

APPELLATE UPDATE

THROUGH THE EYES OF A CHILD

AUGUST 5, 2018

Hon. Darleen Ortega, Oregon Court of Appeals

Hon. Megan Jacquot, Coos County Circuit Court

OVERVIEW

Procedure

Jurisdiction

Permanency Hearings

Implementation of the Legal Permanency Plan

PROCEDURE

Request for Continuance
Parent's Failure to Appear

Request for Continuance

- Juvenile court abused its discretion in denying mother's request for a continuance, when there was nothing in the record to suggest that the court considered:
 - the reasons set forth in mother's motion and supporting declaration,
 - weighed those against competing considerations, and
 - concluded those outweighed mother's interest in having the court consider an updated assessment of her mental health status and related needs.
- *Dept. of Human Services v. N.J.V./D.L.O.*, [290 Or App 646 \(2018\)](#) (p. 22)



Parent's Failure to Appear at TPR Settlement Conference

- The juvenile court abused its discretion when it proceeded with a *prima facie* TPR trial over mother's objection. The juvenile court failed to consider the interests at stake (or failed to make an adequate record of its consideration):
 - A parent's right to her children;
 - The determination of what is in the child's best interests;
 - Mother's right to hear and confront the evidence against her;
 - Mother's right to be heard;
 - Mother's right to have the assistance of counsel.
- ***Dept. of Human Services v. K.D.S.***, [292 Or App 258 \(2018\)](#)
(p. 25)

JURISDICTION

Domestic Violence

Unaccompanied Minors

Subsequent Allegations

Jurisdiction

- Conditions and circumstances: 419B.100(1)(c)
 - DHS must present evidence sufficient to support a conclusion that the child's condition or circumstances expose the child to a current threat of serious loss or injury that is likely to be realized.
 - DHS must establish the type, degree and duration of the harm
 - When the risk is caused by a parent's behavior, DHs must establish a nexus between the parent's allegedly risk-causing conduct and the harm to the child.
 - The risk of harm must be "nonspeculative"; there must be a reasonable likelihood that the threat will be realized.



Domestic Violence

- Power and control/yelling in front of child. (Insufficient)
 - Insufficient when only evidence is that it hurts child's feelings; no expert testimony regarding impact on child; court not permitted to insert own knowledge about impact of domestic violence on child. ***Dept. of Human Services v. J.J.B.***, [291 Or App 226 \(2018\)](#) (p. 15)
 - In *J.H.*, there was evidence of some emotional harm to the child, but no evidence that the child was at risk of physical injury in mother's home, either directly or indirectly. ***Dept. of Human Services v. J.H.***, [292 Or App 733 \(2018\)](#) (p. 10)
- Mother pushed father and threw a glass at him in front of the children. (Sufficient)
 - Parents married, but not living together; no disso filed.
 - Father romantically interested in mother; mother's housing not stable; creates a possibility they may share space. ***Dept. of Human Services v. C.T.***, [288 Or App 593 \(2017\)](#), *rev den* (2018) (p. 16)

Failure to Protect and Mental Health

- Insufficient evidence to support juvenile court jurisdiction when (at the time of the jurisdictional hearing):
 - Mother never disbelieved her child's sex abuse disclosures;
 - Although her initial response to her child's report of sex abuse was inadequate, mother testified she would call police or DHS immediately if her child was in further danger of abuse;
 - Mother had stopped drinking;
 - Mother was engaged in therapy and was taking her medication;
 - Father, who had sexually abused the child, was incarcerated.

Dept. of Human Services v. T.L.H.S., [292 Or App 708 \(2018\)](#) (p. 11)

Failure to Protect

- Sufficient evidence
 - DHS made a founded disposition that grandfather had sexually abused S; parents allowed S to stay with grandfather after DHS made parents aware of the concerns
 - There was expert testimony that given grandfather's history of sexually abusing children, which was never treated or punished, he posed a risk to C.
 - S testified in chambers and denied, or could not recall, the abuse
 - *Dept. of Human Services v. C.T.*, [288 Or App 593 \(2017\)](#), *rev den* (2018)(p. 16)

Unaccompanied Minors

- Facts:

- 17 year old teen from Guatemala subjected to physical abuse by father; mother and government could not protect; child flees to U.S.
- Juvenile court found potential harm was speculative and depended on whether child would be deported; also found child could travel on his own

- Reversed:

- Physical abuse of a child endangers a child's welfare and furnishes a basis for dependency jurisdiction.
- The fact that parents do not have physical custody of a child at the time of a jurisdictional hearing does not defeat jurisdiction, nor does the child's physical distance from parents, or the child's age and ability to travel on his own.
 - ***State v. G.V.L.*, [291 Or App 53 \(2018\)](#) (p. 14)**

Subsequent Allegations



- When a new or amended petition is filed under ORS 419B.100(1)(c) after the juvenile court has taken jurisdiction, the court applies the following analysis:
 - Is there a current risk of harm from:
 - The current allegation standing alone, or
 - Does the new allegation contribute to or enhance the risk associated with the already established bases of jurisdiction.
- In *S.A.B.O.*, the court found insufficient evidence to support new allegation that mother's mental health condition interfered with her ability to parent.
 - *Dept. of Human Services v. S. A. B. O.*, [291 Or App 88 \(2018\)](#) (p. 12)

PERMANENCY HEARINGS

Reasonable Efforts

Sufficient Progress

Compelling Reasons

Reasonable Efforts



- To be reasonable, DHS efforts must focus on ameliorating the adjudicated bases for jurisdiction, and give parents a reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents.
 - The concept of reunifying a child with a parent is not limited to physical reunification.
 - “Reunification” means restoration of the parent’s right to make decisions about the child’s care, custody and control without state supervision, even if the child will not be returned to the parent’s physical custody.
 - *Dept. of Human Services v. L.L.S.*, [290 Or App 132 \(2018\)](#) (p. 18)

Sufficient Progress

NOTICE

- A juvenile court may not change a ward's permanency plan away from reunification based on conditions or circumstances that are not explicitly stated or fairly implied by the jurisdictional judgment.
 - In determining whether a parent was on notice that his/her progress would be assessed based on particular facts, the court looks to the:
 - Petition
 - Jurisdictional judgment, and
 - Documentation attached to the jurisdictional judgment.
- In *C.E.*, the court found the case plan attached to the jurisdictional judgment was sufficient to put father on notice. *Dept. of Human Services v. C.E.*, [288 Or App 649 \(2017\)](#) (p. 19)

Sufficient Progress

- Juvenile court's decision to change the permanency plan due to father's estrangement from his daughter was not a circumstance explicitly stated or fairly implied by the jurisdictional judgment.
 - *Dept. of Human Services v. T. L.*, [287 Or App 753 \(2017\)](#) (p. 21)
- *Ongoing court review of DHS visitation plan crucial to maintaining parent/child relationship.*
 - ORS 419B.449(3): Is the frequency of visits in child's best interest?
 - ORS 419B.337(3): Court may order DHS to change visit plan
 - OAR 413-070-0830(2)(b): DHS may not cancel visits solely due to the act or omission of a parent that is unrelated to the safety or well-being of the child.

Compelling Reasons

- Before changing a plan from reunification to adoption, the court must find that there is not another permanent plan better suited to meet the health and safety needs of the child, including the need to preserve the child's sibling attachments and relationships under ORS 419B.498(2)(b)(B).
 - The moving party bears burden of proving that there are no compelling reasons to forego the filing of a petition to terminate rights.
- *Dept. of Human Services v. J.M.T.M.*,
- [290 Or App 635 \(2018\)](#) (p. 17)



IMPLEMENTATION OF THE LEGAL PERMANENCY PLAN

Motion to Set Aside Guardianship

Motion to Vacate Guardianship and Terminate Wardship

Termination of Parental Rights: Best Interest
Determination

Motion to Set Aside Guardianship

- A court approved permanency plan of guardianship under ORS 419B.476 is a prerequisite to the establishment of a guardianship under ORS 419B.366.
- In *S.H.*, once the underlying permanency judgments were reversed, there was no validly approved plan of guardianship to support the orders and judgments establishing the guardianship.

In re S.H., [289 Or App 88 \(2017\)](#) (p. 7)



Motion to Vacate Guardianship and Terminate Wardship

- A guardianship under ORS 419B.366 continues only as long as the ward is subject to the court's jurisdiction under ORS 419B.328.
 - Motion to terminate wardship:
 - Do the original bases for jurisdiction continue to pose a current threat of serious loss or injury?
 - If so, is the risk likely to be realized?
 - Burden of proof:
 - When the permanency plan for a child is no longer reunification, a parent making a motion to dismiss based on lack of jurisdiction has the burden of proof if requested by the proponents of jurisdiction.
 - Findings in ORS 419B.368(3) not required (best interests; conditions that gave rise to guardianship ameliorated; and parent presently able and willing to care for ward). *Dept. of Human Services v. J.C.*, [289 Or App 19 \(2017\)](#), rev allowed (2018) (p. 8)

Termination of Parental Rights

- General test: (ORS 419B.504)
 - Parent has engaged in *conduct or is characterized by a condition that is seriously detrimental to the child*;
 - Integration of the child into the parent's care is improbable within a *reasonable time due to conduct or conditions not likely to change*;
 - Termination is in the *best interests* of the child.
- In *T.M.D.*, the appellate court reversed the juvenile court's determination that termination was not in the child's best interests, based on evidence of the child's pressing need for permanency, and mother's lack of meaningful progress.
 - *Dept. of Human Services v. T.M.D.*, [292 Or App 119 \(2018\)](#) (p. 26)

