APPELLATE CASE LAW UPDATE

Summaries of Oregon Appellate Court Decisions in Juvenile Court Cases

July 2014 to July 2015

Oregon Judicial Department

Juvenile Court Improvement Program

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Juvenile Delinquency

- ***State v. D.C.*, 269 Or App 869 (2015)**

Facts:

Police were called to investigate a residential burglary involving the theft of an Xbox. The victim identified the youth by name, described what he was wearing, and told police youth had been by his house around the time when the crime could have occurred. About 10 minutes later, police located a youth matching the description by the victim, with a backpack big enough to contain an Xbox. When youth saw police, officers observed him making "furtive gestures" by dropping the backpack and moving away from it in an apparent attempt to get rid of evidence. The officers engaged in a conversation with youth and learned that he knew the victim and had been at the victim's house about an hour before. Finally, officers confronted youth about whether he had the victim's Xbox. Youth admitted he did, and agreed to open the backpack and showed the Xbox to police. Youth was placed under arrest and given his Miranda warnings for the first time.

At trial, the court suppressed statements youth made to police after he was confronted and concluded that youth's consent to the search was invalid. However, the court found the officers had probable cause to arrest youth, and evidence in the backpack would have been discovered during a search incident to youth's arrest. The juvenile court denied the youth's request to suppress the evidence obtained from the search of youth's backpack, and found youth within the jurisdiction of the court for committing acts, which, if committed by an adult, would constitute burglary in the first degree, ORS 164.255, and theft in the second degree, ORS 164.045. On appeal, the court considered whether the officer lacked objective probable cause to believe youth had committed a crime.

Held:

Affirmed.

Under Article 1, section 9, of the Oregon Constitution, a police officer may conduct a search incident to arrest if the search relates to a crime which there is probable cause to believe the arrestee has committed, and when it is reasonable in all the circumstances. To determine whether the state has established that the facts objectively are reasonable, the court looks at the totality of the circumstances which are known to the officer at the time of the arrest, viewed in light of the officer's experience. In this case, the officers' objectively reasonable basis for that belief may be based on the evidence which was not excluded by the court and which was known to the officers when youth was arrested. The court found the events leading up to point where officers asked youth whether he had the Xbox were sufficient to establish an objectively reasonable basis to believe youth had committed a crime, and therefore had probable cause to arrest youth. The juvenile court did not err in denying youth's motion to suppress evidence that was discovered during the search of his backpack.

► ***State v. J.L.S.*, 268 Or App 829 (2015)**

Facts:

One night after midnight, youth was discovered missing from his home. Father called youth, and youth said he had been kidnapped from the house at gunpoint and driven to Portland. He said he subsequently escaped and called two friends who had come to pick him up. Youth's father, who believed his son had been kidnapped, called police, although his son told him not to do so.

After listening to youth's account of what happened, a police detective told youth she did not believe his story. He was given several opportunities to tell the truth. She advised him that if he persisted with his story, she would have to call out the Major Crime Team, at significant expense. She also warned youth he could get a citation for initiating a false report. Despite the warnings, youth stuck to his version of events. The Major Crime Team investigated and found text messages between youth and his friends about a plan to meet and sneak out. When confronted with this evidence, youth admitted he wasn't kidnapped.

A petition was filed to find youth within the jurisdiction of the court for violating ORS 162.375 by unlawfully and knowingly initiating a false report which as transmitted to a law enforcement agency. Youth moved to dismiss, arguing that he had only lied to his father, and there was no evidence that he knew his father was going to call police. Youth also argued he did not violate ORS 162.375 when he lied to the detective on the ground that false statements made to a police officer in the context of an investigation do not constitute a violation of the law.

The juvenile court found youth within the jurisdiction of the court for violating ORS 162.375, and youth appealed.

Held:

Affirmed.

In interpreting the language of ORS 162.375, the court noted the plain language indicates a person violates the statute when he or she knowingly begins or sets going either a false alarm (a sound or signal) or a false report (an assertion or notification that the person should reasonably understand is likely to be transmitted to one of the specified emergency responders and cause a response), causing that false alarm or report to be conveyed to a fire department, law enforcement agency, or other organization that deals with emergencies involving danger to life or property. In addition, by setting out the term "transmitted" in the passive voice, the legislature signaled that it was choosing not to identify the actor or mechanism that must transmit the false alarm or report. Finally, the legislative history indicates that criminal liability under ORS 162.375 does not depend on whether a person acts for him or herself, or causes another to act.

In this case, the court focused on youth's act of repeatedly asserting he had been kidnapped to the detective, after repeated warnings that she would call out the Major Crime Team. The court found this evidence was sufficient to find him within the court's jurisdiction, even though it was the detective who ultimately transmitted the report to the Major Crime Team.

▶ ***State v. J.M.M.*, 268 Or App 699 (2015)**

Facts:

Youth was present with three other people during the planning and commission of a burglary of a church. He was charged with acts that, if committed by an adult, would constitute one count of first-degree theft, ORS 164.055, and one count of second-degree burglary, ORS 164.215. The state proceeded against youth on a theory of accomplice liability. Testimony from the investigating police officer established youth was present during the planning and commission of the alleged crimes, but that he did not participate in them. The officer testified youth was not serving as a lookout and did not want to be part of the burglary. Youth was also not forced to be present during the planning or commission of the crimes.

The juvenile court found the youth within the jurisdiction of the court after finding he was present at the planning, knew the burglary was going to happen, and didn't make any effort not to be there. On appeal, the issue was whether the evidence was sufficient to establish youth's guilt beyond a reasonable doubt.

Held:

Reversed.

Oregon case law establishes that the smallest degree of collusion between accomplices is sufficient for aiding-and-abetting liability. However, evidence that a youth was only present or acquiesced in others' conduct is not enough to establish liability. The court cannot infer that because youth was present during the planning of the burglary, that he was a participant.

In this case, the evidence was insufficient to establish youth actively planned or participated in the burglary. Youth had no legal duty to refrain from being at the scene, or to discourage the others from burglarizing the church.

▶ ***State v. J.C.N.-V.*, 268 Or App 505 (2015), *rev. allowed* (S063111, 06/04/2015)**

Facts:

Youth, age 13 years and eight months, in cooperation with a 20 year old man, allegedly beat, stabbed and robbed the victim. The state charged the youth with offenses that, if committed by an adult, would constitute the crimes of aggravated murder, first-degree robbery, and unlawful use of a weapon. The state petitioned to waive youth into circuit court for prosecution as an adult on the aggravated murder charge under ORS 419C.349 and ORS 419C.352 (Grounds for waiving youth under 15 years of age). After hearing and considering evidence from several witnesses, the juvenile court found that youth was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct of the alleged offense under ORS 419C.349(3). In addition, the court found that waiver was in the best interest of society and youth under ORS 419C.349(4) based on the seriousness of the alleged crime, youth's prior record of assaultive and

violent behavior, and the inability of previous community interventions to successfully address youth's behavioral and emotional health.

Youth appealed, arguing the juvenile court erred in finding that youth was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved under ORS 419C.349(3). Youth argued: (1) the statute requires a showing of more sophistication and maturity than is possessed by the twelve to fourteen year-old with normally developed intellectual and emotional capacities; and (2) the statute requires consideration of youth's ability to exercise mature judgment, his vulnerability to peer pressure and the scientific evidence about the onset of puberty and development of the brain.

Held:

Affirmed.

The legislature intended to allow waiver for those youths (age 12 to 14) who, by nature of their sophistication and maturity, understand what they are doing in a physical sense and understand that their actions are wrong or will likely have criminal consequences. The level of maturity and sophistication that is sufficient is determined by the youth's capacity to appreciate the essential character of his or her conduct, including an appreciation of the criminality or wrongfulness of his or her actions. It does not include an ability to make responsible decisions, resist peer pressure and control impulses. The evidence in this case supported the juvenile court's findings under ORS 419C.349(3).

If the threshold of mental capacity in ORS 419C.349(3) is met, the court may then consider whether retaining jurisdiction is in the best interest of the youth and society under ORS 419C.349(4). Subsection (4) allows for a more thorough evaluation of the youth's circumstances, including the youth's history, the youth's physical, emotional and mental health, and the manner in which the offense was alleged to have been committed.

Juvenile Dependency

Guardianship

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

Facts:

(1) May 2014: the juvenile court entered judgment granting guardianship to maternal grandparents, terminating DHS custody, and dismissing DHS as a legal party.

(2) One week later, DHS moved to set aside the guardianship under ORS 419B.923(1)(c), based on allegations the guardians were allowing the mother and her boyfriend, who were engaging in criminal activity, to live on the guardian's property.

(3) Day after filing the motion, and with no permission from the court, DHS removed the child and placed O with paternal grandparents.

(4) October, 2014: court made oral ruling to set aside guardianship.

(5) October 14, 2014: before entering judgment setting aside the guardianship, the court held a permanency hearing and changed the plan to guardianship with paternal grandparents.

(6) October 15, 2014: the juvenile court entered a judgment setting aside the May, 2014 judgment establishing the guardianship.

Mother and maternal grandparents appealed, arguing the court lacked jurisdiction to consider and grant DHS's motion to set aside the guardianship, because DHS was no longer a party after the May, 2014 judgment establishing the guardianship.

Held:

Vacated and remanded with instructions to deny the motion to set aside the guardianship for lack of standing; permanency judgment vacated.

The judgment establishing the guardianship terminated DHS's temporary custody of the child and dismissed it as a party to the proceeding. ORS 419B.875(1)(a)(G) provides that DHS becomes a party when the agency has temporary custody of the child. The court rejected DHS's argument that due process requires it be allowed to file a motion under ORS 419B.923(1)(c) to set aside the order dismissing it as a party, finding that the state has no entitlement to due process or standing to challenge the application of a state statute to it on constitutional grounds.

Because DHS lacked standing to bring a motion to set aside the May judgment, the juvenile court had no jurisdiction to enter an order granting the motion and setting aside the guardianship. The court also vacated the permanency judgment because it was entered at a time that DHS was not a party to the proceeding.

Jurisdiction

- ***Dept. of Human Services v. K.L.*, 272 Or App 216 (2015)**

Facts:

Parents appealed the juvenile court's entry of a jurisdictional judgment, arguing that they were not properly served with summons.

DHS filed a dependency petition, and later moved to dismiss it after father agreed to participate in services. DHS filed a second petition after father stopped participating in services, and submitted an affidavit for the shelter hearing stating that someone had erected barriers to prevent people from reaching the home, that nobody could be found at the home, and that signs had been erected outside of the home with statements to go away and keep out. The juvenile court

awarded DHS temporary custody of the child. The caseworker contacted father by e-mail, and father sent an e-mail back indicating they had signed custody of the child over to someone else.

DHS requested a warrant, however, the court refused to issue one until DHS served the parents. The court issued an order directing father to appear with the child so that if he didn't appear, a warrant could be issued. The court directed DHS to send the order via mail, first class and certified and to send a sheriff out to try to serve personally and post. DHS subsequently submitted an affidavit detailing service of the order, summons and petition: (1) mailed copies to parents' home; (2) e-mailed documents to address father previously used to contact DHS, (3) posted copies on the door of the home (the caseworker stated there were pets in the home, and that neighbors saw the parents come home late at night). Based on this, the juvenile court issued a warrant for father's arrest. Parents failed to appear for the jurisdictional hearing and the court entered a judgment after determining the parents had been properly summoned to the hearing.

Held:

Affirmed.

The court rejected parents' argument that DHS had to serve them using one of the service methods in ORS 419B.823 in order for service to be valid. The court evaluated whether service was sufficient to comply with due process requirements. Due process requires that interested parties receive notice reasonably calculated, under all circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections. In this case, where there was evidence parents were visiting their home and were checking e-mail, these methods were sufficient to satisfy due process. Mailing the documents made it more likely the parents would receive notice, however, would probably not have been sufficient in this case on its own.

- ***Dept. of Human Services v. M.A.H.*, 272 Or App 75 (2015**).

Facts:

Mother separated from father shortly before M's birth in February, 2013, and had legal custody of the child until she was removed in July, 2014. A few days before M was born, mother expressed concern to grandmother and father that she might harm her baby. She did not intend to harm the child, but made the statement because she was scared and wanted attention. After a referral was made to DHS, mother was hospitalized, evaluated, and was provided with six weeks of counseling. When M was 9 months old, mother left M in the car alone for 20 minutes, however, DHS did not take any action. In July 2014, grandmother reported to DHS that she had been receiving concerning messages from mother. The messages (set forth in the opinion) indicate mother was not always taking care of the child's daily needs, including feeding her and soothing her when she cried. The messages also suggest mother was emotionally abusing M.

DHS removed M from mother's care in July, 2014 and placed the child with father. At the time of removal, the child was physically healthy, was clean and appeared well cared for; mother's house was clean and stocked with appropriate food and toys. Mother continued in counseling,

and by September 2014, mother's therapist notified DHS mother was in a position to focus on parenting M. Meanwhile, the jurisdictional hearing set for September was set over based on DHS's request to allow father time to take steps to obtain legal custody of M. In October, Dr. Truhn completed a psychological evaluation of mother at the request of her attorney, and found that mother's mental health issues did not impair her ability to safely parent at that time, but Dr. Truhn thought they could do so in the future if mother did not continue with treatment. At a jurisdictional hearing in November, DHS presented evidence regarding the circumstances leading up to July, 2014, however, did not present any evidence that mother had engaged in concerning conduct after July 2014.

The juvenile court found jurisdiction based on mother's mental health issues and mother's behavior of subjecting the child to mental, verbal and emotional abuse. In light of the risks mother posed to M, the court found father's lack of a custody order put M at risk because, if the dependency case was dismissed, M would be returned to mother. Mother appealed.

Held:

Reversed.

In order for the court to take jurisdiction under ORS 419B.100(1)(c), the child's "condition or circumstances" at the time of the jurisdictional hearing must be such as to endanger the welfare of the child. In addition, the child's conditions and circumstances must create a current threat of serious loss or injury to the child, and the threat must be reasonably likely to be realized absent juvenile court intervention.

In this case, the juvenile court found affirmatively that mother did not have the motivation or intent to harm M. The messages to grandmother four months prior to the jurisdictional hearing, together with other historical facts about mother and her parenting of M, did not permit the conclusion that mother posed a current threat of serious loss or injury, at the time of the November 2014 hearing. Mother's past mental health issues weren't sufficient to support an interference of her present condition. The only mental health professionals to testify at trial indicated mother's mental health issues were being managed, at the time of the hearing, through counseling and medication. Since mother's behavior and mental health issues did not pose a current threat of serious loss or injury to M at the time of the jurisdictional hearing, fathers lack of a custody order did not endanger M. His lack of a custody order could only endanger M if mother, as the custodial parent, posed a risk to M.

- ***Dept. of Human Services v. M.E.M*, 271 Or App 856 (2015).**

Facts:

The juvenile court entered a judgment taking jurisdiction over mother's child following a status hearing at which mother participated by telephone. The court noted mother was defaulted for failing to appear in person. Mother's attorney was present at the hearing and filed a motion to set aside the judgment asserting mother had appeared, or alternatively, that any failure to appear was due to good cause or excusable neglect. In support of the motion, the attorney submitted a

declaration asserting mother had appeared in person at earlier hearings but had been mistaken about the date of the current hearing. The juvenile court denied mother's motion.

Held:

Reversed.

- ***Dept. of Human Services v. A.B.*, 271 Or App 354 (2015).**

Facts:

In August 2013, parents brought their three month old, N, to stay with grandmother. Parents continued to visit and take N to doctor appointments, but the primary care of N was provided by grandmother. By April 2014, grandmother understood this arrangement to be indefinite. The parents also had a four year old child, K, that they continued to care for (father was the psychological parent). The parents had a history of drug use. On the night of 4/22/14, while mother was working an overnight shift, father took K with him to a controlled drug buy. After father was arrested, police discovered K sleeping in the car and placed her in foster care.

DHS filed a dependency petition alleging that N and K were within the jurisdiction of the juvenile court because their conditions or circumstances were such as to endanger the welfare of the person or others under ORS 419B.100(1)(c), based on mother exposing the children to persons who present a risk of harm, mother's lack of parenting skills, mother's substance abuse, and father's criminal activities and substance abuse. At the shelter hearing, the court ordered DHS to continue K in care and take N into protective custody. DHS attempted to obtain emergency certification for grandmother as a foster-care placement, however, she did not qualify due to a founded DHS disposition from 1992.

The juvenile court took jurisdiction over N and K. As to N, the court found the parents' substance abuse and judgment issues regarding K extended to N, because those parenting decisions were going to be made for both children. Parents appealed the judgment as to N, and argued DHS failed to establish any nexus between parents' conduct and a risk of harm to N.

Held:

Reversed.

A parent's decision to turn over his or her child to another person does not in itself support a determination that there is a current risk of harm to the child. The relevant inquiry under ORS 419B.100(1)(c) is whether the evidence in the record, as a whole, establishes that the totality of the child's circumstances or conditions exposed the child to a current risk of serious loss or injury that was likely to be realized. In this case, DHS had the burden of alleging and proving that parents' conduct posted a risk of serious loss or injury to N despite the fact that grandmother was caring for her. The court's findings did not identify or hint at any specific way in which the parents' risk-causing conduct might have affected N. With DHS's failure to identify such a nexus, the court's decision was based on the speculative belief that as long as parents had legal

custody of N, they might remove her from grandmother's care, at which point she would be exposed to parents' bad judgment and substance abuse issues. This is not sufficient to establish a current risk of harm.

Note:

The court provides an extensive explanation of the relationship between subsections (1) and (2) of ORS 419B.100. Subsection (2) provides the court shall have jurisdiction under subsection (1) even though child is receiving adequate care from the person having physical custody of the child. The court concluded that subsection (2) provides an additional instruction regarding the scope of the inquiry under subsection (1), and does not provide an independent basis for jurisdiction. Reading subsections (1)(c) and (2) together, the court concluded that all of the child's circumstances must be considered, including the circumstance that the child is being cared for by someone other than the parents and the other specific circumstances related to that arrangement. The court overruled *State ex rel Juv. Dept. v. D.*, 55 Or App 912 (1982) to the extent that it held that a former version of subsection (2) provided an independent basis of jurisdiction.

- ***Dept. of Human Services v. E.L.G.,*** 270 Or App 308 (2015)

Facts:

Both parents appealed a judgment establishing jurisdiction over their two-month old child, C, arguing that DHS failed to establish that mother's and father's incestuous relationship posed a current risk of serious loss or injury to C. Mother also argued the court erred in ordering the parents to have no contact with each other.

At the jurisdictional hearing, the parents were present and represented by counsel. Mother admitted to a petition allegation providing that she was not a parental resource for another child and the issues relating to that child (mental health, substance abuse, limited cognitive abilities) have not changed and continue to interfere with her ability to safely parent. Likewise, father agreed not to contest an amended allegation and DHS agreed to dismiss the remaining allegations. After hearing testimony from a caseworker, with no objection or cross-examination from either parent, the court found the state had met its burden with respect to the amended allegation that father was involved in a sexually intimate relationship with his daughter (the mother), which resulted in significant medical issues to the child's sibling and which may affect C; and father continues to maintain the relationship with mother despite a pending criminal investigation. As part of the jurisdictional judgment, the court ordered the parents to have no contact with each other. Mother's attorney objected to the no-contact order.

Held:

Affirmed as to jurisdiction; reversed as to the no contact order.

Regarding the issue of jurisdiction, an issue not preserved in the trial court will generally not be considered on appeal unless the error is plain error. The court considers a number of factors

when determining whether to exercise discretion to correct plain error: the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; whether the policies behind the preservation rule have been served in the case in another way; whether and to what extent the party encouraged the judge's choice; the possibility the party made a strategic choice not to object; and the interest of the judicial system in avoiding unnecessary repetitive legal proceedings.

In this case, the court found the parents' agreements with DHS to admit/not contest some allegations in exchange for dismissal of others, in addition to the failure to object to the sufficiency of the evidence at trial were strategic choices, and outweighed any factors in favor of correcting any jurisdictional error.

Regarding the no contact order, the court found that since jurisdiction was based on parents' sexual relationship posing a risk of harm to C, an order restricting any contact was overbroad.

- ***Dept. of Human Services v. D.H.*, 269 Or App 863 (2015)**

Facts:

The juvenile court asserted jurisdiction over mother's 5-year old child, J, on three bases (summarized as follows): (1) mother's husband is a convicted, untreated sex offender and mother does not believe he poses a risk to the child; (2) mother is unwilling to protect the child from unauthorized contact with her husband; and (3) mother's mental health issues, including an attempted suicide, interfere with her ability to safely parent the child. These conditions were alleged to place the child under a threat of harm.

Mother did not dispute that she permitted her husband to have contact with the child, or that she had mental health issues. However, she disputed that the facts were sufficient to permit the conclusion that mother's conduct posed a sufficient risk of injury or harm under ORS 419B.100(1)(c) that would allow the court to exercise jurisdiction.

Held:

Reversed. The evidence presented at the jurisdictional hearing was legally insufficient to permit the conclusion that J's conditions and circumstances - his exposure to mother's husband and mother's mental health issues - presented a current risk of harm to J.

(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.

▶ ***Dept. of Human Services v. A.L.*, 268 Or App 391 (2015)**

Facts:

The juvenile court asserted jurisdiction over three children pursuant to ORS 419B.100(1)(c) 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 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.

On appeal, the court considered whether the juvenile court's assertion of jurisdiction was error.

Held:

Reversed and remanded.

The court may assert jurisdiction under ORS 419B.100(1)(c) when a child's condition or circumstances are such as to endanger the welfare of the child. To meet this standard, the conditions or circumstances must present a threat: (1) of serious loss or injury; (2) that is current and non-speculative; (3) there is a reasonable likelihood the threat will be realized; and (4) there is a connection between the risk causing conduct and the harm to the child. In addition, the court considers the totality of the circumstances in determining the likelihood of harm to the welfare of the child.

In this case, the court 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) No evidence of the nature of the abuse relating to paternal grandfather's 10-year-old founded disposition of physical abuse was presented by DHS at trial due to confidentiality concerns. There was insufficient evidence to demonstrate a nexus 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.

Finally, the court noted DHS is mistaken in assuming that parents cannot give custody of their children to people who are not DHS certified. The court explained, "[t]o the contrary, the court must have jurisdiction for DHS to change the placement of the children and, for jurisdiction to be warranted, there must be a current threat of harm to the children." In this case, where the parents gave the primary care of the children to the parental grandparents, who did not pose a current threat of harm, the court did not have a basis for asserting jurisdiction over the children.

► ***Dept. of Human Services v. H.H.*, 266 Or App 196 (2014).**

Facts:

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, under ORS 419B.100(1)(c), based on its determination that their condition and circumstances endangered their welfare because: (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.

On appeal, the parents challenged the court's finding that H's injury was nonaccidental, and mother argued that even if the injury was nonaccidental, the juvenile court erred in finding that the children's circumstances endangered them.

Held:

Affirmed.

The court applied the following standard for determining whether a child is endangered to warrant the juvenile court's exercise of jurisdiction under ORS 419B.100(1)(c): *whether under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child*. In this case, the court found the standard 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 S and H.

The court declined to remand the case for further evidentiary development of the parents' claim regarding inadequate assistance of counsel.

► ***Dept. of Human Services v. A.F.*, 268 Or App 340 (2014)**

Facts:

In January, 2013, DHS filed a petition 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. 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. 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.

Father appealed, arguing the evidence was factually insufficient to support jurisdiction.

Held:

Vacated and remanded.

The court analyzed the case under ORS 419B.100(1)(c) (conditions and circumstances jurisdiction), requiring the state to show that harm is present at the time of the hearing. The court rejected DHS's argument that the court took jurisdiction "as to mother" in December, 2013, because father had been served, summoned, appeared and contested jurisdiction, and jurisdiction would not be appropriate until the court held a trial on the contested allegations. *Dept. of Human Services v. W.A.C.*, 263 Or App 382, 328 P 3d 769 (2014). 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.

ICWA

▶ ***Dept. of Human Services v. M.D.*** **266 Or App 789 (2014)**

This case reiterates the standard for "active efforts" under ICWA and presents application of that standard where there is a delay in the provision of a critical service until after the time of the jurisdictional hearing.

Facts:
Mother's baby was removed at birth. The sole basis for jurisdiction was mother's chronic mental health problems, possible paranoid schizophrenia. In the first 5 weeks, DHS referred mother for a neuropsychological to a doctor who was unable to accept the referral. The next doctor told DHS that a full psychological exam should precede a neuropsych. That doctor was not able to schedule the exam until one month after the jurisdictional/dispositional hearing and nearly 5 months after removal. By the time of the jurisdictional hearing, DHS had met with mother 5 times and determined she was not making progress because she did not seem to understand what the worker was saying. DHS decided not to schedule any other services until after the psych was done. DHS provided other services in the form of visits, gas vouchers, compiling the necessary documentation to enroll child in the Cherokee tribe and searching for relatives who could be placement resources.

Mother was actively delusional at the jurisdictional hearing. Grandmother testified that mother was receiving mental health treatment. A licensed social worker, a member of the Yurok tribe, testified that, in his view, DHS efforts were sufficient. Based on that evidence, and the evidence of other services (visits, enrollment, relative search) the court found that DHS had made "active efforts." The court found that mother was delusional despite treatment and nothing else could be done until after the psychological exam. Mother appealed the jurisdictional and dispositional judgment, challenging the juvenile court's determination that the Department of Human Services (DHS) had made "active efforts," due to the delay in providing the psych exam. since that exam was critical. Mother contended DHS should have found a provider that could have seen mother sooner, consulted with her mental health provider and assisted her with psychiatric medication management.

Held:

Affirmed.

The record was legally sufficient to support the juvenile court's determination as to DHS's active efforts under ORS 419B.340(1). Active efforts requires a higher standard than reasonable efforts. The standard obligates DHS to do more than "creat[e] a reunification plan and requir[e] the client to execute it independently." *State ex rel Juv.Dept. v. T.N.* 266 Or App 121, 124, 203 P3d 263, *rev den*, 346 Or 257(2009). The agency must "assist the client through the steps of a reunification." *Id.* In determining whether efforts were active, a court considers "whether a parent is likely to benefit from a service" in light of the nature of the parent's problems. *Dept. of*

Human Services v. M. K., 257 Or 15 App 409, 416, 306 P3d 763 (2013). The court determined that in light of the unique circumstances of this cases, including whether mother was able to benefit from services and her particular problems, that the five month wait for a psych was not "inherently unreasonable" where the record supported an inference that an assessment alone would not have been enough to enable the child's return.

▶ ***Dept. of Human Services v. J.M.*, 266 Or App 453 (2014)**

Facts:

L, an Indian child subject to the Indian Child Welfare Act (ICWA), was born in August, 2012 and placed in relative foster care with his adopted sibling shortly after birth. The juvenile court established jurisdiction over L in December, 2012 based on parents' admissions to allegations that L's conditions and circumstances endangered his welfare as follows: (1) the parents lacked the parenting knowledge to ensure his safety; (2) the parents had mental health problems that interfered with their ability to safely parent him; (3) mother failed to recognize how father's mental health problems presented a safety risk to L; and (4) father's inability to control his anger presented a safety threat to L. At a permanency hearing held in January of 2014, the juvenile court admitted the following exhibits over the parents' objection: (1) psychological evaluations of mother and father; (2) a parenting mentor's report; and (3) a DHS court report that contained out-of-court statements by the psychologist and parenting mentor. After finding that DHS had made active efforts to reunify the family and parents had made insufficient progress for L to be safely returned home, the juvenile court changed the permanency plan from reunification to adoption.

Parents appealed the permanency judgment arguing: (1) the juvenile court violated their due process rights by admitting into evidence out-of-court statements contained within the reports without providing parents the opportunity to cross-examine the authors of those reports; (2) the juvenile court erred in determining DHS made active efforts to reunify the family, and that despite those efforts, parents had not made sufficient progress for L to be safely returned home, and (3) the change in permanency plan from reunification to adoption was a "foster care placement" under ICWA, requiring the juvenile court to find mother's custody was "likely to result in serious emotional or physical damage" based on expert testimony.

Held:

Affirmed. The Court of Appeals reasoned as follows:

(1) The exhibits at issue were admissible under ORS 419B.325(2) and *Dept. of Human Services v. B.J.W.*, 235 Or App 307, 230 P3d 965, *rev den*, 349 Or 56 (2010) without regarding to the competency of the evidence. The court rejected mother's argument that ORS 419B.325(2) does not apply to cases governed by ICWA. The court rejected the parents' due process claim reasoning that other procedural safeguards were in place, including the ability to subpoena the authors of the reports, and protections through the legal process for termination of parental rights before the parents' legal ties to the child are severed. Citing these protections, along with the state's and child's interest in achieving permanency for the child as expeditiously as possible, the

court found a low risk that admitting the reports "...will lead to an erroneous deprivation of [the parents'] liberty interest."

(2) The active efforts standard requires DHS to assist the parent through the steps of reunification and provide appropriate services based on the nature of the parent's problems. The court reviewed the extensive services offered in this case: anger management, parenting classes, mental health treatment, supervised visitation, regular contact with the caseworker and parent coaching, and found the trial court's determination that DHS made active efforts was supported by evidence in the record. Regarding the parents' progress, the court found that despite some progress in therapy, evidence in the record supported the juvenile court's determination that neither parent had demonstrated a change in behavior that would constitute sufficient progress to allow L to safely return home.

(3) The change in permanency plan from reunification to adoption did not constitute a "foster care placement" pursuant to ICWA that would require the juvenile court to find mother's custody was likely to result in serious emotional or physical damage. The court distinguished this case from *Dept. of Human Services v. J.G.*, 260 Or App 500, 317 P3d 936 (2014) in which the court held the establishment of a guardianship is a "foster care placement" under ICWA.

Inadequate Assistance of Counsel

- ***Dept of Human Services v. T.L.,*** 269 Or App 454 (2015), ***rev allowed, (S063204, 06/04/15)***

Facts:

The juvenile court took jurisdiction over mother and father's three children in March, 2013. The court held a permanency hearing in August, 2013 to determine whether the permanency plans for the children should be changed from reunification to a different plan. Initially, attorneys for DHS, the children and mother were present. After trying to contact father's attorney and delaying the hearing for 12 minutes, the juvenile court conducted the hearing and decided to change the permanency plans to APPLA and guardianship. Near the end of the hearing, both parents arrived. The judge explained his decision. Unsworn, father told the court he thought he was doing what DHS asked him to. Father did not say anything about the absence of his attorney, nor indicate he was opposed to the change in permanency plans for the children.

The court subsequently entered the permanency judgments, changing the permanency plans from reunification to APPLA and guardianship. Father appealed, arguing his counsel's failure to appear at the permanency hearing constituted inadequate assistance of counsel under *State ex rel Juv. Dept. v. Geist*, 310 Or 176 (1990).

Held:

Affirmed.

The *Geist* opinion provided that parents could challenge the adequacy of court appointed trial counsel in termination cases on direct appeal, notwithstanding the lack of preservation at the trial

court level. Since *Geist* was decided in 1990, the legislature enacted ORS 419B.923, which provides the procedures for modifying or setting aside an order or judgment at the trial court level. Since there is now a trial level mechanism to assert this challenge expressly provided by statute, the court held that to preserve a claim of inadequate assistance of appointed trial counsel, a parent in a dependency proceeding must first seek to resolve that issue in the juvenile court by moving to modify or set aside the judgment or order to which the claim relates. In this case, father failed to preserve his claim, and the Court of Appeals affirmed the permanency judgments at issue.

Comments:

Although the court ruled that inadequate assistance of counsel claims must be raised at the trial court first, footnote 14 states that the "fundamental fairness" legal standard established by *Geist* for evaluation of the claim still applies.

The dissent by Judge Egan notes several practical concerns presented by the majority's interpretation, including the question of who will bring the claim on behalf of the parent at the trial level.

Permanency Hearings

Findings to change or continue permanency plan

► ***Dept. of Human Services v. R.S.*, 270 Or App 522 (2015)**

Facts:

K was removed from mother's care in February, 2012. The juvenile court established jurisdiction over the child based on mother's: (1) failure to provide adequate supervision; (2) history of choosing unsafe partners; and (3) lack of parenting skills necessary to understand K's behavioral and mental health needs. Almost two and a half years later, when the child was 13, the court held a permanency hearing and changed the permanency plan to APPLA. The child's attorney argued K needed permanency, while mother responded she had been making progress, and needed more time. The evidence showed that mother had made progress in participating in various services, however, there were ongoing emotional and psychological obstacles between mother and K, and that poor communication and a lack of emotional support was a trigger for K's self-harming behaviors and outbursts.

In making the determination regarding the permanency plan, in the judgment form, the juvenile court checked the boxes indicating DHS made reasonable efforts, and mother made sufficient progress toward meeting the expectations set forth in the service agreement, letter of expectation and/or case plan, but also checked the box that the child could not safely be returned to mother's care. In addition, the court in its oral findings noted that changing the plan was in the best interest of K. Mother appealed, and argued the juvenile court's findings were inconsistent, the court impermissibly based its determination on the best interest of the child, and there was

insufficient evidence to support the court's determination that K could not be returned within a reasonable time.

Held:

Affirmed.

In order to change a child's permanency plan from reunification, the court must find DHS made reasonable efforts to make it possible for the child to safely return home and the parent has not made sufficient progress for that to occur. The court must make those determinations with the ward's health and safety as the paramount concerns.

The required determination at issue in the case was "whether the parent has made sufficient progress to make it possible for the ward to safely return home." ORS 419B.476(2)(a). It is possible for a parent to make progress in meeting DHS goals and still not make sufficient progress for the child to safely return home, making the parent's progress legally insufficient under the statute. The court found the juvenile court's oral and written findings sufficient and consistent under the statutory scheme. In addition, the juvenile court's consideration of the child's best interest is consistent with considerations of the child's health and safety, and is required in APPLA cases in making the determination under ORS 419B.470(5)(f) of why it would not be in the best interests of the ward to be returned home, placed for adoption, placed with a legal guardian or placed with a fit and willing relative. Finally, the court rejected mother's argument that the juvenile court erred in determining that K could not safely return to her care within a reasonable time.

► ***Dept. of Human Services v. M.H.*, 266 Or App 361 (2014)**

Facts:

The juvenile court took jurisdiction over A several months after her birth in September, 2010. In July 2011, the juvenile court entered a permanency judgment changing A's permanency plan from reunification to adoption. DHS filed petitions to terminate mother's and father's parental rights in August 2011. Approximately one year later, in August 2012, the court held the annual permanency hearing required by ORS 419B.470(6) and entered a permanency judgment continuing the permanency plan of adoption. While an appeal of that judgment was pending, the juvenile court entered a judgment terminating both parents' parental rights. Five months later, the Court of Appeals reversed the permanency judgment issued in August, 2012, due to lack of the "compelling reasons" findings required by ORS 419B.476(5)(d) and ORS 419B.498(2)(b). Both parents moved the juvenile court to set aside the TPR judgments under ORS 419B.923, which allows the court to modify or set aside any order or judgment made by it. The juvenile court granted the motions on the basis that the court can't proceed with a termination case based on an invalid permanency judgment. DHS and the child appealed the juvenile court's order vacating the TPR judgments.

Held:

Affirmed.

The court rejected the argument that termination could proceed based on the first permanency judgment changing the plan to adoption. The court explained the requirement in ORS 419B.476(5) that the juvenile court make the determination in ORS 419B.498(2) applies regardless of whether the court changes *or maintains* a permanency plan after a permanency hearing. Under ORS 419B.498(2), the court must determine whether it is in the child's best interest not to file a petition for termination because the child can be returned home within a *reasonable time* ("reasonable time" is defined in ORS 419A.004(20) as a period of time that is reasonable given a child's emotional and developmental needs and ability to form and maintain lasting attachments). The court read this requirement together with the responsibility to hold annual permanency hearings in ORS 419B.470, to require juvenile courts to make these determinations after *each* permanency hearing to ensure the most recent permanency plan reflects existing circumstances at the time of the hearing. The court held that ORS 419B.498(3) precludes DHS from proceeding on a TPR petition unless the juvenile court has determined the permanency plan should be adoption at the most recent permanency hearing.

Reasonable Efforts

► ***Dept. of Human Services v. S.W.* 267 Or App 277 (2014).** (Garrett, P.J.)

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.

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. Under the totality of the circumstances, 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.

▶ ***Dept. of Human Services v. T.S.*, 267 Or App 301 (2014).** (Garrett, P.J.)

Facts:

Father appealed a permanency judgment in which the juvenile court changed the permanency plan for his daughter, T, from reunification to adoption. Father argued that DHS did not make reasonable efforts to reunify him with T, based on lack of efforts made during father's incarceration. DHS argued that its efforts over the life of the case were reasonable.

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. At the hearing, a referee changed the plan to adoption. On rehearing in front of a judge, the court affirmed the referee's order.

Held.

Reversed. The court rejected 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), explaining that reasonable efforts are to be evaluated under a "totality of the circumstances", which includes efforts over the life of the case. 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.

NOTE:

Judge Ortega wrote a dissenting opinion in *S.W.*, and a concurring opinion in *T.S.* Her reasoning is partially summarized in the following excerpt from *T.S.*:

"...I believe that the majority's analysis places too great an emphasis on the parent's behavior. Indeed, a comparison of the two cases illustrates the point. In both cases, the fathers participated in services inconsistently early in the case. In both cases, DHS made some efforts early on to connect the father to services and to arrange for contact with the child at issue. In both cases, DHS was primarily working with the child's mother, and those efforts ultimately failed. And in both cases, the fathers were incarcerated and DHS discontinued services and had little to no contact with the father for an extended period of time. Indeed, in *S.W.*, the period of time in which DHS ceased to provide services was 33 months, significantly longer than in this case. What appears to make the difference to the majority in this case is that father took more initiative to seek out more services while in prison and to write to his child than did the father in S.W. and that father persistently asked DHS to assist with... visits. The majority's focus on whether the parent has taken sufficient initiative in the absence of efforts by DHS is misplaced and, taken to its logical conclusion, would allow DHS to hedge its bets on providing reasonable efforts to many parents who lack the coping skills to advocate for themselves and to devise an appropriate reunification strategy without DHS's statutorily required reasonable efforts."

Review Hearings

Motion to Dismiss

► ***Dept. of Human Services v. L.C.*, 267 Or App 731 (2014)**

Facts:

Three children were placed in protective custody after an incident of domestic violence between mother and father in September, 2013. Three months earlier, Father pleaded guilty to one count of fourth-degree assault constituting domestic violence for causing physical injury to mother and was placed on probation. The court established jurisdiction in the juvenile case on the following bases: (1) history of domestic violence in the child's presence; (2) mother has not taken measures to protect herself and the child from father's violence; (3) child has suffered physical injury while in the mother's care; (4) the child's mother needs the services of the state to care for the child; (4) the child's parents are homeless and lack safe and stable shelter; (5) father has a history of using violence against mother, has exposed the child to violence and has not completed treatment; (6) father has mental health difficulties that affect his ability to parent; (7) father has been physically abusive to the child; and (8) father has a history of criminal behavior and incarceration. After the jurisdictional hearing, the children were returned to mother's care and lived with her in a domestic violence shelter.

At a review hearing seven months after the court took jurisdiction, mother moved to dismiss, arguing there was no current threat of serious loss or injury reasonably likely to be realized. She was living in an apartment with the children, and according to DHS, the apartment was clean, the

children well cared for, and mother demonstrated strong parenting skills. In the previous months, mother had attended domestic violence support group meetings and according to the counselor leading the group, had shown a thorough understanding of the domestic violence cycle and the negative impact it has on children. The counselor also reported she had the confidence and knowledge to protect her children from domestic violence. She participated in a psychological evaluation, and the psychologist reported her child abuse potential was low and she was not showing any symptoms of a mental health or substance abuse disorder. Mother participated in mental health counseling until she was discharged by her counselor.

Meanwhile, father participated in various assessments and services. Although he was attentive and actively participating, he seemed to minimize his abusive behavior and its effects. He also scored high on the violence scale and was found at high risk of committing further violent acts. He still had a significant amount of treatment to complete at the time of the review hearing. Although mother and father wanted to have contact, they were abiding by the no contact rules of father's probation.

At the review hearing, mother told the court she would work with father's probation officer to arrange for supervised visits if and when those were allowed. DHS argued that it would be some time before father would finish treatment, and that DHS would need to monitor father's visits to see how things go before he reunites with his family. The juvenile court denied mother's motion, and mother appealed.

Held:

Reversed.

The court stated the general rule that juvenile court jurisdiction cannot continue if the jurisdictional facts on which it is based have ceased to exist. When a parent moves to dismiss, DHS bears the burden of proving that continued jurisdiction is warranted. In order to continue jurisdiction based on a parent's past conduct, it must be reasonably likely that 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. In this case, DHS was concerned about the possibility that father would engage in domestic violence and mother would fail to protect the children, however, no evidence was presented that mother's past endangering conduct would make it likely she will engage in the conduct again. The record did not contain sufficient evidence the factual bases for jurisdiction persisted to the degree that they posed a current threat of serious loss or injury that was reasonably likely to be realized.

Termination of Parental Rights

- ***Dept. of Human Services v. M. P.-P.,*** **272 Or App 502 (2015)**

Facts:

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.

- ***Dept. of Human Services v. K.M.J.*, 272 Or App 506 (2015)**

Facts:

Mother received notice on October 18, 2013 that her termination hearing was scheduled for March 6 and 7, 2014. Before her termination hearing, mother moved to Washington. Her attorney did not know she had moved and was not able to contact her for several months. On February 24, 2014, mother sent letters to the court, her social worker and her attorney informing them that she lived in Washington and provided them with her address. The letters requested that the hearing be moved to Washington because she lacked a car and phone. The letters acknowledged the correct time and location of the hearing. Mother's attorney responded with a letter explaining the hearing could not be moved and requesting that she contact him immediately. Mother did not respond. Before the TPR hearing commenced, mother's attorney moved to withdraw. The court denied the motion, proceeded with the TPR hearing without mother present (her attorney remained), and entered a judgment terminating mother's rights. At a subsequent hearing on mother's motion to set aside the judgment, mother appeared by phone and testified she was aware of the scheduled dates for the TPR hearing but was unable to attend. The juvenile court denied mother's motion.

Held:

Affirmed.

On appeal the court considered: (1) whether the parent has established as a matter of law that the nonappearance resulted from excusable neglect; and (2) even when a parent makes a predicate

showing of excusable neglect, the court has discretion to determine whether "in the totality of the circumstances to allow the motion." Under ORS 419B.923(1)(b), excusable neglect includes "a parent's reasonable, good faith mistake as to the time or place of a dependency proceeding." *State ex rel Dept. of Human Services v. G.R.*, 224 Or App 133 (2008).

In this case, the court found mother did not show excusable neglect because: (1) she cut off contact with her attorney, subsequently communicated with DHS, and did not respond to the evidence that she could have obtained a bus pass or a gas voucher; (2) mother did not request the hearing be rescheduled, and (3) had she communicated with her attorney, she would have learned that she could appear by phone.

- ***Dept. of Human Services v. A.S.-M*, 270 Or App 728 (2015)**

Facts:

Mother and father had multiple children in foster care from 2006 to 2008, and then six children who entered care in April, 2011. DHS filed petitions to terminate parental rights to the children in October 2012. Before the termination trial, mother's attorney sent a letter to Dr. Kolbell, a psychologist, requesting an opinion as to whether mother should have a GAL appointed. DHS subsequently filed a motion to appoint a GAL for mother pursuant to ORS 419B.231(4). Over mother's objection, the juvenile court appointed a GAL after considering the following evidence: (1) a neuropsychological evaluation by Dr. Kolbell, (2) Dr. Kolbell's reply letter to mother's attorney providing an opinion as to mother's capacity based on his review of the six month old neuropsychological evaluation, and (3) Dr. Kolbell's testimony.

After trial, the court entered judgments terminating parents rights to the children, finding the parents were unfit and had either refused, been kicked out of, or declined opportunities for treatment, father continued to use drugs, mother continued to be oppositional, and there was continuing emotional and physical domestic violence between the parents creating a combat zone for the children. Mother and father appealed.

Held:

Affirmed as to father; reversed as to mother.

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.

The court found the appointment of the GAL rendered the proceeding fundamentally unfair because it changed the manner in which mother was entitled to direct the course of the proceeding, and the very appointment of the GAL contributed to the evidence against mother in the proceeding.

As to father, the court found the record contained sufficient evidence that father was unfit at the time of his termination trial and his conduct and conditions were detrimental to his children. Professionals involved with the children testified that removal from the parents was beneficial for the children and permanency was urgently needed due to the stress and trauma they had experienced. Integration into the home within a reasonable time was not possible due to father's failure to complete treatment, lack of stable income and access to basic resources, and his own belief that it would not be a good idea to bring all of the children home at once.

- ***Dept. of Human Services v. J.A.M*, 270 Or App 464 (2015)**

Facts:

The juvenile court terminated father's rights to H, a five year old at the time of trial, finding father was unfit under ORS 419B.504. Father appealed and argued: (1) DHS failed to prove his addiction to heroin continued because he wasn't using at the time of trial, and his use of other drugs did not constitute substance abuse; (2) DHS failed to prove his drug abuse was seriously detrimental to H; and (3) at the time of trial, he was fit and able to safely parent H within a reasonable time.

At the time DHS became involved in the case, H had just turned four, and lived with father's parents having moved there soon after H's mother killed herself on H's second birthday. Since mother's death, father had been overcome with grief, and had been using illicit drugs. When the child was removed, there were syringes within the child's reach, and heroin, trash and dirty laundry throughout the room father shared with H. Father was using heroin and Oxycodone several times a day.

At the time of trial, father had not completed substance abuse treatment or counseling as recommended. During the six months before and during the termination trial, he was given 10 opiate prescriptions from 6 different doctors and did not disclose to the prescribing doctors he was being treated with methadone, or of the other opiate prescriptions. According to expert testimony at trial, taking methadone and opiates together greatly increases the risk of overdose or death. He also had taken benzodiazepines without a current prescription, which his treatment counselor testified was concerning and in violation of his treatment plan. Finally, grandmother testified father was still living with her and would not be able to live in her home with H. A psychologist testified the H's primary attachment was to her aunt and uncle, and that moving H back to her father would put her at risk for attachment disorder and other difficulties.

Held:

Affirmed.

The court rejected father's argument that his use of prescribed opiates for his medical conditions the months before trial were not examples of substance abuse. The court found his use, combined with his nondisclosures, put him at risk of violating his probation or endangering his treatment plan, both of which could have been seriously detrimental to his ability care for H. Father continued to deny his addiction, and minimized the conditions that led to H's removal from his care, which expert testimony established increased father's risk for relapse.

The court distinguished this case from other cases in which the court found a parent's use of drugs did not endanger the child because of an insufficient nexus between the drug use and the risk of harm to the child. These cases involved past drug use or no drug use in the presence of the child, and insufficient evidence that the drug use created a harmful environment for the child. In this case, it was father's drug use itself that created the circumstances that were dangerous to H. The court found father unfit because he had not successfully treated his substance abuse problem.

Finally, the court found termination was in H's best interest based on the attachment she had formed with her aunt and uncle, and the evidence that removing her would place her attachment to them at risk, and potentially aggravate her existing mental health problems.

- ***Dept. of Human Services v. M.U.L.*, 270 Or App 343 (2015)**

Facts:

Mother appealed a judgment terminating her parental rights to A and argued: (1) the juvenile court committed plain error by continuing the appointment of a guardian ad litem (GAL) after mother had been found competent in separate criminal proceedings; (2) she received inadequate assistance of counsel when her attorney failed to object to the continuation of the GAL appointment; and (3) the termination proceedings were fundamentally unfair.

Mother had a long history of mental illness. On October 9, 2013, the circuit court found mother unfit to proceed in her criminal case and committed her to the Oregon State Hospital (OSH). In light of this, DHS requested the appointment of a GAL in the termination case, which the court appointed over mother's objection. By December 2013, mother had stabilized and a hearing was held on December 20 on whether to continue the GAL appointment. DHS requested the appointment continue, mother's attorney did not object, and the juvenile court ordered continuation of the GAL.

The termination trial occurred in February, 2014. At trial, mother's treating psychiatrist and an OSH nurse testified that, three days earlier, they had determined mother was able to aid and assist and had discharged her from OSH. During the trial, a DHS caseworker acknowledged that mother was stable and mother appeared to understand the questions she was asked. Neither

mother nor her attorney objected to the continued appointment of the GAL. The juvenile court terminated mother's parental rights to A.

Held:

Affirmed.

The court reviewed the provisions of ORS 419B.237(2) (removal of GAL), and determined the juvenile court does not have a *sua sponte* obligation to determine whether the GAL appointment should be terminated. Rather, the court is only required to consider removal of a GAL if a request is made to remove the GAL. Therefore, the juvenile court did not commit plain error. The court also rejected mother's constitutional challenge.

Regarding mother's argument that she was deprived of adequate assistance of counsel when her attorney failed to object to the continuation of the GAL, the court ruled ORS 419B.923 provides a trial-level mechanism to set aside judgments in termination cases, based on the recent holding in *Dept of Human Services v. T.L.*, 269 Or App 454 (2015). Since that issue was not raised below, the court did not consider it.

- ***Dept. of Human Services v. I.M.K.*, 270 Or App 1 (2015)**

Facts:

Please refer to the opinion for an recitation of the parents' extensive involvement with child welfare over a 10 year period. The juvenile court terminated parents' rights to I and K, based on the determination that parents were unfit under ORS 419B.504 because they were unable to provide minimally adequate parenting at the time of trial and would not be able to do so within a reasonable time for I and K due to conduct or conditions that were not likely to change.

Held:

Affirmed.

The juvenile court may terminate a parent's rights under ORS 419B.504 if the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home is improbable within a reasonable time due conduct or conditions not likely to change. The parent's fitness is measured at the time of trial, and the focus of the test is on the detrimental effect of the parent's conduct or condition on the child. Also, termination of parental rights must be in the child's best interest.

With respect to father, although he had been clean and sober for nearly a year prior to trial, he concluded his treatment early, despite his counselor's recommendation that he continue to attend group sessions. His counselor said father had a high risk of relapse. The court found this behavior consistent with evidence that father has an antisocial personality disorder that compromises his ability to parent and gives father an unrealistic belief in his own ability to overcome problems that may arise. In addition, father inconsistently attended batterer's

intervention and parenting classes, and pleaded guilty to a charge of Assault IV shortly before trial. The court found this lack of follow through over a period of four years, combined with testimony that father is motivated to engage in services because of external requirements and not because he believes that he needs to change, made it uncertain that father would effect a lasting change.

With respect to mother, the court distinguished this case with prior holdings that previous substance abuse does not prove present unfitness. Although mother had been clean and sober for four months and had not used methamphetamine for 10 months, the court found over a period of years, mother has had periods of drug abuse, sobriety and relapse. That pattern, combined with evidence that mother had a personality disorder making it likely the pattern will repeat itself, and mother's use of marijuana four months prior to the termination trial, was sufficient for the court to find mother's conduct or condition was seriously detrimental to the children.

Finally, the court found it was in the best interests of the children to terminate parental rights. The children, both age four at the time of the trial, had experienced multiple placements and were exhibiting developmental delays and attachment issues.

▶ ***Dept. of Human Services v. E.M.,*** **268 Or App 332 (2014)**

Facts:

The juvenile court asserted jurisdiction over father's four children in August 2011. A year and a half later, DHS filed a petition to terminate parental rights. On November 15, 2013, while father was incarcerated in King County, Washington, DHS served father with a petition and summons which directed father to personally appear for a trial from December 2 to December 6, 2013 at 9:00 a.m. each morning. The summons required father's personal appearance and notified him of the consequences of failing to appear. Father's attorney arranged to have father appear by video from jail. However, the Wednesday prior to the trial at 4:50 p.m., the day before Thanksgiving, father was released from jail and directed to appear on additional charges in King County Washington Superior Court at 8:30 a.m. on Monday, December 2, one half hour before he was due to appear in Oregon at the TPR trial.

Father did not appear personally at the termination trial, but his attorney was initially present. DHS argued the court should allow presentation of *a prima facie* case in father's absence, because he made no attempt to contact the court, DHS or his attorney to make alternative arrangements. Father's counsel argued father cannot be present at two courts at the same time, and presented no information about whether father attempted to contact him after his release. The court excused father's counsel and allowed DHS to proceed, because father had made no attempt to communicate.

Held:

Reversed and remanded.

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.

- ***Dept. of Human Services v. R.K.,*** 271 Or App 83 (2015)

Facts:

This case involved the termination of parental rights to two children, X and R, and their three parents: mother, the father of X (XZF) and the father of R (RK). X was born to mother and XZF in 2007, and was age six at the time of trial. R was born in 2012 to mother and RK, and was age two at the time of trial.

The juvenile court terminated mother's parental rights to both boys pursuant to ORS 419B.504, determining that there was clear and convincing evidence that mother was unfit due to her criminal conduct, drug and alcohol abuse, exposure of the children to domestic violence, lack of effort or failure to maintain a suitable or stable living situation for the children, emotional or mental illness, and lack of effort to adjust circumstances or conditions to make return of the children possible within a reasonable time.

Similarly, the juvenile court terminated RK's rights based on unfitness. RK had repeatedly violated his probation by consuming alcohol, having contact with mother, failing to check in with his PO, and received jail sanctions. He also was incarcerated for a period of five months for operating a stolen vehicle, and was released two days prior to trial. The juvenile court found his three weeks of participation in services was not sufficient, and expressed concern based on past conduct that father would continue to see mother. An expert also testified R was not bonded to his father and it would be in R's best interest to be adopted.

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.

Held:

Reviewing the case *de novo*, the court stated the test for terminating rights on the basis of 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. ORS 419B.500; ORS 419B.504.

Mother: affirmed.

Mother argued on appeal that with DHS assistance in securing drug and alcohol treatment, she would be able to resolve her drug addiction and mental health issues within six months - a reasonable time given the children were doing well in their placement. The court found mother's assessment of her ability to parent the children at the conclusion of the six month period was not supported by the evidence which showed she had a long history of drug abuse, domestic violence and past resistance to help, and it was unlikely that her conduct and conditions would change in the foreseeable future.

RK: affirmed.

At the time of trial, father had just been released from jail and started treatment, and had not yet addressed the other issues in the jurisdictional judgment - domestic violence and criminal conduct. The court found RK remained unfit, and these circumstances made it improbable that R could be returned within a reasonable time.

XZF: reversed.

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).