Appellate Update

Angela Sherbo
Juvenile Law Resource Center
401 NE 19th Ave., Suite 200
Portland, OR 97232
Phone: (503) 232-2540
Fax: (503) 231-4767

Time to Appeal/Late Appeals

State ex rel Juv. Dept. v. M.U., 229 Or App 35, 210 P3d 254 (2009)

In *M.U.*, Mother appealed from a jurisdiction judgment. The court dismissed the appeal on its own motion, holding that mother had not filed her notice of appeal within 30 days of entry of the judgment[1], as required by ORS 419A.200(3), and had failed to file a motion for leave to file a late appeal within 90 days as allowed by ORS 419A.200(5).

Mother argued that the failure to properly file a notice of appeal constituted inadequate assistance of counsel, and that she was entitled to a delayed appeal under a line of cases beginning with *State ex rel Juv Dept. v. Geist*, 310 Or 176, 796 P2d 1193 (1990) and *State ex rel SOSCF v. Hammons*, 169 Or App 589, 10 P3d 310 (2000). Under these cases parents could raise the issue of inadequate assistance of both trial and appellate counsel. Where the inadequacy alleged was the failure to timely file the Notice of Appeal, a late notice could be filed. *Hammons*, 169 Or App at 594. Subsequent to these decisions, however, the legislature created a remedy in ORS 419A.200(5). The Court of Appeals held that statute is "the procedure the legislature has made available to vindicate the right to adequate counsel in the filing of a notice of appeal of a juvenile court judgment. The fact that mother did not timely invoke, and, thus, qualify for, that

[1] Mother's trial counsel apparently mailed the Notice of Appeal on the 30th day but failed to comply with ORS 19.260(1) and ORAP 1.35(1)(c) requiring the filing of a certificate from the U.S. post office where the appellant relies on the mailing date.

remedy does not nullify its existence and allow us to, instead, craft, under the rationale of *Hammons*, a more extensive remedy, circumventing the legislatively prescribed restrictions." However, the court specifically expressed no opinion about whether the state or federal constitutions compelled a different result.

Default Judgments and Motions to Set Aside

> *State ex rel Juv. Dept. v. Jenkins*, 209 Or App. 637, 149 P3d 324 (2006); *State ex rel Juv Dept. v. D.J.*, 215 Or App 146, 168 P3d 798 (2007); *State ex rel DHS. v. G.R.*, 224 Or App 133, 1987 P3d 51 (2008)

Father appealed the trial court's denial of his motion to set aside a default termination of parental rights judgment. Father mistakenly thought the trial was to begin at eleven a.m. and was on his way to the courthouse when the procedure commenced at nine a.m. Despite a request from his counsel that the hearing be continued, the trial judge proceeded with a "*prima facie*" hearing which concluded only a few minutes before father arrived. In his motion to set aside, filed before the termination of parental rights judgment was even entered, father explained that he had been preparing for trial, had witnesses subpoenaed and was simply mistaken (because of the time of earlier court appearances) about the time. In addition, an older termination of parental rights case was set for the same time, involved some of the same counsel, and would take precedence over father's case. Even had father appeared on time, no trial would have been held.

The Court of Appeals held that ORS 419B.923(1)(b) authorizes the court to set aside a judgment for excusable neglect. When the facts are not in dispute the question of "excusable neglect" is one of law. The Court of Appeals reviewed the legislative history of 419B.923(1) and said:

> [T]he legislative history of ORS 419B.923(1) discloses that the legislature, in enacting the statute's 'excusable neglect' provision, was especially concerned with 'horror stor[ies]' of parents having their rights termination in their absence when, because of good faith mistakes, they went to the wrong courtroom or appeared at the wrong time. See Tape Recording, Senate Committee on Judiciary, HB 2611, Apr 30, 2001, Tape 115, Side B (statements of Sen John Minnis and Kathie Osborn, Senior Attorney, The Juvenile Rights Project). Given that history, we have no doubt that the legislature intended "excusable neglect" in ORS 419B.923(1)(b) to encompass a parent's reasonable, good faith mistake as to the time or place of a dependency proceeding.

The second step in the analysis is to determine, where excusable neglect has been established, what the parameters of the court's discretion are in determining whether to set aside the judgment.

> We are unaware of any published discussion of the contours of that discretion. We can, however, divine several considerations that should reasonably guide, and restrict, the exercise of discretion in this context. Those considerations include, at least, the following: (1) the nature and magnitude of the interest that was adjudicated and "forfeited" in the movant's absence; (2) the movant's promptness in attempting to rectify his or her nonappearance; (3) the extent to which the interests of other parties and the court would be prejudiced if the motion were granted, including because of intervening detrimental reliance on the judgment; and (4) whether the movant can present at least a colorable defense on the merits.
>
> Here, those considerations militate decisively in father's favor. First, it is difficult to imagine a more profound interest to be lost by way of an irrevocable default than parental rights. Second, father here moved very quickly to set aside the termination – within four days of the termination hearing – and, indeed, 20 days before the entry of the termination judgment. Third, the record discloses no detrimental reliance by any party on the court's oral termination order in the four-day interval between that order and the filing of the motion to set aside. Nor does the record disclose that the child TR's interest would be meaningfully impaired if the trial were reset. Further, although we are most mindful of the exigencies of dependency proceedings, the uncontradicted information in father's affidavit shows that another termination

> case was scheduled for trial the same day and would have taken precedence over this case, which would have had to have been rescheduled. That strongly suggests that the requested relief could have been granted 'without doing violence to the regular disposition of litigation.' [citations omitted] Finally, whatever the ultimate merit of his position, father was, in fact, prepared to defend against the stance of the termination petition.
>
> Conversely, we do not discern – and the state does not identify – any discretionary consideration compelling the denial of relief under ORS 149B.923(1)(b). Accordingly, in the totality of the circumstances, the trial court erred in denying father's motion under ORS 419B.923(1)(b).

Two earlier cases, *Jenkins* and *D.J.* had held that a parent could not take a direct appeal from a default judgment terminating parental rights, and intimating that the proper remedy was a motion to set aside the default judgment *(Jenkins,* 209 Or App at 646 fn. 4) and that a motion to do so almost one year after the original default judgment was untimely (*D.J.*).

The Record on Appeal

State ex rel Juv. Dept. v. L.V., 219 Or App 207, 182 P3d 866 (2008)*; State ex rel Juv. Dept. v. K.L.*, 223 Or App 35, 194 P3d 845 (2008); *State ex rel DHS v. T.N.*, ___ Or App ___, ___ P3d ___ (September 2, 2009); *State ex rel Dept. of Human Services v. N.S.*, 229 Or App 151, 211 P3d 293 (2009)

In several recent cases the Court of Appeals has been critical of the weakness of the record. Review and permanency hearings where no sworn testimony is taken are common in many parts of the state.[2] The Court's comments may indicate a growing frustration about appeals in cases where there is virtually no factual record.

In *L.V.*, the Court of Appeals reversed the trial court's finding that father could not parent the child now, finding that the record contained only "unsupported assertions"

[2] The mean length of time for review hearings conducted statewide between July 1, 2007 and June 30, 2008 was 20 minutes; for permanency hearings it was 26 minutes. Oregon Judicial Dept., Juvenile Dependency Event Statistics Report No. 8a, 12/30/08.

that he could not do so. And in *K.L.*, in an appeal from a permanency hearing, the Court referred to the "limited record" and noted:

> The record consists of a DHS 12/14 Month Permanency Review Report and of unsworn colloquies between the court, on the one hand, and mother, mother's attorney, the children's attorney, the DHS representative, and others present in the courtroom, on the other. ORS 419B.325 and ORS 419B.476(1) make admissible reports, testimony, and other material related to the children's history and prognosis without regard to their competency or relevancy under the rules of evidence, but they do not provide for unsworn testimony. It is not clear that all of the evidence would be admissible under these statutes even if it were sworn. However, because no party objects to our using the existing record in deciding this appeal, we do not consider the issue further.

In *N.S.*, Mother appealed from a judgment establishing a guardianship under ORS 419B.366. The guardianship was based on the fact that "mother's alleged inability to recognize the risk of harm posed by her brother, a convicted sex offender, made it impossible for child to return to mother's care within a reasonable time." The court reversed, holding that there was "insufficient evidence that mother's brother poses a risk of harm to child." The court held that in the case of an untreated sex offender, there must be "some nexus between the nature of the offender's prior offense and a risk to the child at issue."

At the guardianship hearing, the juvenile court limited the evidence to events occurring after the April 2008 permanency hearing. However, the court stated on the record that "the information that was adduced" at the earlier hearing would be "incorporated" into the guardianship proceeding, that it "formally adopt [ed]" that information. The court held that "none of the documents mentioned by the court was entered into evidence, and they do not otherwise appear in the trial court file.

Accordingly, they are not part of the record on appeal." Further, the court held that "the juvenile court's vague statement that the information 'adduced' at the April hearing was 'incorporated' into the guardianship proceeding did not constitute 'taking judicial notice of that information.'"

In *T.N.*, Mother appealed from permanency judgments changing the plan for her two children from APPLA to guardianship. She claimed that the judgments did not comply with ORS 419B.476(5), because they did not **"**explain why placement with mother is not appropriate."

In a per curiam opinion, the court reversed and remanded, finding that "the judgments are essentially boilerplate recitations and, at various points, incorporate by reference certain 'attached report(s).' * * *. No reports are attached to the judgments, and it is impossible to determine what reports the court intended to incorporate. In fact, the state concedes on appeal that the 'report(s)' to which the judgments refer might not even be part of the record in this case. Those defects in the judgments preclude meaningful review in this appeal."

The Judgment on Appeal

State ex rel Dept. of Human Services v. J.N., 225 Or App 139, 200 P3d 615 (2009); *State ex rel Dept. of Human Services v. M.A.*, 227 Or App 172, 205 P3d 36 (2009); *State ex rel Juv. Dept. of Jackson County v. J.F.B.*, 230 Or App 106, ___ P3d ___ (August 5, 2009); *State ex rel Dept. of Human Services v. T.N.*, ___ Or App ___, ___ P3d ___ (September 2, 2009)

In *J.N.*, Father appealed from a judgment changing the permanency plan for his child from permanent foster care to adoption. He assigned error to the trial court's failure to make statutorily-required findings of fact. The court noted that ORS 419B.476(2)(d) requires the court to "[m]ake the findings of fact under ORS 419B.449(2)." That statute,

in turn, provides that, "[a]t the conclusion of the [permanency] hearing, the court shall enter findings of fact." ORS 419B.449(2). Even though father did not object at the hearing, the court held that the failure of the juvenile court to make findings could be reviewed as plain error. However, the court declined to exercise its discretion to review the error, because father failed to show how the court's failure to make a finding regarding the number of schools the child attended had harmed his case, and because the error could easily have been corrected if pointed out to the juvenile court.

In *M.A.*, Mother appealed from a permanency judgment changing the plan for her children from return to parent to APPLA. The juvenile court failed to make findings in the judgment as required by ORS 419B.476(5). The court held that mother was not required to preserve this claim of error, because "the statute dictates that the required findings be made-not at the time of hearing-but in an order issued within 20 days after the hearing. ORS 419B.476(5). Until that order issued, mother had no way of knowing that the court would enter a judgment that did not comply with the statute. Indeed, it was not unreasonable for mother to assume that the court, in entering the written judgment, would make the findings necessary to support its oral ruling."

The court rejected the state's argument that it was sufficient for the judgment to refer to what it "heard from the parties" and for the court to take judicial notice of the court report, holding that this "establishes, at most, the information on which the court relied in making its decision. It does not, without more, reflect the court's reasoning or demonstrate the basis for the court's ultimate decision, much less set forth, as required in this case, a 'compelling reason' why it is in the children's best interest to move to a permanency plan of long-term foster care."

Further, in a footnote, the court suggested that even if the judgment had incorporated the court report by reference, it would have been insufficient to satisfy the requirements of the statute.

J.F.B. was a consolidated appeal in an ICWA case in which mother appealed from permanency judgments entered in July of 2008 changing the plan for her children to adoption, and a second set of judgments entered in August of 2008 changing the plan from adoption to permanent guardianship. Mother argued that the July 2008 judgments failed to make the findings required by ORS 419B.476(5). The court agreed, holding that under *M.A.*, mother was not required to preserve this claim of error.

With regard to the August 2008 judgments, even though the plan at the time of the hearing was adoption, the court held that because mother sought reunification, the juvenile court was obligated to make findings regarding whether DHS had made "active efforts to make it possible for the ward to safely return home and whether the parent has made sufficient progress to make it possible for the ward to safely return home."

In *T.N.* discussed above, Mother appealed from permanency judgments changing the plan for her two children from APPLA to guardianship. In addition to the court's discussion of defects in the judgment – "essentially boilerplate" – the court also addressed the record issue, "No reports are attached to the judgments, and it is impossible to determine what reports the court intended to incorporate. In fact, the state concedes on appeal that the 'report(s)' to which the judgments refer might not even be part of the record in this case. Those defects in the judgments preclude meaningful review in this appeal."

<u>Procedural Issues</u>

Exclusionary Rule Does Not Apply in Dependency Cases – *State ex rel Juv. Dept. v. W.P.*, 345 Or 657, 202 P3d 167 (2009)

The Oregon Supreme Court recently held that the exclusionary rule does not apply in dependency cases. The case involved use in the juvenile court proceeding of evidence that drugs were found in father's house and on his person after police executed a search warrant. In the juvenile court, father argued that the search warrant was not supported by probable cause and that the evidence found should be suppressed. Without reaching the merits of the validity of the search, the trial court denied the motion, ruling that the exclusionary rule does not apply in juvenile dependency proceedings. The Court of Appeals affirmed without opinion.

The Supreme Court assumed for the purpose of the analysis that the evidence was obtained in violation of father's Article I section 9 and Fourth Amendment rights and analyzed the availability of the exclusion of the evidence under both constitutional provisions.

The critical issue for the Oregon constitutional analysis is whether the father's liberty interest in the dependency proceeding is sufficiently akin to the liberty interest at stake in a criminal proceeding. The Court held that "because this case does not implicate father's liberty interest in remaining free from state custody," the case law interpreting Article I section 9 does not require the Court to exclude the evidence. The Court reached the same result under the Fourth Amendment analysis.

The Court could have ended the Article I section 9 discussion with the conclusion that the liberty interest in "family integrity" is not sufficiently akin to physical liberty interest. However, the Court spent some amount of time discussing the "temporary and

conditional" nature of the deprivation. Is this a signal that the result might be different in a termination of parental rights case?

Exclusion of Evidence for Discovery Violation - *State ex rel Juv. Dept. v. G.A.K. and A.M.F.*, 225 Or App 477, 201 P3d 930 (2009)

The state appealed from the dismissal, with prejudice, of dependency petitions and assigns as error both the dismissal with prejudice and the trial court's exclusion of several items of evidence, including a video of a "forensic interview" of one of the children at the Jackson County Child Advocacy Center. Parents' attorneys sought the sanctions at the time set for the jurisdictional hearing to begin. They argued that they had not received the documents to which they were entitled until late in the proceedings and had never been provided a copy of the DVD of the Child Advocacy Center interview. Father's attorney said he had requested a copy from DHS but was told he needed to get it from law enforcement or the Center. He watched it the morning of the hearing and mother's attorney had still not seen it at the time of the hearing. The state argued that:

> [M]other and father could have filed their own motion to compel discovery, not "anything out of the ordinary" in cases involving alleged sexual abuse, if they were concerned that discovery was not being provided. The state also indicated that the normal process in the county for obtaining a recording of an interview for purposes of expert review, which, as experienced counsel, mother's and father's attorneys should have been aware of, is to seek a protective order. Otherwise, the state argued, DHS appropriately advised father's attorney where to make arrangements to view the DVD. According to the state, that the parties chose not to do so should not be held against the state. Finally, the state argued that, even if the court were to find a violation, the extreme remedy of preclusion was unwarranted, given that there had been no motion to compel or other "formal accusation" of discovery violations and given the importance of the evidence in evaluating whether there had been a credible disclosure of sexual abuse.

* * * * *

> We have also recently observed that, in cases arising under the Juvenile Code, "the interests of the children will always be a relevant, even primary, consideration." *State ex rel Juv. Dept. v. D.J.*, 215 Or App 146, 154, 168 P3d 798 (2007); see also ORS 419B.090 (recognizing that it is the policy of the state of Oregon to safeguard and protect children's rights to safety, stability, and freedom from abuse, exploitation, and neglect).
>
> Application of those principles in this case leads us to conclude that the court abused its discretion in ordering preclusion of the state's evidence. First, we are not persuaded on the record before us that there is any evidence of willfulness on the part of DHS to delay disclosure or otherwise circumvent the strictures of the statute. Rather, it appears – again, on this record – that the state first received notice that mother and father were alleging discovery violations on the morning of the hearing and no evidence of willful delay was presented. Moreover, the court failed to consider the interests of the children before on to exclude the state's evidence was, under the circumstances, unjustified by, and clearly against, reason and the evidence.

Juvenile Court's Authority to Order a Parent to Undergo a Psychological Evaluation, (or two) - *State ex rel Juv. Dept. v. G.L.*, 220 Or App 216, 185 P3d 483 (2008); *State ex rel Juv. Dept. v. R.N.L.*, 218 Or App 188, 180 P3d 704 (2008)

In *G.L.*, mother assigned as error the juvenile court order requiring her to undergo a psychological evaluation. She argued to do so was error "without a jurisdictional finding of a mental health problem endangering the welfare of the children." The Court of Appeals affirmed the trial court. The Court reasoned that ORS 419B.343(1)(a) which requires DHS's case planning to bear a "rational relationship" to the jurisdictional findings "must also be understood to require that the Court's specification of a particular type of service that DHS provides bears a rational relationship to the jurisdictional findings." In this case, because mother had failed to benefit from past services and since DHS is obligated to provide services that will help her reunite with her child, the Court did not exceed its authority in ordering the psychological evaluation. In a footnote, the

court discussed whether the order that mother complete any recommended treatment would require a second evidentiary hearing to determine whether the recommended treatment was needed but because

> "mother does not contest the validity of the court's order that she submit to any recommended treatment, we consider only whether the court was authorized to order a psychological evaluation."
>
> *G.L.* 220 Or App at 221 n. 3

In *R.N.L.*, a termination of parental rights case, the mother was ordered to submit to a psychological evaluation and did so. The evaluation was relatively optimistic and recommended that the termination of parental rights trial be postponed to allow mother to continue to stabilize. As the state was preparing for trial it was learned that the caseworker had not sent some information about the child to the psychologist. The additional information was sent to the psychologist who then wrote a letter saying his report should be given little weight and that DHS should consider a second psychological evaluation. The state moved for an order requiring mother to submit to a second evaluation. The Court of Appeals discussed the argument made to the trial court:

> Mother opposed the motion arguing that the state was requesting the second evaluation solely to create a strategic trial advantage and not in M's best interests. At a hearing on the motion, the state explained that the case worker mistakenly gave Ewell incomplete information about M. and, because Ewell's report was subject to impeachment based on that incomplete information, the court had no current valid psychological evaluation of mother. Mother responded that the state controlled the information given to Ewell and could have given him additional information before the January trial date instead of requesting a second evaluation. She also argued that if the proposed evaluation were to proceed as planned, she would receive the report only a few days before trial.
>
> The trial court acknowledged that mother would require extra time to prepare her defense if the second evaluation were ordered, but it concluded that fundamental fairness required that it obtain

> complete information with which to decide the case given the seriousness of a termination trial.

On appeal mother's contentions that the state sought the evaluation for tactical advantage and that the trial court abused its discretion in ordering the evaluation were rejected.

> The record does not support mother's contentions that the state requested a second evaluation only to create a tactical advantage at trial. Ewell himself recommended the second evaluation after learning that he prepared his report based on incomplete information about M's circumstances. We need not determine the state's motivations for requesting the order, however, because the trial court made its motivation clear: to ensure that all relevant, helpful and accurate information was available to decide a case that will drastically affect the lives of M and her mother.

These two cases in turn rely on two much older cases, *State ex rel Juv. Dept. v. Maginnis*, 28 Or App 935, 561 P2d 1033 (1977) *and State ex rel Segrest v. Van Hoomissen*, 276 Or 1077, 557 P2d 661 (1976), that bear a more thorough review.

<u>Termination of Parental Rights Cases</u>

1. Unfitness under ORS 419B.504

State ex rel Dept. of Human Services v. A.T., 223 Or App 574, 196 P3d 73 (2008); *State ex rel Dept. of Human Services v. J.S.*, 225 Or App 115, 200 P3d 567 (2009); *State ex rel Dept. of Human Services v. D.F.W.*, 225 Or App 220, 201 P3d 226 (2009); *State ex rel Dept. of Human Services v. R.T.*, 228 Or App 645, 209 P3d 390 (2009); *State ex rel Dept. of Human Services v. A.L.S.*, 228 Or App 700, 209 P3d 817 (2009)**;** *State ex rel Dept. of Human Services v. R.J.T.*, 229 Or App 619, ___ P3d ___ (July 15, 2009); *State ex rel Juv. Dept. of Multnomah County v S.W.*, ___Or App___, ___P3d___ (October 7, 2009)

A.T. was a state's appeal from the denial of a petition to terminate father's parental rights on the bases of unfitness and neglect. The state appealed only from the trial court's finding that father was not unfit.

Father had a history of substance abuse, and served two prison sentences while the children were in substitute care. Father participated in treatment while in prison in the summer of 2006, and relapsed in September of the same year. He returned to prison in October of 2006, and participated in treatment again. He was released one week prior to the termination trial. The trial court concluded that the state had not proved by clear and convincing evidence that the father was incapable of reuniting with his child in the near future. The Court of Appeals disagreed.

> As noted above, the evidence demonstrates that father was still in the process of being treated for chemical dependency. The trial court was convinced that father would complete that treatment and maintain sobriety, based primarily on the court's factual determination that father was earnest in his desire to achieve recovery and to reunify with N. Although we, like the trial court, find father's efforts to be commendable, father's *intentions* are not the only predictor of success in this case. Father has been addicted to drugs for more than half of his life. The only sustained periods in the past 10 years of his life in which he has been drug-free have been in prison. McClaflin, father's current drug counselor, testified that treatment for chemical dependency while incarcerated is "very, very, very different" from treatment outside prison. That is, people who are incarcerated do not "hav[e] to deal with any of their normal day-to-day type activities. So they're gaining information about their use, they're in a supportive environment, but they're not actually having to walk it out." In McClafin's experience, "usually folks kind of tend to go backward a little bit as soon as they get released from incarceration, and then we have to start moving forward again." That was the case with father when, in 2006, the stresses of everyday living, work, recovery, and visitations compromised the progress that father had made with his chemical dependency while incarcerated. The stress was such that father relapsed. According to McClaflin, it generally takes six months to a year to be confident in a person's recovery status.
>
> The past, in this case, is the best predictor of father's future success; we find it to be highly unlikely that father would be able to balance the stresses of everyday living, work, recovery, and domestic violence and parenting training, and to progress to the point where integration is possible, in less than six months. Thus, we conclude, given father's extensive drug abuse history and the testimony of McClaflin, that father is

> at least six months away--likely more--from achieving a level of recovery that would permit the reintegration of N into father's home.
>
> Six months to a year is too long for N to wait, particularly given how speculative reintegration is at this point. At the time of trial, N had been in DHS custody for half of her life. Although she had done well in foster care, she needs stability and permanence at this stage of her development, as well as the opportunity to form lasting attachments. Because of her anxiety, N has a heightened need for a structured, consistent, and stable routine in the immediate future. For that reason, we find that integration into father's home within a reasonable time is improbable.
>
> *A.T.* 223 Or App at 587-588.

In *J.S.*, both parents appealed judgments terminating their parental rights on the bases of unfitness and neglect. DHS conceded that the evidence of neglect was insufficient to support termination. The court affirmed on the basis of unfitness. It found that mother had a diagnosed mental illness, schizoaffective bipolar disorder, and that her symptoms and "resulting decompensations" were seriously detrimental to her children. The court also found that the children could not be returned to mother's home within a reasonable time, because mother was "unable to permanently separate from father, a person who has physically abused her in the presence of the children."

With regard to father, the court found that he had a history of criminal conduct, alcohol abuse, and domestic violence, and that this conduct and condition has been seriously detrimental to the children. The court also found that while father was engaged in services at the time of trial, his "history of poor performance" caused the court to conclude that the children could not be returned to his home within a reasonable time. Finally, the court found that termination was in the children's best interests, because they were "adoptable and currently living with their prospective adoptive family." The court noted that the two older children had been removed from the parents twice and that the youngest child had been in foster care since birth.

In *D.F.W.*, both parents appealed from judgments terminating their parental rights on the bases of unfitness and neglect (father only). The court reversed, finding that although both parents had "serious" substance abuse problems when the child was placed in substitute care, they had begun working to resolve their problems and as a result, they were not presently unfit at the time of trial. The court also found that while the child had developed "substantial problems" - in part caused by her first foster placement - she was doing well at the time of trial.

With regard to mother, the court expressed concern about the possibility of relapse, but concluded that there was not "clear and convincing evidence that any use at the time of the hearing was either addictive or habitual or that it had substantially impaired her parental ability." The court similarly found that father's bipolar disorder and history of substance abuse did not make him presently unfit. The court was critical of some of DHS' efforts to assist father in maintaining a relationship with the child.

> Father visited M.W. until he left Oregon in early 2006. He did not see her again before he entered prison shortly after his return. At least after he was served with the termination petition in March 2007, he wrote to M.W. and sent her cards through DHS. He also sent M.W. a check, but DHS refused to give it to M.W. and returned it to father's trust account at the prison. As discussed above, DHS also refused father's request that it permit M.W. to attend father's graduation from his parenting class, as the children of the other participants did. After father left prison, DHS allowed father one visit with M.W. Although M.W. was concerned before the visit about whether she would recognize father, the visit went well and it was clear that M.W. was attached to father. A week later, M.W.'s DHS worker met with father to discuss M.W.'s situation. The worker believed that father understood both M.W.'s needs and what was necessary to be her parent, but DHS nevertheless refused to permit any additional visits. It explained that father's rights were to be terminated--although the termination hearing had not yet occurred and the trial court had not ruled--and that M.W. had already grieved the loss.
>
> *D.F.W.* 225 Or App at 234

The trial court also terminated father's parental rights on the basis of neglect. The court reversed, holding that father was in prison during the six months preceding the filing of the petition, and was therefore unable to pay support. The court also rejected DHS's claim that father had failed to maintain contact with the child, suggesting that in the six months preceding the filing of the petition, there was no plan to reunite the child with father and that DHS had, in some instances, prevented father from having contact with her.

In reaching this result, the court rejected the trial court's finding that the parents were not credible, stating "we give little weight to a credibility finding that turns on [factors other than demeanor] such as internal consistency, logic, and corroboration. We are as able as the trial court to evaluate those other factors."

In *R.T.*, both parents appealed from judgments terminating their parental rights on the basis of unfitness and neglect (father only). The court reversed, "because the state did not prove by clear and convincing evidence that integration of the child into parents' home was improbable within a reasonable period of time due to conduct or conditions that were not likely to change."

At the time of the termination trial, the child had been in substitute care for almost two years (essentially his entire life). He had the "potential" to develop reactive attachment disorder, although this disorder had not been diagnosed.

The court agreed with the trial court that "the state proved by clear and convincing evidence that mother and father are, individually, and collectively, *presently* unfit by reason of conduct or condition seriously detrimental to the child." Specifically, the court held that mother's incarceration and both parents' failure to "stabilize their

living situation" and address their drug and domestic violence issues constituted conduct and conditions seriously detrimental to the child, because they prevented the parents from providing the child with a "stable and safe living environment at that time."

The court held, however, that the state had failed to prove that reintegration of the child into the parents' home was improbable within a reasonable time. The court based this decision on three factors: (1) the parents had made "substantial and sustained efforts" to address their problems; (2) the child "had some minor developmental issues" but had not been diagnosed with reactive attachment disorder; and (3) Dr. Ewell did not "render an opinion" as to whether the child's integration into a "parental home was improbable within a reasonable time." Dr. Ewell's testimony, in the view of the court, was "more nuanced". Dr Ewell testified that

> …mother and father needed a few months to demonstrate that they could reunite after mother's release from Coffee Creek and to address issues in their relationship as well as prepare themselves to meet child's needs and that, within three to five months, an appropriate examination could occur to determine whether integration of A into their home could occur at that time or could occur within a reasonable period of time. In other words, as of the time of the termination trial, Ewell did not render an opinion as to whether integration of A into a parental home was improbable within a reasonable period of time. Rather, he indicated that he would need to wait an additional three to five months--and then, depending on the parties' circumstances, at that point, the prospects for integration could, presumably, range from highly probable in a short period of time to highly improbable ever, much less within a reasonable period of time.

The court also found that the child would not "suffer any substantial detriment from waiting a few additional months" for permanency.

On the issue of neglect, the state alleged that father had failed to pay court-ordered support. The court agreed, but held that "the evidence in the record is that [father] has little disposable income after paying for necessities such as rent, insurance, and the fees for his and some of mother's required services to address their various needs.

Under those circumstances and in light of his substantial efforts to address his issues and his record of consistent and positive contacts with [the child], we conclude that state has not established the statutory grounds for neglect by clear and convincing evidence."

In *A.L.S.*, Mother appealed from a judgment terminating her parental rights on the basis of unfitness. Mother had a long history of substance abuse, and had been unsuccessful at completing treatment and maintaining sobriety. However, she completed a treatment program while incarcerated, and at the time of the termination trial, had not used drugs in the previous year. She had, however, consumed alcohol on four or five occasions.

By the time of trial, the child - who was six years old - had spent more than half of her life in foster care. She suffered from "several mental and physical ailments that are exacerbated by stress and anxiety," and was at risk for developing reactive attachment disorder. At the time of trial, she was placed in a potential adoptive home with a relative.

The court affirmed the judgment terminating parental rights, holding that "mother has failed to effect a lasting adjustment to her conduct-specifically, her addiction to intoxicating substances-after extensive efforts by DHS." The court found that mother's conduct and conditions were seriously detrimental to the child, citing *F.W.* for the proposition that in cases "involving children who had been removed from the parent at a young age and had lived with the parent only for sporadic periods, where children in such cases have special needs and are healthily bonded to their foster parents, the issue is not whether a parent is minimally adequate, but whether the parent has waited too long to reform in light of the child's pressing needs."

In *R.J.T.*, Mother appealed from a judgment terminating her parental rights on the basis of unfitness. Mother has been diagnosed with major depressive disorder and borderline personality disorder, both of which have caused suicidal ideation and suicide attempts. Some of these behaviors were witnessed by the child.

The court affirmed, holding that "more than two years after DHS became involved with the family, mother continues to engage in the sort of conduct that made her unable to care for her children: expressing suicidal ideation and engaging in self-harming behavior. Mother continues to have major depressive disorder and borderline personality disorder, conditions that underlie her self-harming conduct." In addition, the court found that mother's conduct was seriously detrimental to the child, despite the fact that she was "generally well adjusted" and doing well in her foster placement. The court focused on the potential harm if the child were returned to mother, including the risk that the child would "mimic" mother's self-harming behaviors, suffer from depression, and "develop a painful sense of responsibility" for mother's condition.

Judge Schuman wrote a vigorous dissent, arguing that the state failed to prove that mother's conduct and condition were seriously detrimental to the child. Explaining his decision to dissent, Judge Schuman wrote that "DHS presented *no* evidence that mother's conduct or conditions have already had a serious detrimental effect on L, and the evidence of future detriment is speculation that does not even approach the clear and convincing standard." The dissent explains that because of this conclusion, he does not reach the "reintegration" or "best interests" elements.

> Guided by these precepts, I conclude that the state failed to prove by clear and convincing evidence that mother's conduct or condition was seriously detrimental to L. Because I reach this conclusion, I do not address

> whether integration of L into mother's home is "improbable within a reasonable time," ORS 419B.504. *See Stillman*, 333 Or at 145 (integration inquiry necessary only if serious detriment found).
>
> Further, I do not consider whether termination is in L's best interest. I understand that not taking that factor into consideration runs counter to our natural inclination to protect children and to enable them to flourish. However, under ORS 419B.504, in a contest between a neurotic, dysfunctional, criminal, or otherwise marginal parent who, despite these qualities, can provide minimally adequate care for a child, on the one hand, and the state, which may have identified an adoptive placement where the child will probably thrive and flourish, on the other, the bad parent wins. Some would say we have chosen to sacrifice children on the altar of parental rights. Others would point out that a regime in which bad parents can lose their children when the state finds what it regards as better parents can easily degenerate into a dystopia where every parent must live in fear that some bureaucrat will decide that another parent is more deserving. In any case, under well-settled state and federal law, sometimes bad parents win and, as a consequence, children lose.
>
> Further, the state authorities charged in the first instance with deciding whether to seek termination of parental rights do not, I presume, choose their calling because they want to protect bad parents; they choose it because they want to help children. Yet under our statutory and constitutional law, helping children by taking them from a bad but marginally competent biological parent and placing them with an obviously better one is (to put it bluntly) illegal. The child's best interest, in other words, enters into the calculation only when the state has proved by clear and convincing evidence that the parent's conduct or conditions have a seriously detrimental effect on the child. *R.J.T.*, 229 Or App at 652

Citing *R.T.*, the dissent stated that "given the absence of evidence that mother exposed [the child] to suicide attempts or cutting behavior in the past, and even if we were to credit the theory that borderline personality disorders may be passed from generation to generation by proximity, future serious detriment is far too speculative to justify terminating mother's parental rights."

In *S.W.*, the Mother conceded she was not fit at the time of trial but argued that the termination judgment should be reversed because DHS failed to provide her with dialectical behavior therapy (DBT) and therefore "failed to make reasonable efforts" to

reunify the family. Mother also argued that because she could complete DBT within a year, her child could be returned within a reasonable time and termination was not in the child's best interests. The court rejected mother's arguments and affirmed.

The trial court terminated mother's parental rights on two grounds: (1) emotional illness, mental illness or mental retardation of the parent of such nature and duration as to render the parent incapable of providing proper care for the child or ward for extended periods of time; and (2) failure to effect a lasting adjustment after reasonable efforts by available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected.

On appeal, the child argued that because mother's parental rights were terminated on the basis of her mental illness, it need not prove that it made reasonable efforts – relying on the court's observation in *State ex rel Juv. Dept. of Multnomah County* v. T.N., 226 Or App 121, 203 P3d 262 (2009) that ORS 419B.504(5) "merely states as *one factor* to be considered whether a parent has failed to make a lasting adjustment after available social agencies have made reasonable efforts," and if a parent concedes that she is unfit under another provision of ORS 419B.504, her "complaint about the need for additional efforts" is "academic." In this case, however, the court addressed mother's "reasonable efforts" argument, noting that it "need not decide" the issue of whether reasonable efforts needed to be shown.

In addition, the court held that the child could not be returned to mother within a reasonable time, because DBT was "not likely to be effective[.]" The court held that "[a]lthough [the child] does not have special needs, he had been in his grandparents' care for about 20 of the 33 months of his life by the time of the termination hearing. With no

indication of when mother might be able to safely care for him, return within a reasonable time is improbable."

2. Extreme Conduct under ORS 419B.502

State ex rel Dept. of Human Services v. K.C., 227 Or App 216, 205 P3d 28 (2009); *State ex rel Dept. of Human Services v. A.C.*, 228 Or App 403, 209 P3d 328 (2009), on reconsideration 230 Or App 119, ___ P3d ___ (August 5, 2009)

In *K.C.*, Mother appealed from a judgment terminating her parental rights on the bases of unfitness and extreme conduct. The extreme conduct allegation under ORS 419B.502 was that mother had shaken her six-month old child, causing serious physical injury. The court held, citing *Rardin*, that ORS 419B.502 "provide [s] a procedure for terminating parental rights based upon past conduct, even when the parent might be a 'fit' parent at the time of the termination proceeding" and "even if the court determines that the conduct will not recur."

Although mother's statements about what had happened to the child were inconsistent, the court found that clear and convincing evidence supported the conclusion that mother caused the injury. The court also rejected mother's argument that termination was not in the child's best interest because he was not in an adoptive placement.

A.C. was a state's appeal from a judgment dismissing the petition to terminate parental rights on the basis of unfitness and extreme conduct. In its first opinion, the court addressed only unfitness. At the time of trial, mother had completed drug treatment and was participating in drug court. She had recently married a man who was an untreated sex offender. The court affirmed, without analyzing whether mother's conduct and conditions persisted, and whether they were seriously detrimental to the child. Instead, the court held that "we agree with the trial court that the state has not carried its

burden of proving that it is highly probable that mother's child cannot be returned to her custody within a reasonable time."

Because the court did not address its assignment of error regarding extreme conduct, DHS petitioned for reconsideration. The court allowed reconsideration and affirmed.

In its petition, DHS alleged that mother's parental rights should be terminated based upon ORS 419B.502(6), which provides that parental rights may be terminated based upon "previous involuntary terminations of the parent's rights to another child if the conditions giving rise to the previous action have not been ameliorated." Specifically, the evidence established that mother's parental rights to two other children had been terminated based upon her substance abuse, her choice of unsafe partners, and her inability to maintain a stable living situation. The court held that "there is persuasive evidence that both mother and her new husband have made positive changes in their behavior and their attitudes that support the psychological evaluations concerning their potential to be fit parents. On this record, given the state of circumstances that now exist, we find that the conditions giving rise to the previous termination action have been ameliorated to the extent that termination of mother's parental rights based on her prior extreme conduct is not appropriate."

3. ICWA Standards

State ex rel Juv. Dept. of Multnomah County v. T.N., 226 Or App 121, 203 P3d 262, rev den 346 Or 257, 210 P3d 905 (2009); *State ex rel Dept. of Human Services v. K.C.J.*, 228 Or App 70, 207 P3d 423 (2009)

In *T.N.*, Mother appealed from a judgment terminating her parental rights to two children on the bases of unfitness and neglect. DHS conceded that the evidence of

neglect was insufficient to support termination. Mother conceded that her long history of untreated mental illness was a condition seriously detrimental to her children, but she argued that DHS had made inadequate efforts to provide her with services.

ICWA applied to one of mother's children. With regard to that child, the court held that ICWA required, in addition to proving the elements of ORS 419B.504, that the state demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

However, with regard to the non-ICWA case, the court observed that "ORS 419B.504(5) applies, and that statute merely states as *one factor* to be considered whether a parent has failed to make a lasting adjustment after available social agencies have made reasonable efforts." Because mother conceded that she was unfit based on other provisions of ORS 419B.504, her "complaint about the need for additional efforts" was "academic."

In *K.C.J.*, Father appealed from the judgment terminating his parental rights on the basis of unfitness in an ICWA case. The court affirmed, stating that in addition to the requirements of ORS 419B.504, the court in an ICWA case must determine "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" and that this determination must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses." In addition, DHS must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

Despite DHS's argument to the contrary, the court held that all of the elements required to terminate parental rights, including those contained in ORS 419B.504, must be proved beyond a reasonable doubt.

Permanency Cases

State ex rel DHS v. H.S.C., 218 Or App 415, 180 P3d 39 (2008); *State ex rel Juv. Dept. v. K.L.*, 223 Or App 35, 194 P3d 845 (2008); *State ex rel Juv. Dept. of Jackson County v. K.D.*, 228 Or App 506, 209 P3d 810 (2009); *State ex rel Juv. Dept. of Jackson County v. C.D.J.*, 229 Or App 160, 211 P3d 289 (2009); *State ex rel Dept. of Human Services v. E.K.*, 230 Or App 63, ___ P3d ___ (July 29, 2009)

In *H.S.C.*, the Court of Appeals reversed a judgment changing the permanent plan to adoption. Father, who had been incarcerated in an ICE facility during part of the case, appealed, claiming DHS failed to make reasonable efforts to reunify him with his daughter. The Court of Appeals reviewed two earlier permanency cases where plan changes to adoption were reversed and concluded:

> Those cases teach that DHS is obliged to undertake reasonable efforts to make it possible for the ward to safely return home based on the circumstances existing during the period prior to the permanency hearing and that period must be sufficient in length to afford a good opportunity to assess parental progress.

In *K.L.*, the Court reversed the trial court's denial of a request by both DHS and the mother to extend the plan of return to parent for 90 days. Mother was making progress but not yet in a position to have the children returned. The trial court was concerned about the length of time the children had been in substitute care and the mother's lack of independence. On *de novo* review, the Court of Appeals saw the evidence differently concluding that "we do not see a period of independence as an absolute requirement, as the trial court apparently did."

DHS had requested a 90-day continuance, which the juvenile court denied, believing that it was required to change the plan to adoption because the children had been in substitute care for 15 of the previous 22 months.

The court observed that a request for a continuance coming from DHS was entitled to "greater weight" than a request coming from a parent. It held that ORS 419B.498(2)(b) authorized DHS to defer filing a termination petition if there was a compelling reason to do so, including the fact that a "parent is successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time * * *."

The court held that because mother was successfully participating in services and the children were living with relatives, a delay in filing a TPR petition was "unlikely to be damaging." Therefore, the court should have granted the continuance.

In *K.D.*, Mother appealed from a permanency judgment changing the plan for her child from return to parent to adoption. The child was within the jurisdiction of the juvenile court due to the fact that father was an untreated sex offender (having been convicted of "statutory rape" 13 years earlier) and mother allowed him to have contact with the child. At the time of the permanency hearing, mother had divorced father, and he had not seen the child in over a year. At the hearing, all of the parties agreed that the plan should remain return to parent. Despite this, the juvenile court changed the plan to adoption.

The court reversed, holding that DHS had made reasonable efforts but that the evidence did not establish that the child could not safely be returned to mother within a reasonable time.

At the time of the hearing, the child had been in substitute care for 15 of the previous 22 months. Therefore, DHS was required to file a petition to terminate parental rights absent a compelling reason not to do so. The court found that a compelling reason existed in this case, because a new case plan was developed shortly before the hearing, and "more time was needed to assess mother's progress under the new case plan."

In *C.D.J.*, Father appealed from a permanency judgment changing the plan for his child from return to parent to adoption. The child was born in December of 2007, and placed in substitute care shortly after her birth due to mother's substance abuse issues. Father's paternity had not been established. In February of 2008, the juvenile court established jurisdiction over the child "with regard to mother." At the time, father was incarcerated, although he was due to be released in December of 2008. The permanency hearing was held eight months after the juvenile court assumed jurisdiction, and before father's paternity was conclusively established. DHS did not offer father any services while he was in prison.

The court reversed, holding that "DHS's efforts to establish father's paternity constituted reasonable efforts to make possible child's safe return home to father." However, the court also concluded "that father made sufficient progress to allow child to return home. DHS's requests, by their nature, required nothing more than father's cooperation. Although father took five months to acknowledge paternity, he ultimately both acknowledged paternity and submitted to DHS's request for a paternity test. As far as the record reveals, DHS's requests required father to do little more. Given the minimal nature of DHS's requests and the accelerated pace of the permanency hearing, father's

acknowledgement of paternity and his cooperation in paternity testing constituted sufficient progress toward reunification under the circumstances."

In *E.K.*, Mother appealed from four permanency judgments, changing the plan for three of her children to adoption and for one of the children to APPLA. Two other children remained in mother's home. The court affirmed, holding that with regard to DHS's reasonable efforts, "it was reasonable for DHS to focus on incremental changes and to suggest that mother seek community resources to gain insight into her children's special needs." Further, given the expert testimony that the children needed permanency "now," the court concluded that "the preponderance of the evidence demonstrates that it was unlikely that mother would make sufficient progress to allow the other four children to be returned within a reasonable period" of time.

Jurisdiction

State ex rel Juv. Dept. v. S.A., 230 Or App 346, ___ P3d ___, 2009 WL 2449230; *State v. S.M.P.*, ___Or App____, ___P.3d____(Sept. 16, 2009); *State ex rel Juv. Dept. v. D.T.C.*, ___Or App ____, ___ P3d _____ (October 28, 2009)

In *S.A.*, Father appealed a judgment making his child a ward. At trial father had made admissions to two allegations, but challenged the third as insufficient to establish jurisdiction and went to trial on it. That allegation read: "Father has a history of substance abuse, which, if active, would endanger the welfare of the child." Father argued that the allegation was insufficient to support juvenile court jurisdiction because it does not allege *current* endangerment. The state conceded error and the Court of Appeals agreed.

In *S.M.P.*, the trial court had dismissed a dependency petition alleging the child "suffered unexplained, non-accidental trauma" while in the care of the parents, who were separated. After trial on the mother's case, the juvenile court dismissed because the state

failed to establish its allegations against mother, who was the custodial parent. On appeal the court reversed holding that there was sufficient evidence for juvenile court jurisdiction where the state proved that: "child had been physically abused. It is 'axiomatic that the physical abuse of a child endangers the child's welfare, and, thus, furnishes a basis for the exercise of dependency jurisdiction.' *G. A. C. v. State ex rel Juv. Dept.*, 219 Or App 1, 11, 182 P3d 223 (2008) (citations omitted). Although we defer to the juvenile court's finding that mother's testimony was 'credible in every way' and accept the court's conclusion that mother did not inflict child's injuries, the evidence indicates that child suffered physical injuries most likely caused by physical abuse and that therefore child needs the court's protection." *S.M.P.* slip op at 3

In *D.T.C*, the Court of Appeals reversed a judgment establishing juvenile court jurisdiction over three of father's four children with mother. Father has another 5 year old child with Tabitha who has never been out of their care. In August of 2008 DHS filed a petition alleging that father's "substance abuse interferes with his ability to safely parent" and that "despite services offered" father had been "unable and/or unwilling to overcome the impediments to his ability to provide safe, adequate care" for the children. Testimony at the hearing related in large part to father's past alcohol abuse and involvement with DHS.

DHS first became involved with the children in 2005 when they were living with mother. In June of 2007 the juvenile court took jurisdiction over the children and ordered father to participate in substance abuse treatment at OnTrack which he did not do. He did participate in parenting classes and, despite a belligerent start, got very favorable reviews. His relationship with DHS remained antagonistic to the point he refused supervised visits

with his children, preferring to "wait DHS out." The effect of his drinking was described by his children at the time as making him "meaner" and "edgier" and that he regularly passed out on the couch.

By the time of the hearing however, father had not had a drink for at least ten months, according to Tabitha's testimony which was found credible by both the trial and appellate courts. The trial court found that father was making a good faith effort on his own and that Tabitha's testimony was "reassuring."

Nevertheless, the judge found both allegations had been proven and explained his reasoning on the second one:

> "And I don't think it's fair, I don't think it's right that if somebody comes into court later and says, 'Despite being ordered to do that, I managed to do the equivalent on my own and therefore we should disregard what this judge has ordered that I should do.' I don't think that's--I don't think I can do that or should do that and I'm not going to do it in this case."
>
> *D.T.C.* slip op at 5

Calling it a close case, the Court of Appeals reversed holding that the state failed to prove that under the totality of the circumstances there was a reasonable likelihood of harm to the welfare of the children. The court noted that the court's focus is on the child, not "on how 'fair' the court's decision is to 'other people' or on father's obstinacy and failure to comply with specific DHS directives." *D.T.C.* slip op at 8.

The court concluded that "because the state has not shown that father was using alcohol at the time of the dependency hearing, nor that he was then at risk of relapsing, nor that a relapse was likely to endanger the children's welfare, it has failed to meet its burden." *Id.*

The court's discussion of the risk of relapse is instructive:

"Here, we perceive little if any evidence that father's condition was harmful to the children in the past. From the record, we learn that he "act[ed] out" when he drank, that his conduct when drinking frightened the children, and that drinking made him mean and "controlling." Obviously, that is not ideal parenting. However, without more, it is not inherently or necessarily more harmful or dangerous than other varieties of parenting that would, by no stretch of the imagination, justify state intervention into the parent-child relationship. Passing out is a different matter; had father been the only caregiver in the home when that occurred, we would readily conclude that doing so endangered the welfare of the children. However, at all relevant times, father was living with Tabitha, a nondrinker, and there is no evidence that she was not in the home when father drank himself unconscious." *D.T.C.* slip op at 7.