JUDICIAL ENGAGEMENT AND LEADERSHIP INSTITUTE
JUVENILE COURT IMPROVEMENT PROGRAM
OREGON JUDICIAL DEPARTMENT

INCARCERATED PARENTS WORKGROUP

Report to the Judicial Engagement and Leadership Institute Executive Committee

Dated: 03.30.2018

The Incarcerated Parents Workgroup Charge:

The Incarcerated Parents Work Group will investigate the law, Department of Corrections' administrative rules and policies, and the technical opportunities and barriers to:

- incarcerated parents appearing in juvenile court in person, by video, or by phone;
- incarcerated parents having visits with their children at the institutions; and
- incarcerated parents' participation in services and programs likely to promote reunification upon release, including services provided by DOC, DHS, or others.

The workgroup will consider recommending to the Chief and State Court Administrator that OJD form a joint committee on Incarcerated Parents in Juvenile Cases with participation by OJD, DHS, and Department of Corrections.

The work group will report its findings and recommendations to the JELI Executive Committee on or before April 10, 2018.

Workgroup Membership:

Hon. Daniel R. Murphy (chair)
Hon. Paula Brownhill
Hon. Lisa Greif
Hon. Megan Jacquot
Hon. Linda Hughes
Hon. Ann M. Lininger
Hon. Amy Holmes Hehn
Hon. Heidi Stauch
Leola McKenzie
Megan Hassen

Summary:

The workgroup received its charge from the Executive Committee at its October 23, 2017 meeting in Sun River. The workgroup met several times by telephone conference and coordinated activities by email.

To carry out the workgroup's charge, the following have been completed:

1. Judge Lisa Greif prepared a summary of case law related to incarcerated parents. It is included Appendix I.

2. Judge Ann Lininger formulated and sent out a survey to juvenile judges on the problems that courts encounter concerning incarcerated parents in juvenile cases. The results of that survey are Appendix II.

3. Judge Megan Jacquot obtained Department of Corrections regulations pertaining to incarcerated parents and they are Appendix III.

4. Juvenile Law and Policy Counsel Megan Hassen prepared a memo on reasonable efforts required for incarcerated parents as well as the question of how long a parent could be incarcerated before it would be appropriate to implement a concurrent plan. It is Appendix IV. While these materials are very helpful, it was agreed that these determinations are fact driven and must be made by the court in each case.

The workgroup became aware of a subcommittee to the Governor's Reentry Council that is working on implementation of SB 241 (2017). The new law requires the Department of Corrections to align policies, procedures and funding to be consistent with a new bill of rights for children of incarcerated parents. Judge Courtland Geyer from Marion County is a judicial member of the Reentry Council, and has recommended that Megan Hassen and Judge Ann Lininger be appointed to the Children of Incarcerated Parents Implementation Team (SB 241 subcommittee). Megan Hassen and Judge Ann Lininger will act as liaisons between the JELI Incarcerated Parents Workgroup and the Children of Incarcerated Parents Implementation Team. The workgroup committed to providing training at the 2018 August JCIP Eyes of the Child Conference and/or the Model Court Summit.

Recommendations:

The workgroup recommends to the Executive Committee as follows:

1. That the Executive Committee forward this report and the recommendations to Chief Justice Thomas Balmer, State Court Administrator Nancy Cozine, and Leola McKenzie, director of Juvenile and Family Court Programs.

2. That the Governor's Reentry Council and related Children of Incarcerated Parents Implementation Team address the problems facing incarcerated parents, including communications and visitation with their children and participation in dependency hearings.

3. That, if the Reentry Council does not address the problems faced by incarcerated parents and their children, an inter-agency workgroup be formed through the cooperative actions of the Chief Justice and the Governor to identify solutions to

these problems. The proposed solutions should be communicated to the Chief Justice, Governor, and Legislature for further action.

4. That representatives of the Incarcerated Parents workgroup present at the JCIP Eyes of the Child Conference and/or the Model Court Summit in August 2018 on solutions to the problems faced by incarcerated parents in the child welfare system.

5. That the Incarcerated Parents Workgroup become a JELI standing committee and continue its efforts to solve these problems.

Respectfully submitted,

Daniel R. Murphy, Circuit Judge
Chair, JELI Incarcerated Parents Workgroup

Appendix

Contents

Appendix I

Incarcerated Parents: Review of Law

by Hon. Lisa Greif

DHS v. M.K., 257 Or App 409 (2013)

- Father was incarcerated for sexual abuse of a minor
- A psychosexual evaluation of the father was recommended to determine if he would be a threat to his own child's safety
- DHS would not pay for the evaluation while father was incarcerated because it would cost $5000
- Juvenile court changed the plan to adoption at the permanency hearing
- COA reversed the juvenile court and held that the court should have considered the totality of the circumstances related to the reasonableness of DHS's reunification efforts, including both the potential benefits of providing services and the burden of associated costs
- COA reiterated that DHS must provide parents with a reasonable opportunity to adjust their conduct and become minimally adequate parents
- In determining whether the efforts are reasonable under the particular circumstances, the court may consider whether the parent has attempted to make appropriate changes in his or her life and whether parents ignored or refused to participate in plans suggested by the state
- COA cited prior opinions noting that the mere fact of a parent's incarceration does not excuse DHS from making the reasonable efforts required by statute

DHS v. D.J., 259 Or App 638 (2013)

- Father was sentenced to prison due to his probation being revoked
- The court was unable to reach the father by telephone at the time of the permanency hearing and proceeded to conduct the hearing without him, over father's attorney's objection
- COA held that a party's right to participate in hearings includes the right to testify on the party's own behalf

DHS v. S.W., 267 Or App 277 (2014)

- Child was born with severe physical problems and also had emotional problems
- Father was incarcerated when DHS first became involved with the family and DHS helped him initially get into a treatment program
- Father was subsequently incarcerated in Washington from January 2011 through March 2012 and then was sentenced to an additional 45-month prison term in Oregon

- COA cited a prior case (for contrasting purposes) where it held that DHS failed to make reasonable efforts regarding its engagement with an incarcerated parent because the efforts were virtually nonexistent
- In this case, the COA held that, although DHS could have made greater efforts to provide services to the father while he was in prison, that the efforts over the life of the case, including when he was out of custody, were reasonable
- The COA referred to the health and safety of the child as the paramount concerns the court should consider as well as father's own conduct and responses to the efforts that DHS did make
- The COA cited the six hour round trip for the child to visit the father in prison, the stress of the prison environment (especially in light of the child's particular physical, behavioral, and emotional problems), the lack of the relationship between the child and the father, and a psychologist's evaluation which questioned whether the father was even a viable visitation resource when it found that DHS's decision not to send the child to visit the father in prison did not evidence a failure to make reasonable efforts
- The COA held that the length and circumstances of a parent's incarceration should be weighed against the child's stage of development and particular needs

DHS v. C.L.H., 283 Or App 313 (2017)

- Child was born a medically fragile infant and is a carrier of MRSA
- Father sentenced to approximately 2 years in prison for burglary and drug charges
- DHS determined visits between the father and the child while he was incarcerated would not be appropriate or in the child's best interests because the prison was five hours from the child's foster care placement and potentially required an overnight stay and also because the child's bodily fluids presented a risk of MRSA transmission
- Father argued that DHS's efforts to reunify him with his child were not reasonable, citing DHS's failure to contact him in prison for 8 months, failure to inquire into what services might be available to him at the prison, and failure to attempt to provide the father with education or training to prepare him to care for a child with special needs
- The COA held that the juvenile court should have considered all of the circumstances relevant to the cost-benefit analysis and that DHS may not withhold a potentially beneficial service to an incarcerated parent (or any parent) simply because, in its estimation, reunification with the child is ultimately unlikely even if the parent successfully engaged in the services and programs that DHS provided

DHS v. S.M.H., 283 Or App 295 (2017)

- Mother was in and out of custody during the pendency of her children's cases and was ultimately sentenced to a prison term
- For the first 8 months of mother's prison's term, despite mother's requests, DHS did not provide financial assistance to mother for video and telephone visitation with her children
- DHS did also not maintain consistent contact with the mother for a 6-month period of time
- COA held that DHS failed to adequately engage the mother while she was incarcerated because it did not allocate sufficient resources to the family's case and it did not become aware of mother's participation in services; thus, the juvenile court's finding that DHS provided the mother with reasonable reunification services was in error

DHS v. L.L.S., 290 Or App 132 (2018)

- Father was sentenced to more than 30 years in prison for sexual offenses involving a minor
- COA held that the fact of incarceration, standing alone, does not relieve DHS of its obligation to make reasonable efforts to ameliorate the bases of jurisdiction
- Further, that incarceration of a parent only provides a basis for juvenile court jurisdiction over a child if, as a result of that incarceration, the child faces a threat of serious harm, and there is a reasonable likelihood that the harm will come about
- DHS had no contact with the father for nearly 10 months
- DHS argued that its efforts to reunify the child with the father were reasonable because no amount of visitation or services could ameliorate the basis for jurisdiction and that it lacked the power to shorten father's prison sentence
- The COA found that DHS could have discussed the conditions of return with the father and how to satisfy those from prison and to assess whether he could meet the conditions of return with reasonable assistance from DHS
- Because DHS did not even make minimal efforts, the COA reversed the juvenile court's finding of reasonable efforts at the permanency hearing and remanded the case for further proceedings

Appendix II

Survey on Problems Related to Incarcerated Parents and their Children in the Juvenile Court system by Hon. Ann Lininger and Stesha Powers

MEMORANDUM

TO: Children of Incarcerated Parents Work Group
FROM: Ann Lininger and Stesha Powers
RE: Summary of Survey Results
DATE: March 13, 2018

INTRODUCTION

As part of the JELI Children of Incarcerated Parents Work Group, we distributed a survey to circuit court judges who handle juvenile delinquency and dependency cases. The goal of this survey was to identify opportunities to improve outcomes for children of incarcerated parents. We received twenty-four responses. Here is a summary of key findings.

SUMMARY OF RESULTS

Respondents identified two key opportunities to improve outcomes for these youth:

- Support positive interactions between children and their incarcerated parents by improving communication, visitation, and participation opportunities.
- Support parents' access to skills classes and information about how they can parent and support their children during their time in custody.

Question 1:
What challenges have you seen with participation of incarcerated parent's in their child's court proceedings?

- Difficulty with coordination. Parents are not available, or DOC is unaware or unwilling to accommodate the hearing.
- Each facility has varying technological capacities. Some are incapable of doing video, which only allows for phone participation.

Question 2:
What successes have you seen with participation of incarcerated parents in their child's court proceedings?

- Increased offerings of parenting and substance abuse classes.
- Attorneys providing meaningful support to incarcerated parents, which improves parent participation.

Question 3:
For youth in the juvenile delinquency system who have an incarcerated parent, what steps would you like to see taken to support positive, healthy parent-child relationships?

- Increased communication between parents and children, using sources such as letters, video, phone, and in-person.

- Family counseling opportunities that utilize available technology, such as Skype and video.

Question 4:
For youth in the juvenile dependency system who have an incarcerated parent, what steps would you like to see taken to better support healthy parent-child relationships and potential reunification?

- Improved visitation strategies, which do not induce stress on the child.
- Stronger communication between DHS and DOC.

Question 5:
Please identify a change that could be made to Oregon's juvenile delinquency system to improve outcomes for children of incarcerated parents.

- Ongoing support and education for parents and children.
- Increased opportunities for communication between facilities.

Question 6:
Please identify a change that could be made to Oregon's juvenile dependency system to improve outcomes for children of incarcerated parents.

- Improved communication and support from caseworkers.
- Ongoing support and education for parents and children.

Question 7:
Please identify any training topics related to incarcerated parents that you would like to see addressed in an educational program.

- For judges, available resources through DOC facilities.
- For parents, parenting support when incarcerated and after release.

Question 8:
How would you like to see this work group focus time to support positive futures for children of incarcerated parents?

- Improve visitation and communication between children and parents.
- Provide ongoing educational supports for parents and children.
- Better coordination and communication between DOC and DHS.

Appendix III

DOC Visitation Administrative Rules by Hon. Megan Jacquot

Department of Corrections

Chapter 291

Division 127
VISITING (INMATE)

291-127-0200
Authority, Purpose and Policy

(1) Authority: The authority for these rules is granted to the Director of the Department of Corrections in accordance with ORS 179.040, 423.020, 423.030, and 423.075.

(2) Purpose: The purpose of these rules is to establish Department policy and procedures regarding inmate visitation, and the administration of visitation programming in Department of Corrections facilities. The Department encourages productive relationships between families and inmates and sees inmate visitation as a positive means to strengthen ties and increase the likelihood of success upon release.

(3) Policy:

(a) Visiting is an integral component of facility management, inmate habilitation and community safety. Visiting can improve public safety, encourage responsible familial relationships and reduce the risk of future criminal behavior.

(b) Within the inherent limitations of resources and the need for facility security, safety, health and good order, it is the policy of the Department of Corrections to permit, promote, facilitate, and encourage approved visitation by inmates with their families, friends, and others in Department of Corrections facilities.

(c) When authorized, visitation in a Department of Corrections facility is permitted neither as a matter of right nor as a privilege of the inmate or the inmate's visitor; rather, visitation in Department of Corrections facilities is permitted by the Department when it furthers the inmate's correctional planning and the Department's correctional goals and mission and is consistent with the safe, secure and orderly management and operation of the facility.

(d) The Department may structure visiting in its correctional facilities as an incentive program for inmates to encourage good institutional conduct.

Statutory/Other Authority: ORS 179.040, 423.020, 423.030 & 423.075
Statutes/Other Implemented: ORS 179.040, 423.020, 423.030 & 423.075
History:
DOC 24-2008, f. & cert. ef. 9-26-08
DOC 3-2005, f. 3-11-05, cert. ef. 3-14-05
DOC 10-2000, f. & cert. ef. 4-25-00

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Department of Corrections

Chapter 291

Division 127
VISITING (INMATE)

291-127-0220
Inmate Eligibility

(1) All inmates, except those inmates in intake status or as specifically provided in these rules, are eligible to apply for visits while confined in a Department of Corrections facility.

(2) Inmates Convicted of Sexual Crimes Involving Minor Children:

(a) Inmates who have a current or prior conviction for a sexual crime involving a minor child are ineligible to visit with any minor child, other than their own biological child. Inmates who have a current or prior conviction for a sexual crime involving their biological, step or foster child, or who have a documented history of sex abuse with a member of their immediate family are ineligible to visit with any minor child, including their own biological child.

(A) The inmate shall provide or have provided verification that the child is his/her biological child; e.g., birth certificate.

(B) An adopted child is considered a biological child.

(b) An inmate who is ineligible to visit with a minor child under the provisions of this rule may request reconsideration to apply for such visits by writing to the Chief of Inmate Services. The Chief of Inmate Services or designee may authorize such visits if he/she determines these visits will achieve a legitimate correctional objective, in furtherance of the Department's mission.

(A) The written request must include an evaluation which assesses the inmate's risk to minor children. The evaluation shall be conducted by a specialized sex offender evaluator approved by the Department. This evaluation must include a specific issue polygraph performed by a licensed polygrapher approved by the Department.

(B) The Department shall develop a list of suitable evaluators and polygraphers, which will be available to inmates. Cost of the evaluation is the responsibility of the inmate.

(C) The Chief of Inmate Services or designee may request assistance from community corrections resources in making the determination to grant or deny the request.

(D) If an exception is granted, it shall be applied consistently to all Department facilities. The Chief of Inmate Services' decision shall be final and not subject to further review.

Statutory/Other Authority: ORS 179.040, 423.020, 423.030 & 423.075
Statutes/Other Implemented: ORS 179.040, 423.020, 423.030 & 423.075
History:
DOC 17-2009, f. & cert. ef 10-20-09
DOC 24-2008, f. & cert. ef. 9-26-08
DOC 3-2005, f. 3-11-05, cert. ef. 3-14-05
DOC 10-2000, f. & cert. ef. 4-25-00

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Appendix IV

Memorandum of Law on Reasonable Efforts and Sentence Length and Reunification by Megan Hassen

Memorandum

To: JELI Incarcerated Parents Work Group
From: Megan Hassen
RE: Reasonable Efforts and Length of Sentences
Date: March 13, 2018

I agreed to research two questions at our last meeting: (1) what reasonable/active efforts should DHS provide for incarcerated parents, and (2) how long of a sentence must a parent have to be considered unavailable for reunification? My analysis of each issue is provided below.

1. What reasonable/active efforts should DHS provide for incarcerated parents?

In general, appellate courts have analyzed reasonable efforts considering the totality of the circumstances, and the facts and circumstances of the case. In addition, Oregon law establishes the following basic principles to guide the analysis of reasonable efforts.

- Efforts must be rationally related to the jurisdictional requirements. ORS 419B.343(1)(a)
- Reunification efforts should be provided for each parent. *Dept. of Human Services v. T.S.*, 267 Or App 301 (2014)
- DHS must provide appropriate services to allow the parent the opportunity to adjust his or her circumstances, conduct or conditions to make it possible for the ward to safely return home within a reasonable time. ORS 419B.343(2)(a) In other words, efforts are reasonable only if DHS has given the parent a fair opportunity to demonstrate the ability to adjust his or her behavior and act as a minimally adequate parent. *Dept. of Human Services v. M.K.*, 257 Or App 409 (2013).
- Efforts are judged over the life of the case, with an emphasis on the period before the hearing sufficient to afford a good opportunity to assess parental progress. *Dept. of Human Services v. S.S.*, 278 Or App 725 (2016)
- The focus is on DHS conduct, and a parent's resistance to DHS efforts does not categorially excuse DHS from making meaningful efforts toward that parent. However, evidence specifically tied to the parent's willingness and ability to

participate in services may be considered when assessing DHS efforts. *Dept. of Human Services v. J.M.*, 275 Or App 429 (2015), *rev den* 358 Or 833 (2016)

- If the case is subject to ICWA, the caseworker is required to make active efforts. An active effort means that DHS must assist the parent through the steps of reunification. The type and sufficiency of that effort depends on the particular circumstances of the case. *Dept. of Human Services v. D.L.H.*, 251 Or App 787, *modified on recons.*, 253 Or App 600 (2012)(DHS made active efforts when DHS mad an effort to contact mother, the caseworker visited mother in jail and offered a substance abuse evaluation, DHS explored whether visitation could occur with DOC and the children's therapist before deciding it would not be in the child's best interest, and DHS discussed available programs available through prison).

Some additional principles can be pulled out of the cases involving incarcerated parents:

- A parent's incarceration does not excuse DHS from making reasonable efforts. *Juvenile Dept. of Cook County v. Williams*, 204 Or App. 496 (2006).
- The types of activities DHS could engage in with an incarcerated parent include contacting the parent and investigating the parent, child relationship; assessing the parent's strengths and weaknesses; exploring services available to the parent during incarceration and incorporating those services into a service agreement; communicating with the prison counselor about the parent's progress; and investigating the possibility of visitation. *Juvenile Dept. of Cook County v. Williams*, 204 Or App. 496 (2006).
- When a parent is willing to engage in services, DHS must meet the parent's efforts in kind if the parent would benefit from additional services that would materially contribute to the goal of ameliorating the jurisdictional bases. *Dept. of Human Services v. S.M.H.*, 283 Or App 295 (2017)
- At a minimum, if the caseworker knows where the parent is, the caseworker should have regular contact with the parent. *Dept. of Human Services v. C.L.H.*, 283 Or App 313 (2017)
- At a minimum, the caseworker should communicate the conditions of return to the parent and discuss with the parent how those conditions might be satisfied, even if the parent won't be available to have physical custody of the child. This may include exploring whether the parent will make a plan for someone else to care for the child while s/he is incarcerated. *Dept. of Human Services v. L.L.S.*, 290 Or App 132 (2018)
- DHS should provide services that are rationally related to the basis of jurisdiction, and if no services are provided, be prepared to explain the reason why. *Dept. of Human Services v. C.L.H.*, 283 Or App 313 (2017)

- If DHS is relying on services that are available within the facility, the caseworker needs to assess whether they are sufficiently tailored to the basis of jurisdiction. If they aren't, the caseworker will need to develop appropriate services for the parent, which may include hiring a specific person to help the parent address the obstacle to reunification.
- When a parent argues that DHS has failed to make specific efforts, the court must consider the totality of the circumstances and weigh:
  - The burdens that the state would shoulder in providing services, versus
  - The benefit that might reasonably be expected to flow from that service.

- If lack of a relationship with the parent is part of the basis of jurisdiction, DHS will need to establish visitation or contact between the child and the parent, or explain why contact is not possible. *Dept. of Human Services v. S.S.*, 278 Or App 725 (2016) (When the child's lack of a relationship with the parent is part of the basis of jurisdiction, DHS's efforts to rebuild the relationship over a period of four months did not make up for its failure to allow contact or prepare the children for contact with mother for a period of six months). The court should consider the child's health and safety in determining whether efforts to provide visitation are appropriate. *Dept. of Human Services v. S.W.*, 267 Or App 277 (2014) (DHS efforts were reasonable even though no visits were provided over a period of 33 months when child had physical, behavioral and emotional problems, round trip to the prison would involve six hour drive, the child had no relationship with the father, and a psychological evaluation questioned whether father was a viable visitation resource).

2. How long of a sentence must a parent have to be considered unavailable for reunification?

DHS is required to provide reasonable efforts to reunify the parent and the child until the court has relieved the agency of the requirement under ORS 419B.340(5) or until the permanency plan has changed.

A. Court relief from requirement to provide reasonable efforts. ORS 419B.340(5) (Aggravated Circumstances)

Under ORS 419B.340(5), the juvenile court may excuse DHS from making further reasonable efforts to reunify a child with the child's parents when it finds there are "aggravated circumstances", specific enumerated circumstances set forth in the statute, including a parent's conviction for specific crimes. Incarceration is not a specific circumstance enumerated in ORS 419B.340(5). Although the statute sets forth specific circumstances in which the finding can be made, the court is not limited to those

circumstances. ORS 419B.340(5)(a); *State ex Rel Juv. Dept. v. Risland*, 183 Or App 293 (2002)(list of "aggravated circumstances" in (5)(a) is not exclusive).

In terms of application, the case law provides the following guidance:

- "Aggravated" circumstances are those involving relatively more serious types of harm or detriment to a child.
- The use of "circumstances" indicates not only a concern about the parent's actions and conditions, but also with the results of those actions and conditions, including effects, direct and indirect, on a child ("any" child, not just the child who is the subject of the dependency petition).
- Incarceration of a parent, without more, is not in itself an aggravated circumstance under ORS 419B.340(5)(a). *Juvenile Dept. of Cook County v. Williams*, 204 Or App. 496 (2006).
- In *Risland*, the court found sufficient evidence in the record to support the juvenile court's finding of aggravated circumstances because the child had suffered severe mental injury as a result of his exposure to significant domestic violence, the parents' drug use, and a highly unstable home life. In addition, the parents had already been provided extensive services before the court assumed jurisdiction, and the conditions had not been significantly remediated. 183 Or App 293 (2002).

When an aggravated circumstance finding is *not* made, only after the agency has provided reasonable efforts, can the court consider the circumstances and duration of a parent's incarceration. The parent's incarceration can be considered in determining whether the parent has made sufficient progress. *Dept. of Human Services v. C.L.H.*, 283 Or App 313 (2017) In *D.A.N.,* the court found sufficient evidence in the record for the juvenile court's finding that father had not made sufficient progress when he would not complete services and be available for reunification for at least nine months from the hearing, leaving E in foster care for a total of 21 months. The Court of Appeals found the juvenile court implicitly found the additional nine months was not a reasonable time for the child. *Dept. of Human Services v. D.A.N.*, 258 Or App 64 (2013)

B. Reasonable Time Determinations.

Assuming DHS makes reasonable efforts and the parent does not make sufficient progress for the child to safely return home, before changing the plan to adoption, the court must determine whether the parent is participating in services that will make it possible for the child to safely return home within a reasonable time. ORS 419B.476(5)(d); 419B.498(2)(b)(A); *Dept. of Human Services v. S.J.M.*, 283 OR App 367 (2017)*, rev allowed* (2017). "Reasonable time" is defined as a period of time that is reasonable given a child's emotional and developmental needs and ability to form and maintain lasting attachments. ORS 419A.004(23) In *D.I.R*, the Court of Appeals provided a list of the type of evidence the court may consider in making a reasonable time determination:

(1) whether the child's placement in substitute care would be unacceptably long given her age;
(2) the amount of time the child had already spent in foster care;
(3) the child's unique permanency needs;
(4) how long the parent would have to remain in services before the child could safely return home, and how such a delay would impair the child's best interests;
(5) whether the parent suffers from drug or alcohol addition, or that the parent has mental health issues that are too severe to alleviate within the foreseeable future; and
(6) the parent's participation and progress in services at the time of the permanency hearing.

Dept. of Human Services v. D.I.R., 285 Or App 60 (2017)

In *D.L.H.*, the Court of Appeals affirmed the juvenile court's implicit finding that the child could not be returned to mother's care within a reasonable time when the children's psychologist provided an opinion that the children needed permanency and mother would be incarcerated for eight months after the permanency hearing and would have restrictions on visitation for two years after her release. *Dept. of Human Services v. D.L.H.*, 251 Or App 787 (2012)

C. Termination of Parental Rights.

If the permanency plan is changed to adoption, and the case proceeds to termination, may the parent's rights be terminated based on the parent's unavailability due to incarceration? Under ORS 419B.504, a parent's rights may be terminated if the court finds the parent or parents are unfit by reason of conduct or conditions seriously detrimental to the child and integration of the child into the home of the parent is improbable within a reasonable time. In determining the conduct or conditions, the court is provided a non-exclusive list of factors that may be considered, including criminal conduct that impairs the parent's ability to provide adequate care for the child. ORS 419B.504(6).

A parent's rights can not be terminated under ORS 419B.504 solely on the basis of a parent's incarceration, unless the condition of incarceration is shown to be seriously detrimental to the child. *State ex rel. SOSCF v. Stillman*, 333 Or 135 (2001) In *Stillman,* the children were generally well adjusted and had a strong relationship with father. Although father was incarcerated, the only evidence of detriment to the children was the anxiety that was caused by the termination proceeding itself. This was not sufficient to establish that the parent's incarceration was seriously detrimental to the child, although the court acknowledged that prolonged incarceration could be a condition so seriously detrimental to the child as to warrant a finding of unfitness. Subsequent case examples include:

- In *D.M.T.*, the Court of Appeals found father was unfit because he was subject to a PPS condition that he have no contact with minors, which would prevent him

from providing a stable home to the child for a prolonged period of time (two years). The court found that lack of stability would be detrimental to the child, who according to treatment providers, needed a stable environment to help prevent him from developing full blown Reactive Attachment Disorder. The child's therapist testified that making the child wait for two years would be harmful to the child. *Dept. of Human Services v. D.M.T.*, 239 Or App 127 (2010).

- In *C.R.P.*, when mother still had 34 months of a prison sentence to serve at the time of the termination hearing, the court held that on its own was not sufficient to establish detriment to the children. Although the child had been diagnosed with adjustment disorder after DHS moved her to a different placement, the court found that type of difficulty was not related to mother, but was part of what might be expected when a child is in the juvenile system. *In the Matter of C.R.P.*, 244 Or App (2011).
- In *R.K.*, the court reiterated that incarceration is a condition that can be considered when determining a parent's fitness under ORS 419B.504. Whether the condition is detrimental to the child is determined at the time of the trial. The court found the evidence in this case wasn't sufficient to show detriment when it was based on the child's placement moves, which are not the type of serious detriment that provides a basis for terminating parental rights. Generalized testimony that a lack of permanency could result in emotional distress also did not constitute detriment. Finally, the court found there was no evidence of unfitness based on father's conduct as a parent. He had a relationship with the child prior to his incarceration and took care of him regularly, continued to visit with the child while incarcerated and had a positive relationship with the foster parent and adoptive placement. *Dept. of Human Services v. R.K.,* 271 Or App 83 (2015)