ORS 419B.839 (1)(f). The statement must explain that to "appear personally" does not include appearance through the person's attorney.

(e) A statement that, if the court has granted the person an exception in advance under ORS 419B.918, the person may appear in any manner permitted by the court under ORS 419B.918.

(f) A statement that no later than 30 days after the petition is filed each party about whom allegations have been made must admit or deny the allegations and that, unless the court specifies otherwise, the admission or denial may be made orally at the hearing or filed with the court in writing.

(g) A statement that if the petition alleges that the child has been physically or sexually abused, the court, at the hearing, may enter an order restraining the alleged perpetrator of the abuse from having contact with the child or attempting to contact the child and requiring the alleged perpetrator to move from the household in which the child resides.

(h) A statement that the parent or other person legally obligated to support the child may be required to pay at some future date for all or a portion of the support of the child, including the cost of out-of-home placement, depending upon the ability of the parent or other person to pay support.

(5) If the summons requires the person to appear before the court to admit or deny the allegations of the petition or requires the person to file a written answer to the petition, the summons must advise the person that, if the person contests the petition, the court:

(a) Will schedule a hearing on the allegations of the petition and order the person to appear personally; and

(b) May schedule other hearings related to the petition and order the person to appear personally.

(6) At a hearing, when the person is required to appear personally, or in the person's written answer to the petition, the person shall inform the court and the petitioner of the person's current residence address, mailing address and telephone number.

(7) If a person fails to appear for any hearing related to the petition, or fails to file a written answer, as directed by summons or court order under this section or ORS 419B.816, the court may establish jurisdiction without further notice, either on the date specified in the summons or order or on a future date, and may take any other action that is authorized by law including, but not limited to, making the child a ward of the court and removing the child from the legal and physical custody of the parent or other person having legal or physical custody of the child.

(8) If the summons requires the person to appear personally before the court, or if a court orders the person to appear personally at a hearing in the manner provided in ORS 419B.816, the person may not appear through the person's attorney, unless the person is the child at issue in the proceeding who has been served with summons in accordance with ORS 419B.839 (1)(f). [2001 c.622 §6; 2001 c.962 §54; 2003 c.205 §§10,11; 2007 c.497 §3]

419B.816 Notice to person contesting petition to establish jurisdiction. If the person appears in the manner provided in ORS 419B.815 (2)(b) or (c) and the person contests the petition, the court, by written order provided to the person in person or mailed to the person at the address provided by the person, or by oral order made on the record, shall:

(1) Inform the person of the time, place and purpose of the next hearing or hearings related to the petition;

(2) Require the person to appear personally at the next hearing or hearings related to the petition;

(3) Inform the person that, if the person is represented by an attorney, the person's attorney may not attend the hearing in place of the person, unless the person is the child at issue in the proceeding who has been served with summons in accordance with ORS 419B.839 (1)(f);

(4) Inform the person that, if the court has granted the person an exception in advance under ORS 419B.918, the person may appear in any manner permitted by the court under ORS 419B.918; and

(5) Inform the person that, if the person fails to appear as ordered for any hearing related to the petition, the court may establish jurisdiction without further notice, either on the date specified in the summons or order or on a future date, and may take any other action that is authorized by law including, but not limited to, making the child a ward of the court and removing the child from the legal and physical custody of the parent or other person having legal or physical custody of the child. [2003 c.205 §10b; 2007 c.497 §4]

Mother, whose attorney had been present at the hearing, subsequently filed a motion to set aside the default and "the Judgment of Jurisdiction and Disposition that was entered as a result of the default," asserting that mother had

appeared and participated in the hearing and, alternatively, that any **"failure to appear was due to good cause or excusable neglect."** In support of her motion, mother's attorney filed a declaration asserting that mother had appeared in person before the court in this case at several prior hearings, but that she had been mistaken about the date of the hearing in question and, although not physically present at the hearing, had participated by telephone. The court denied mother's motion to set aside the default.

Mother appeals, asserting that the "juvenile court erred in denying mother's motion to set aside its 'default' judgment asserting jurisdiction over [M]." She asserts, in part, that the juvenile court "had no authority to enter a 'default' judgment as a punitive measure when mother appeared by phone and through counsel for the scheduled status hearing." (Boldface omitted.) The Department of Human Services concedes that, "in the unique circumstances presented by this case," the juvenile court erred "in denying mother's motion to set the jurisdiction judgment aside, and the judgment should be reversed."
We agree with the parties that the juvenile court erred in denying mother's motion under the circumstances presented here. Accordingly, we reverse and remand to the juvenile court for further proceedings.

Proceeding without a Parent: TPR

- *Dept. of Human Services v. K.M.J.*, 272 Or App 506 (2015)
  - Facts:
    - Mother FTA at termination hearing.
    - At the hearing to set aside the judgment, she testified she was aware of the time and date of the hearing.
  - Held:
    - Affirmed.
    - Excusable neglect: a parent's reasonable, good faith mistake as to the time and place of a dependency proceeding.
      - She never requested the hearing be rescheduled, transportation assistance, or to attend by phone.

Mother moved to Washington prior to TPR hearing and didn't tell her attorney

She wrote a letter to the court requesting the proceeding be moved to Washington, and acknowledged she was aware of the time and place of the hearing

FTA at hearing; her attorney represented her at the hearing; court terminated her rights

Proceeding Without a Parent: TPR

- *Dept. of Human Services v. E.M.*, 268 Or App 332 (2014)
  - Facts:
    - Incarcerated father served with petition and summons to appear at trial from December 2 to 6 at 9:00 a.m. each morning.
    - Father's attorney arranged to have father appear by video.
    - Father released on Wednesday at 4:50 p.m., the day before Thanksgiving, and was directed to appear in King County at 8:30 a.m. on Dec. 2.
    - Father did not appear at TPR trial, but his attorney was present and argued that father couldn't be in two courts at once. No information was presented about whether father attempted to contact his attorney after release.

We begin with father's second assignment of error,
because it is dispositive. As noted, father assigns error to
the juvenile court's denial of his motion for a continuance.
DHS responds that the juvenile court did not abuse its discretion
in declining to continue the termination trial after
father failed to appear.
A juvenile court has the authority to postpone a
hearing or make other procedural accommodations to protect
the parent's right to participate, ORS 419B.875(2)(c),
when a parent is *unable to or prevented from personally*
appearing due to the parent's incarceration, physical condition,
mental illness, or need to be in another courthouse at
the same time as the parent's scheduled hearing, for example.
ORS 419B.800(3) ("ORS 419B.800 to 419B.929 [governing
procedure and practice in all juvenile court proceedings
under ORS chapter 419B] do not preclude a court in which they apply from regulating pleading, practice and procedure
in any manner not inconsistent with ORS 419B.800
to 419B.929."); *see also State ex rel Juv. Dept. v. Evjen, 107*
Or App 659, 663 n 4, 813 P2d 1092 (1991) ("[W]hen a parent
is absent from a termination hearing only because of a

physical condition that has temporarily delayed the ability to travel, we have held that a court should grant a motion for a continuance." (Citing *State ex rel Juv. Dept. v. Jones, 40 Or* App 401, 595 P2d 508 (1979))).

Here, in denying father's motion for a continuance, the court failed to take into account that father had maintained contact with his attorney in preparation for the termination trial and had been cooperative with the judicial process. *See, e.g., State ex rel Juv. Dept. v. Bryant, 84 Or* App 571, 574, 574 n 2, 735 P2d 5 (1987) (affirming termination judgment when a parent—who was represented by counsel—stymied termination proceedings by her own actions, including by failing to cooperate in good faith with the judicial system, make contact with her appointed attorney, or aid in her own defense). Further, the court did not consider that father had previously arranged to appear electronically from jail, ORS 419B.918, before he was released from jail near the end of the business day on the eve of a holiday weekend with instructions to appear at an arraignment the following Monday morning, a mere 30 minutes before father's termination trial was scheduled to begin in another state. Indeed, the court failed to consider that the termination trial was scheduled to occur over the course of four days, from December 2 through December 6, and postponing the hearing for as little as several hours or one day would have allowed father the opportunity to participate in the hearing.

DHS argues that the court did not abuse its discretion, because father was absent and did not contact his attorney or the court to notify either of his need to be at the arraignment in Washington. Although it appears that father may have had an opportunity to contact his attorney or the court directly on the Friday after Thanksgiving, there is no indication in the record whether father's attorney's

office had been open that day or—due to the brief
nature of the exchange between father's attorney and the court—that father had *not contacted his attorney's office.*
The trial court's one-line inquiry questioned father's ability
to operate a telephone while ignoring entirely the constraints
of imprisonment, displacement, and indigence. In
any event, in light of father's involvement with his attorney
in preparing for the trial and his attorney's appearance and
argument on his behalf, the reasons behind father's possible
failure to communicate with his attorney do not appear
to have any bearing on whether it remained his intention
to participate in the termination hearing and whether the
juvenile court abused its discretion in failing to grant a
continuance.

Based on the circumstances presented, the juvenile
court erred by denying father's motion for continuance or
otherwise failing to make other procedural accommodations
to protect father's right to participate, ORS 419B.875(2).
ORS 419B.800(3).2

Proceeding Without a Parent: TPR

- *E.M.* (continued)
  - Juvenile court allowed state to proceed in absence of father and his attorney because father made no attempt to communicate with his attorney, DHS or the court.
  - Reversed.
    - Juvenile court has authority to postpone hearing or make other procedural accommodations to protect the parent's right to participate when parent is unable to appear in person due to:
      - Incarceration, physical condition, mental illness, or conflicting court dates
  - Compare: ORS 419B.819(7) & (8); 419B.820(2) – (4); ORS 419B.800(3); ORS 419B.875(2)

Court of Appeals treated father's counsel's argument that father could not be in two places at one an "implicit motion for a continuance"

A juvenile court has the authority to postpone a hearing or make other procedural accommodations to protect the parent's right to participate when a parent is unable to or prevented from personally appearing due to the parent's incarceration, physical condition, mental illness, or the need to be in another courthouse at the same time as the parent's scheduled hearing, for example. The court cited factors that should have been considered, including that father had maintained contact with his attorney, had been cooperative with the judicial process, and had previously arranged to appear electronically. In addition, the juvenile court could have postponed the multi-day trial for a few hours or a day, and did not consider the constraints of imprisonment, displacement and indigence. **Based on the circumstances presented, the juvenile court erred by denying father's motion for continuance or otherwise failing to make other procedural accommodations to protect father's right to participate.**

Motion to Set Aside Guardianship

- After the court enters a judgment establishing a guardianship and terminating DHS custody of the ward and dismissing DHS as a party…
  - DHS is no longer a party under ORS 419B.875(a)(B)
  - DHS has no legal standing to request the court to set aside the judgment.
  - DHS does not have a due process right to seek relief from the order dismissing it as a party. The Due Process Clause of the Fourteenth Amendment does not guarantee fairness or due process to the state.

Dept. of Human Services v. B.M.C., 272 Or App 255 (2015).