

APPELLATE CASE LAW UPDATE SUPPLEMENT

August to November 2011

1. Department of Human Services v. N. S., --- Or App ---, --- P3d --- (November 2, 2011) (affirming permanency judgment changing plan from reunification to guardianship)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment that changed the permanency plan for child from reunification to guardianship after the juvenile court determined that despite reasonable efforts by the Department of Human Services (DHS), mother failed to make sufficient progress to allow child to return safely home because she had not gained insight or developed a protective capacity to address the risks posed by return of child to her care. Mother challenges both of the juvenile court's determinations, contending that DHS failed to make reasonable efforts and that she had made sufficient progress to allow child to return to her home. Held: DHS made reasonable efforts by offering multiple services to mother and child. Further, evidence in the record supports the juvenile court's findings as to continued risk to child, mother's inability to appreciate risks to child, mother's insufficient progress in developing parenting skills, and harm to child if removed from the care of her guardians. As a matter of law, those facts provide a basis for the court's determination that mother failed to make sufficient progress to allow child to return home. Affirmed.

2. Department of Human Services v. N. M. S., --- Or App ---, --- P3d --- (October 26, 2011) (reversing permanency judgments changing plan from reunification to adoption)

THE COURT OF APPEALS' SUMMARY:

In this dependency case, mother appeals a judgment approving a change in the permanency plans for her three children, F, R, and T, from reunification with mother to adoption. F's father also appeals the change in the permanency plan for F. Parents argue that, under the reasoning of *Dept. of Human Services v. G. E.*, 243 Or App 471, 260 P3d 516, *adh'd to as modified on recons*, 246 Or App 136, ___ P3d ___ (2011), the juvenile court erred in relying on facts extrinsic to the jurisdictional judgment in determining whether the

Department of Human Services had made "reasonable efforts" toward reunification of children with mother, and whether mother had made "sufficient progress" toward reunification, as required under ORS 419B.476(2)(a). The sole fact upon which the jurisdictional judgment relied was mother's admission that one of the children "presented with unexplained physical injuries deemed by medical professionals to have been non-accidental." Held: The court erred in determining that its jurisdiction encompassed any unsafe or detrimental conduct that affected the best interests of the children and in basing its permanency decision on concerns outside the scope of the jurisdictional judgment.

EXCERPT FROM OPINION:

* * * In *G. E.*, as noted, we concluded that "[s]ome of the statutory 'factual' grounds for the assertion of jurisdiction," in particular, ORS 419B.100(1)(c) (condition or circumstances are such as to endanger the welfare of the child), are "so elastic or formless" that they are insufficient to provide a parent with constitutionally adequate notice as to what he or she needs to do to eliminate the need for jurisdiction. *G. E.*, 243 Or App at 480. We do not consider the circumstances of this case to be analogous. First, among the "statutory 'factual' grounds" for jurisdiction, that the child was subjected to "unexplained physical injury" is unique in that it is, by its very nature, incapable of further precision. An unexplained injury is just that--*unexplained*. Notwithstanding that imprecision, however, the legislature has seen fit to establish it as an independent and sufficient basis for jurisdiction. In this case, moreover, we have additional content: mother's admission that the unexplained injury was deemed to be nonaccidental.

Based on those considerations, we conclude that, in this context--that is, where the jurisdictional judgment is based on an unexplained, nonaccidental injury--the basis for jurisdiction includes those "conditions or characteristics" potentially demonstrated by the specific facts alleged. In other words, it properly encompasses those conditions or characteristics that could have caused the nonaccidental injury. See G. E., 243 Or App at 479. That universe is admittedly broad--it may, for example, point to physical abuse, substance abuse, mental health issues, domestic violence, failure to protect, or other conditions. The universe, however, will narrow as DHS identifies possible explanations for the injury and develops a case plan based on that knowledge. See K. D., 228 Or App at 516 (a parent's progress is assessed with reference to the "barrier to reunification * * * identified in the dependency petition and the applicable case plan").

However, if the parental condition or characteristic is *not* one that fairly can be implied from the facts found in the jurisdictional judgment, then it is outside the scope of the court's jurisdiction, and that deficit cannot be remedied by claims of "actual notice" through case plans or, as the state suggests in this case, letters of expectation. That is so because, as we held in *G. E.*, a petition or jurisdictional judgment must provide a parent with reasonable notice of the deficiencies that he or she must address in order to prevent continued jurisdiction; if it does not, it affects a "substantial right" of the parent--*viz.*, the right to constitutionally adequate notice--and the petition or judgment must be amended before the court can rely on such "extrinsic facts" in its permanency decision.

The juvenile court here determined that its jurisdiction encompassed any "unsafe and detrimental conduct" that affected the best interests of the children and based its permanency decision on concerns about mother's hygiene, parenting skills, and overall poor judgment. The court also relied on mother's mental health problems, which, the court found, affected her ability

to carry out her "parental responsibilities." Although the latter characteristics and conditions-- poor judgment and mental health problems—*may* conceivably be implicated in an allegation of unexplained, nonaccidental injury, concerns about hygiene and general parenting skills are not. Thus, although mother was on notice from the jurisdictional judgment that she needed to address any condition that *could have caused the risk of nonaccidental injury* to her children, such conditions would not, in any event, include general parenting skills or poor housekeeping.

Because the court's analysis that DHS had made reasonable efforts to reunify the family and that mother's progress toward that goal was insufficient was based, at least in part, on an erroneous understanding of the scope of the jurisdictional judgment, we reverse and remand.

(Footnote omitted; emphasis in bold italics added).

3. Department of Human Services v. L. B., --- Or App ---, --- P3d --- (October 19, 2011) (reversing permanency judgments changing plan from reunification to adoption)

THE COURT OF APPEALS' SUMMARY:

Mother appeals judgments changing the permanency plan for her children, who are in the state's custody, from reunification with her to adoption. She argues that the juvenile court erred in entering the judgments because they do not contain the finding required as to whether "[t]here is a compelling reason * * * for determining that filing such a petition [to terminate parental rights] would not be in the best interests of the child or ward." ORS 419B.498(2)(a) (cross-referenced in ORS 419B.476(5)(d)). Mother concedes that she did not raise that issue below, and the Department of Human Services contends that, as a result, we should affirm the judgments. Held: Even if ordinary preservation principles were to apply under the circumstances, the Court of Appeals would nonetheless exercise its discretion to correct the plainly erroneous judgments. The confusing form of the judgments made it unsurprising that neither the parties nor the court discovered the error, and the legislature has provided a clear mandate that the court expressly include the missing finding in its written order.

EXCERPTS FROM OPINION:

Mother appeals judgments changing the permanency plan for her children, who are in the state's custody, from reunification with her to adoption. She argues that the juvenile court erred in entering the judgments because they do not include the finding required by ORS 419B.476(5)(d)--namely, a finding as to whether "[t]here is a compelling reason * * * for determining that filing such a petition [to terminate parental rights] would not be in the best interests of the child or ward." ORS 419B.498(2)(b) (cross-referenced in ORS 419B.476(5)(d)). Mother concedes that she did not raise that issue below, and the Department of Human Services (DHS) contends that, as a result, we should affirm the judgments. We exercise our discretion to review the claimed error and reverse the judgments.

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* * * Apparently, after the permanency hearing, DHS provided mother with "check the box" forms of judgment. The form used for both judgments, frankly, is confusing--at least with

respect to the findings required by ORS 419B.476(5) and ORS 419B.498(2)(b). The form has a section entitled "Compelling Reasons" that includes an option to check a box that "DHS has demonstrated compelling reasons why filing a Petition to Terminate Parental Rights would not be in the child(ren)'s best interests at this time," as well as boxes that, if checked, reflect particular reasons (such as that the parents are "successfully working to complete a plan and improve protective capacities"). The "Compelling Reasons" section later includes a box for a finding that "DHS has failed to demonstrate compelling reasons why filing a Petition to Terminate Parental Rights would not be in the child(ren)'s best interest at this time." [Footnote 1: Adding to the confusion, the form phrases the relevant findings in terms of what DHS "has demonstrated" or "failed to demonstrate," whereas ORS 419B.498(2)(b) is simply phrased in terms of whether the circumstance exists--*i.e.*, whether "there is a compelling reason * * *."] However, the structure of the form does not make clear that the later finding--"DHS has failed to demonstrate compelling reasons"-- is an *alternative* to the earlier box stating that "DHS has demonstrated compelling reasons * * *." Indeed, the alternative findings are separated by yet another box stating, "DHS has not provided the child(ren)'s parents with the services the agency deemed necessary for the safe return of the child(ren), within the time frame the agency established in the case plan, if reasonable efforts to make it possible for the child(ren) to safely return home are required." [Footnote 2: Whether the agency has or has not provided services is a relevant "circumstance" under ORS 419B.498(2)(c), but it is not, technically speaking, one of the "compelling reasons" for not moving toward termination listed in paragraph (2)(b) of the statute. In that sense, the "Compelling Reasons" title within the form is somewhat inaccurate; that section of the form more accurately pertains to the "circumstances in ORS 419B.498(2)," and "compelling reasons" are among those circumstances.]

None of the boxes within the "Compelling Reasons" section of the judgments were checked in this case, and, given the forms, it is unsurprising that neither the parties nor the court discovered that error. Based on the judgments, we can only infer, from the court's ultimate conclusion to change the plan as to each child, that it actually made the specific, predicate finding for a change of plan set out in ORS 419B.476(5)(d)--namely, that there are *not* compelling reasons for determining that filing a petition to terminate parental rights would not be in the best interests of the child or ward.

The statute, however, demands more than inferences from a permanency judgment. As we explained in *M. A.*, ORS 419B.476(5) expresses the legislature's intent that "the trial court carefully evaluate DHS's decision to change a permanency plan for a child in order to ensure that the decision is one that is most likely to lead to a positive outcome for the child." 227 Or App at 183. Indeed, the matter is of such import that the legislature has required not only that the findings be made, but that they be expressly included in the court's written order. In other words, the legislature has manifested its intent that a juvenile court expressly connect all of the dots along the way to a change in the permanency plan. The court did not do so in this case and, given the clear legislative mandate and interests at stake, as well as the confusing form of judgment, we consider this an appropriate case in which to exercise our discretion to correct the errors in the permanency judgments.