
Juvenile Law Reader

Youth, Rights & Justice
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"The number and types of legislation impacting children and youth that will be introduced in 2013 remain largely unknown."

2013 Legislative Preview

By Mark McKechnie, Executive Director

The 2013 Oregon Legislative Session will soon be upon us, and thousands of bills will be introduced and considered. The 2013 session will include a number of changes in the composition of the House and Senate and in the schedule of the session. The 2011-12 Legislature was characterized by an unusual 30-30 split between Republicans and Democrats in the House. This meant that each committee was led by co-chairs, including one from each party, and the House was led by Republican and Democratic co-speakers.

There was a great deal of turnover in both chambers, resulting from a number of retirements and other changes during the 2012 elections. The most significant result is that the Democrats have a majority in the House, 34 seats to the Republicans' 26 seats. Rep. Tina Kotek has been chosen Speaker of the House by her caucus. While there were a number of changes in the Senate, as well, the overall composition has not changed. Democrats maintain 16 seats, compared to 14 seats held by Republicans.

Unlike past legislative sessions, the 2013 session will begin with three "organizational days" in January, the 14TH through the 17TH. There will then be a break until the session

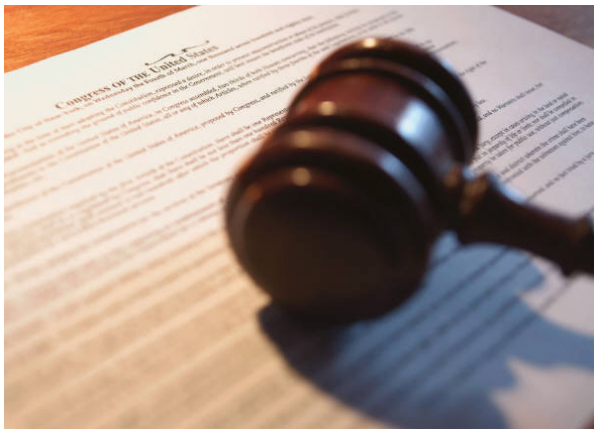
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« *Legislative Preview continued from previous page* begins on February 4TH. Legislation that was filed pre-session will be introduced in January, but hearings will not occur until the official start to the session in February. Additional bills will be introduced after the session begins.

The number and types of legislation impacting children and youth that will be introduced in 2013 remain largely unknown. Here is a preview of a few issues that will be on the agenda, however.

Youth, Rights & Justice Priorities

Youth, Rights & Justice has requested the drafting and introduction of two bills in the 2013 session. First, YRJ has requested a bill to modify



state statutes related to school discipline in order to limit zero tolerance policies and encourage schools to use more alternatives to suspension and expulsion. (To read more about the problems with Oregon's current school discipline policies, see: http://www.oregonlive.com/opinion/index.ssf/2012/04/student_achievement_education.html)

LC 2121 will be introduced by the House Committee on Education. The bill will limit mandatory expulsions to the requirements of the federal Gun Free Schools Act. As a result, it will allow local school district administrators to use greater discretion than Oregon law currently allows them to determine on a case-by-case basis whether students should be suspended or expelled.

The bill also requires districts to update their student discipline policies to use individualized and developmentally-appropriate approaches to remedy student behavior problems. The legislation encourages districts to use graduated and multi-faceted approaches to improving student behavior and to

minimize the use of school exclusion.

Youth, Rights & Justice used legislation recently passed in Colorado as a model for this bill. Other states are considering similar changes. Law enforcement groups in California are pressing for legislation to reduce the use of school exclusion there, as well. (See: "Classmates not Cellmates: Effective School Discipline Cuts Crime and Improves Student Success," a report by Fight Crime: Invest in Kids, California, at: <http://www.fightcrime.org/SchoolDisciplineReportCA>)

The Oregon bill encourages the use of evidence-based approaches such as Positive Behavioral Supports and Interventions (PBIS) and Restorative Justice. As of 2012, over 60% of Oregon schools have already implemented or begun to implement PBIS as an approach to supporting positive behavior school wide and to teaching positive behavior skills to at-risk students.

LC 209 will be introduced through the House Judiciary Committee. The bill seeks three changes to state law related to juvenile sex offender

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Youth, Rights & Justice
401 NE 19TH Ave., Suite 200
Portland, OR 97232
(503) 232-2540
F: (503) 231-4767
www.youthrightsjustice.org

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Youth, Rights & Justice is dedicated to improving the lives of vulnerable children and families through legal representation and advocacy in the courts, legislature, schools and community. Initially a 1975 program of Multnomah County Legal Aid, YRJ became an independent 501 (c) (3) nonprofit children's law firm in 1985. YRJ was formerly known as the Juvenile Rights Project.

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Queries regarding contributed articles can be addressed to the editorial board.

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registration: 1) Eliminates the requirement to register when a youth is adjudicated of a felony sex offense when the act was committed before the age of 16; 2) Allows a person required to register on the basis of a juvenile adjudication in Oregon to apply for relief in the court where the adjudication occurred, even after the person has moved to another state; and 3) Creates an exception to the adult relief statute to allow a person to apply for relief from registration when the criminal act occurred before the person reached the age of 16 but the crime was first reported to law enforcement after the person was 18 years or older.

Public Defense Funding

In addition to the policy bills described above, YRJ also supports Policy Option Packages (commonly referred to as “POPs”) proposed by the Office of Public Defense Services (OPDS). One POP seeks to increase compensation for court-appointed attorneys at the trial level, and reduce the pay disparity between public defenders and their counterparts in the district attorneys’ offices. The POP targets disparities in the counties

where there is the greatest difference between PD and DDA salaries. For example, the starting salary for an entry-level deputy district attorney can be \$21,000 per year higher than an entry-level public defender in Multnomah County, even though both attorneys appear on the same cases.

The second POP is designed to reduce caseload sizes in juvenile dependency cases. Evidence from other states and the ABA guidelines for juvenile attorneys indicate that caseload sizes should be no higher than 100 cases per attorney and that optimal caseload sizes for attorneys representing clients in juvenile court range between 60-80 active cases. A pilot study of parents’ attorneys in Washington State found that children were more likely to reunify with parents, that reunifications happened more quickly and that reunifications were more successful when attorney caseloads were limited to 80 or fewer active cases. The study also found that reduced delays also led to more timely adoptions when reunification could not be achieved. In addition to lower caseloads, attorneys in the Washington pilot were subject to increased performance standards and

training requirements, and they also had increased access to investigators, social workers and expert witnesses.

For more information on the OPDS budget, read the statement on the 2013-15 OPDS budget request by OPDS executive director Nancy Cozine in this issue.

Education Programs in Detention Facilities

The Oregon Juvenile Department Directors Association is advancing legislation (LC 1453) to ensure adequate funding for school programs in county detention facilities. The legislation would increase the weighting of funding for students served in these programs. Youth in the juvenile justice system often have significant academic and behavioral needs and are much more likely to require special education services. Funding models, which are based on average daily attendance, have disadvantaged school programs in local detention facilities. Because these programs often house youth for short time periods prior to adjudication or for short-term sanctions, the average daily attendance is much more

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volatile than it is for other types of schools. These school programs have lost or risked losing teacher staffing due to these fluctuations in daily attendance.

Foster Youth Bill of Rights

Children First for Oregon and its Oregon Foster Youth Connection have requested the introduction of a “Foster Youth Bill of Rights.” The bill would require the Department of Human Services to develop a document enumerating the basic rights of foster children and youth and provide the notice to dependent children upon entering foster care and upon each change in placement. The bill also requires that the notice be posted in DHS-certified foster homes and other substitute care settings. The bill also requires DHS to adopt rules establishing a complaint process regarding the placement or services they receive as a foster child. The bill also requires that children and youth be notified of court hearings and CRB reviews and be provided transportation to attend hearings when they wish to participate.

The bill also focuses on notices

to older youth who are preparing to transition from foster care to adulthood, including information on obtaining a driver’s license; the availability of the state tuition and fee waiver; how to obtain health services; and how to obtain a copy of the youth’s credit report.

Court Appointed Special Advocates’ (CASA’s) Proposed Legislation



While the draft legislation is not yet available at press time, the state’s CASA program directors have circulated a list of legislative concepts designed to ensure CASAs’ access to information and intended to expedite the path to permanency for children in care, particularly for those age three and under. The CASAs were talking to Youth, Rights & Justice after the deadline for bill filing and soliciting input from various parties.

There may be substantial changes made to the bill after it is introduced in 2013. Youth, Rights & Justice urged the CASAs to strike a better balance between the child’s permanency needs and the due process rights of parents to respond to allegations made against them.

More Expected on Child Welfare

Every session there are a number of bills introduced to address problems in the state’s child welfare system. At this time, there are a number of placeholder bills introduced that will be amended during the 2013 session. Stay tuned.

Public Safety Commission

The Governor’s Commission on Public Safety recently finalized its report. The commission opted not to make specific recommendations, but rather outlined a menu of choices for the Governor and Legislature to consider for the 2013 session. The Governor charged the commission, which included representatives from the legislature, the courts, the public safety system and the public, to find

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cost-effective alternatives to Oregon's current corrections practices, which will continue to protect the public at a lower cost. Current projections predict that Oregon would need to add 2,300 prison beds over the next decade under current laws and sentencing practices.

The Commission was assisted in its efforts by the PEW Commission on the States, which has assisted several other states in their efforts to reform criminal justice policy, reduce system costs and implement cost-effective approaches to public safety. Commission member Dick Withnell, who was appointed by the Governor as the public's representative on the commission repeatedly advocated for modifications to Measure 11 sentences as they apply to youth who were age 15-17 years at the time of offense. According to the report, Measure 11 accounts for "14 percent of 2011 admissions but 49 percent of the prison time imposed in 2011."

Two options to modify Measure 11 sentences were included in the report. Option 1 would remove second degree assault and robbery and first degree sex abuse from the list of

offenses requiring mandatory minimum sentences. Option 2 would reduce mandatory minimums for these offenses to 36 months. The report also included an option to add "second look" provisions for youth ages 15 to 17 who are convicted under Measure 11. The report includes the option to: "Allow all youth offenders sentenced as adults to be reviewed by a judge at 50 percent and 75 percent of their sentences upon petition by the Oregon Youth Authority (OYA). This policy would be prospective and would not apply to youth offenders currently in the custody of OYA."

The CPS issued this release on December 21, 2012:

"Commission on Public Safety Submits Report on Corrections and Sentencing Reforms"

Commission report includes policies to improve public safety, hold offenders accountable, avert \$600 million.

SALEM – The Oregon Commission on Public Safety released today its final report on policy reforms aimed at protecting public safety, holding offenders accountable, and controlling corrections costs. Convened by the governor in May



2012 at the request of the Legislature, the Commission was tasked with analyzing Oregon's corrections and sentencing data, auditing existing policies, and submitting a package of policy options.

The Commission included legislators from both parties and chambers as well as practitioners from the criminal justice system, including judges, a district attorney, a member of the defense bar, a community corrections director, a sheriff, a public member, and the director of the Oregon Department of Corrections. The Commission met 10 times over six months to review data, hear testimony, and engage in policy discussions that were open to the public and archived online.

With the completion of this data-driven public process, today the

Commission submitted to the governor a package of policy options focused on achieving fiscally sound and pragmatic policy solutions that offer a better public safety return on taxpayer investments. The Commission did not endorse one specific path to reform but left it to the Legislature to consider various options. Taken together, all the Commission's policy options would avert the projected 2,300 prison beds and the accompanying \$600 million dollars in additional corrections costs over the next decade. The complete report can be found here: <http://www.oregon.gov/CJC/Pages/2012ComPubSaf.aspx>."

The Commission did not issue a single set of recommendations, but rather provided a menu of options. The Governor has said that his recommended budget for 2013 assumes savings or reinvestment through the reform of current corrections and criminal justice policies. The Legislature would need to adopt many of the strategies outlined in the report in order to realize the savings sought by the Governor. ●

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Incarcerated Parents and their Children

By Caitlin V. Mitchell

The United States incarcerates more people than any other country in the world, with 2.3 million people currently in the nation's prisons or jails—a 500% increase over the past thirty years.¹ What people often don't realize, however, is the toll that incarceration takes on families: of the 74 million children in the United States in mid-2007, 1.7 million, or 2.3%, had an incarcerated parent, with roughly half of these children under ten years old.² In 2007, most people incarcerated in the United States reported having minor children: 63% of federal inmates and 52% of state inmates.³ These statistics are even starker in communities of color, where 1 out of 15 black children reported having a parent in prison, compared to 1 out of every

111 white children.⁴ In Oregon, roughly 20,000 to 25,000 children have an incarcerated parent.⁵



PHOTO © HELENE SOUZA

Although effects on family are not generally taken into consideration when legislatures or the voting public passes tough-on-crime laws

or when courts enforce those laws through sentencing, incarceration creates enormous collateral consequences for parents, children, and society generally.⁶ When incarcerated parents are unable to communicate with their children they tend to have worse outcomes, both in terms of their progress and behavior inside the prison, and their recidivism rates after they are released.⁷ Having a parent in prison can be highly traumatic and stigmatizing for children and is correlated with children ending up in prison themselves as juveniles or adults.

Parents and children share a constitutional right to family integrity based in the Due Process Clause of the Fourteenth Amendment – a right that doesn't evaporate just because a parent is in prison.⁸ With the right kind of support, children can maintain meaningful relationships with their incarcerated parents⁹ that can be highly beneficial to both.¹⁰ Too often, however, our society has been unable to support these families, to the detriment of both parents and children.

Parents in prison face many challenges. On a daily basis, practical obstacles such as distance, expense of travel, and the need for extensive coordination between the Department of Corrections and social service agencies make it difficult for parents and children to maintain relationships. Some correctional facilities are located in remote areas that are far from people's homes and communities, and this distance can pose a major obstacle to visitation.¹¹

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A recent national study found that only 53% of parents in state prison had spoken with their children over the telephone, and that only 42% had a personal visit, since they began serving their sentence.¹² Although there are a few organizations in Oregon that offer transportation for children, many parents—particularly those whose children are in foster

care—see their children infrequently. A recent study conducted by the Oregon Department of Corrections on prison visitation found that many visitors travel between four and eight hours to see their incarcerated family member.¹³ Even when transportation can be arranged, bringing children into correctional facilities can be difficult due to waiting in lines, clothing rules, lack of adequate food, access to rest rooms, and other issues.¹⁴

In the most extreme situations, incarcerated parents without financial resources or strong family ties risk losing their parental rights permanently.¹⁵ This is due in part to the Adoption and Safe Families Act (ASFA), which requires that states file a petition to terminate parental rights if a child has been in foster care for

fifteen of the most recent twenty-two months.¹⁶ This deadline has increased the number of incarcerated parents who lose their parental rights,¹⁷ as the typical sentence for an incarcerated parent is between eighty and one hundred months.¹⁸ Although median length of stay for inmates at correctional facilities in Oregon is shorter—65.64 months—it is still significantly longer than the 15-month ASFA deadline.¹⁹

There are a number of positive developments in Oregon that point toward a greater recognition of incarcerated parents and their children. First, the Oregon Court of Appeals has recently been more active in the area of juvenile dependency law, including reversing a termination of parental rights case involving a mother in prison and reversing a permanency judgment in a case involving a jailed father.²⁰ These cases are important because they emphasize that incarceration does not necessarily render a parent “unfit” and that these parents are entitled to the same

support services as their non-incarcerated counterparts.

Secondly, there are a number of organizations that are providing crucial, life-changing support for incarcerated parents and their children. Two examples are the Portia Project and Sponsors, both based in Eugene. The Portia Project assists incarcerated women with their family-law-related legal issues, with the help of law students from the University of Oregon’s “Women in Prison” legal clinic. The organization is also involved in educating the public about incarceration in Oregon—most recently, in November of this year, it organized a two-day conference at the University of Oregon Law School entitled, “Prisons and People: A Focus on Women and Their Children.” Sponsors, another not-for-profit organization in Eugene, assists people released from prison in successfully re-entering into the community, through mentoring, transitional housing, counseling, and a number

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of other programs. It is currently in the process of raising money to build a new facility for parents released from prison who are able to re-gain custody of their children, a crucial resource for parents who wish to reunify but lack the financial resources to provide adequate housing for their families. Other organizations in the area that do important work with families divided by incarceration include the Center for Family Success (through Pathfinders of Oregon), Girl Scouts Behind Bars, and the Early Head Start program at Coffee Creek Correctional Facility. Finally, the Oregon Department of Corrections has been supportive of parents' efforts to maintain relationships with their children. In particular, Coffee Creek Correctional Facility—Oregon's only women's prison—offers programming for parents, has visitation facilities that are child-friendly, and hosts a yearly event called "Through a Child's Eyes," during which mothers spend an entire day

with their children.

The Portia Project, Sponsors, the Oregon DOC, and other organizations in Oregon that work with incarcerated parents and parents recently released from prison are addressing what is now a national issue: the fact that this country's high incarceration rates and lengthy prison sentences mean that many children in the United States are growing up with a parent in prison. Although incarcerated parents and their children continue to face many obstacles to maintaining their relationships, there is a growing awareness that until we are able to respect and support these families, the rights and interests of both parents and their children will be compromised. ●

¹ William J. Sabol ET AL., Bureau of Justice Statistics, Prisoners in 2008 (2008).

² Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, Dep't of Justice, Special Report: Parents in Prison and Their Minor Children 1-2 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>; see also Sarah Schirmer ET AL., The Sentencing Project, Incarcerated Parents and Their Children: Trends 1991-2007, at 6 (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

³ Glaze & Maruschak, *supra* note 2, at 1.

⁴ Schirmer ET AL., *supra* note 2, at 1-2.

⁵ Department of Corrections Family Visitation Study, Oregon Department of Corrections (2009), available at www.oregon.gov/DOC/RESRCH/docs/visitation_study_200910.pdf.

⁶ See Renny Golden, War on the Family: Mothers in Prison and the Families They Leave Behind (2005) (analyzing collateral impacts of mass incarceration).

⁷ Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities 8 (Jeremy Travis & Michelle Waul eds., 2003); William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. Res. Crim. & Delinq. 287, 304 (2008); Jeremy Travis, Families and Children, 69 Fed. Probation 31, 31-32 (2005).

⁸ Stanley v. Illinois, 405 U.S. 645, 651 (1971).

⁹ Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 Fordham Urb. L.J. 1671, 1683-84 (2003).

¹⁰ Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. Crim. L. & Criminology 77, 83 (2011).

¹¹ See U.S. Department of Justice National Institute of Corrections, *Developing Gender-Specific Classification* (2004).

¹² Glaze, *supra* note 2.

¹³ Department of Corrections Family Visitation Study, *supra* note 5 at 11.

¹⁴ *Id.* at 16.

¹⁵ See Arlene F. Lee ET AL., Child Welfare League of America, the Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents 7-8 (2005).

¹⁶ 42 U.S.C. § 675(5)(E) (2006).

¹⁷ See Lee ET AL., *supra* note 15.

¹⁸ Steve Christian, Nat'l Conference of State Legislatures, Children of Incarcerated Parents 3 (2009), available at www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf.

¹⁹ Quick Facts, Oregon Department of Corrections (2012) available at http://www.oregon.gov/DOC/GECCO/docs/pdf/IB_53_quick_facts.pdf.

²⁰ *Dept. of Human Services v. C.M.P.*, 244 Or App 221 (2011); *State ex rel. Jur. Dept. v. Williams*, 204 Or App 496 (2006).

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Case Summaries

Dependency and Termination of Parental Rights Cases

There were a number of cases decided since the last Reader (including some that will be reviewed in our next issue) and the editors are grateful to **Kimberlee Petrie Volm** and **Valerie Colas** from the **Juvenile Appellate Section of OPDS** for their work summarizing them.

Termination of Parental Rights

Appointment of a Guardian-Ad-Litem for Parent

Dept. of Human Services v. K.L.W., 253 Or App 219, 288 P3d 1030 (October 24, 2012) (Nakamoto, J.)

In 2007, the department removed

the father's child, L, because the father exhibited symptoms of paranoid delusion and required hospitalization. Thereafter, the juvenile court asserted jurisdiction based on the father's mental health condition.

The department filed a petition to terminate the father's parental rights on the basis of ORS 419B.504 (unfitness). And, it filed a motion to appoint a guardian *ad litem* for the father arguing that he lacked substantial capacity to "understand the nature and consequences of the proceeding or to give direction and assistance to his attorney on decisions a parent must make in [the termination] proceeding [.]” ORS 419B.231(2)(a)(A). The father's counsel opposed the motion, arguing that she felt confident that the father understood the nature of the termination proceeding.

At the hearing, the department's expert testified that the father's delusional disorder and tendency to veer off topic would make it difficult for his counsel to represent him during

the termination proceeding and that the father was unable to act according to his best interests. The juvenile court appointed a guardian *ad litem*. Shortly thereafter, the guardian *ad litem* stipulated to the allegations in the petition to terminate the father's parental rights.

At the subsequent settlement hearing, the father's attorney explained that she signed the stipulated judgment because it was her duty to follow the guardian *ad litem*'s directions. The court did not allow the father to speak, reasoning that only the guardian *ad litem* could speak on the father's behalf. The juvenile court entered the stipulated judgment thus terminating the father's parental rights to L.

The father appealed, arguing that the appointment of a guardian *ad litem* was invalid and because the juvenile court should not have appointed a guardian *ad litem*,

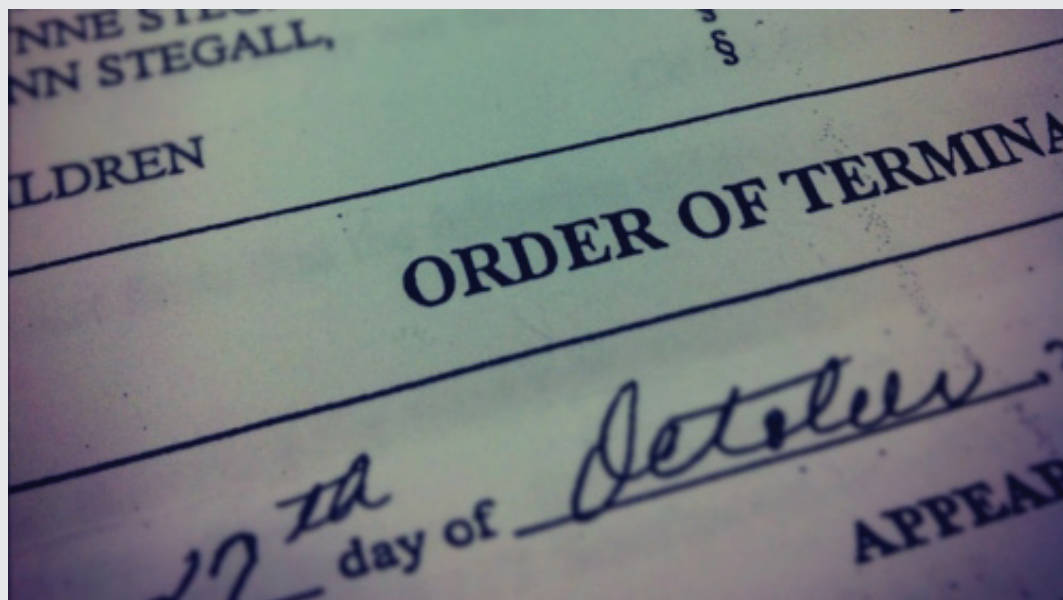
the guardian *ad litem*'s consent to the stipulated judgment was invalid. Alternatively, the father argued that even if the appointment of the guardian *ad litem* was valid, the process employed by the juvenile court in terminating his parental rights was fundamentally unfair and so violated his rights to procedural due process.

Reasoning that there was sufficient evidence in the record to support the juvenile court's finding that the

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father's disability rendered him unable to direct and assist his counsel, that the juvenile court did not abuse its discretion in appointing a guardian *ad litem* for the father; and that the guardian *ad litem* had the authority to stipulate to the termination, the Court of Appeals affirmed:

“In *Cooper*, we addressed whether the juvenile court could adjudicate the merits of a termination peti-

tion when the mother failed to personally appear at the pretrial hearing, but the mother's guardian *ad litem* requested a trial on her behalf. 188 Or App at 595. We determined that, when a guardian *ad litem* is appointed for a parent, ‘it is the function and responsibility of a guardian *ad litem* to appear on behalf of, and represent the interests of, the incapacitated person.’ 188 Or App at 598. We noted, however, that the guardian *ad litem*

does not represent the parent ‘for all purposes.’ See *id.*, (noting that in *Christmas v. Scott*, 183 Or 113, 117, 117-18, 191 P2d 89 (1948), a case involving the appointment of a guardian *ad litem* for a ‘deranged person,’ the Supreme Court held that an action is properly prosecuted in the name of the deranged person and does not belong to the guardian *ad litem*). Ultimately, we concluded that, for the purposes of ORS 419B.917, which requires personal

appearance by a parent, the guardian *ad litem*'s appearance and assertion of the mother's right to a trial on her behalf constituted an appearance by the mother. *Id.* at 599; see also *State ex rel Dept. of Human Services v. Sumpter*, 201 Or App 79, 85, 116 P3d 942 (2005) (“The guardian *ad litem* *** has the legal authority to waive the right to a trial.”)

“Shortly after our decision in

Cooper, the legislature enacted ORS 419B.234 which sets out the duties of a guardian *ad litem* in the juvenile dependency context. Or Laws 2005 ch 450, §3. Under ORS 419B.234, after a guardian *ad litem* is appointed, the guardian *ad litem* must ‘[m]ake legal decisions that the parent would ordinarily make concerning’ the termination proceeding. ORS 419B.234(3)(b).”

K.L.W., 253 Or App at 230 (footnote omitted).

The Court of Appeals did not review the father's due process argument because the father did not develop the argument on appeal. The Court of Appeals noted that its holding was limited to the father's arguments on appeal, and that it did not reach the issue of whether ORS 419B.234 authorized a guardian *ad litem* to stipulate to the termination judgment or whether any such grant of authority would violate a parent's due process rights. *Id.* at 234 fn 8.

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Dispositional Findings— Preservation of Error Required

***Dept. of Human Services
v. C.C., 253 Or App 271,
P3d (November 7, 2012)
(Wollheim, J.)***

The mother appealed the juvenile court's dispositional judgment, arguing that it was defective because the juvenile court failed to include the required ORS 419B.340(2) determinations, *viz.*, a brief description of the department's efforts to prevent the child's out-of-home placement or to reunify the family, and an explanation of why further efforts could not have prevented the child's removal. The mother acknowledged that this argument was not made at the trial court, but argued that under *State ex rel DHS v. M.A.*, 227 Or App 172, 182-83, 205 P3d 36 (2009), preservation was not required. In the alternative, mother requested that

the court exercise its discretion and review the error as plain error.

The department conceded that the juvenile court erred in failing to include the brief description of the department's reasonable efforts as required by the statute, but argued that under *Dept. of Human Services v. D.D.*, 238 Or App 134, 141, 241 P3d 1177 (2010), *rev den*, 349 Or 602 (2011) the mother was required

to have preserved her claim below.

Reasoning that *D.D.* controlled, the Court of Appeals affirmed:

"In *Dept. of Human Services v. D.D.*, 238 Or App 134, 141, 241 P3d 1177 (2010), *re den*, 349 Or 602 (2011), we concluded that the findings required by ORS 419B.340(2) must be included in the dispositional order. It is not sufficient for the juvenile court to

recite the findings on the record at the hearing. *Id.* at 142. DHS agrees that the juvenile court's failure to include the required findings in the dispositional judgment was error, but argues that mother failed to preserve the error.

"* * * *"

"We have refused to extend the reasoning of *M.A.* to a juvenile court's failure to include the required findings of ORS 419B.340(2) in a dispositional order. As we explained in *D.D.*, unlike the permanency judgment, which may be entered up to 20 days after the hearing, a dispositional order is required to be entered at the end of the hearing. *See* ORS 419B.325(1) (the juvenile court shall enter an appropriate dispositional order at the termination of the hearing). Because of that distinction, we concluded in *D.D.* that a parent can, and is required to, object to the court's failure to include the statutorily



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required findings in the disposition order in order to preserve the issue for appeal. 238 Or App at 144-45.

“Mother asserts that this case is distinguishable from *D.D.*, because the juvenile court in this case did not, in fact, enter the dispositional order and judgment at the termination of the hearing, as required by ORS 419B.325(1), but delayed entering the judgment until three days after the conclusion of the hearing. As in *M.A.*, mother asserts she had no practical ability to raise the issue of the defect in the judgment until the judgment was entered. Consequently, she contends, she was not required to object, and her claim of error is not subject to the constraints of plain error review.

“We reject mother’s attempted distinction of *D.D.* Because a dispositional order is required to be entered at the conclusion of the hearing, the court’s failure to make

the required finding is ripe for objection at that time, irrespective of the court’s delay in entering the order. We conclude for that reason, as we did in *D.D.*, that mother had the opportunity and was required to preserve her claim of error that the court failed to make the required findings. 238 Or App at 144.”

C.C., 253 Or App at 275.

Uniform Child Custody Jurisdiction and Enforcement Act

***Dept. of Human Services v. S.C.S.*, 253 Or App 319, _P3d _(November 7, 2012) (Schuman, J.)**

The mother had lived in Oregon for four years, became pregnant while in Oregon, and received prenatal care in Oregon. The department initially became involved with the mother after she had tested positive for methamphetamine while pregnant.

Thereafter, the mother returned to Indiana to give birth to N. A few months later, the mother returned to Oregon to collect her belongings. While in Oregon, the mother sought medical care for N from various providers, many of whom believed that she suffered from some sort of mental health issue. The providers reported their concerns to the department.

During the investigation, the mother informed the caseworker that N was in Indiana, even though N was still in Oregon. The mother attended a meeting with the caseworker and the caseworker asked the mother to submit a urine sample for urinalysis. In addition, the caseworker informed the mother that, because of concerns that the mother would run from investigation, the department was going to take N into protective custody. The mother became agitated and almost dropped N. After N’s removal, the mother and her family made threatening phone calls to the department, and the mother threat-

ened the department’s staff during visits.

The juvenile court asserted jurisdiction over the mother’s infant, N, due to the mother’s mental or emotional condition “that interferes with her ability to parent and that, while suffering from a mental or emotional condition, she is unable or unwilling to provide N with care, guidance and supervision necessary for N’s physical, mental, and emotional well being, placing N at risk.”

The mother appealed, arguing that the juvenile court lacked subject matter jurisdiction over N under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and that the court had erred in asserting jurisdiction.

Reasoning that the juvenile court had subject matter jurisdiction over N, and that the department had met its burden to prove that jurisdiction was warranted, the Court of Appeals affirmed:

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“We begin with the question of subject matter jurisdiction. The UCCJEA, ORS 109.701 to 109.834, sets forth the rules for determining jurisdiction in custody cases involving multiple jurisdictions. Under ORS 109.741(1), an Oregon court has jurisdiction to make an initial custody determination if:

‘(b) A court of another state does not have jurisdiction under subsection (1)(a) of this section, or a court of the home state of the child has declined to assert jurisdiction on the ground that this state is the more appropriate forum under ORS 109.761 or 109.764, and:

‘(A) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

‘(B) Substantial evidence is avail-

able in this state concerning the child’s care, protection, training and personal relationships;

“A state is the ‘home state’ of a child less than six months old if it is the state in which the child lived from birth. ORS 109.704(7). N in this case was less than six months old when proceedings began; she was born on September 19, 2011, the petition concerning her was filed on December 9, 2011, and the hearing occurred on February 6, 2012. At the time, she had not lived in any state ‘from birth.’ Thus, ORS 109.741(1)(a) does not confer jurisdiction on Oregon or Indiana; N had no home state as that term is defined.

“ORS 109.741(1)(b), on the other hand, *does* confer jurisdiction on Oregon because no other state has jurisdiction under paragraph (1)(a) and both subparagraphs (1)(b)(A) and (1)(b)(B) apply. N and mother ‘have significant connection with’ Oregon beyond mere physical

presence. ORS 109.741(1)(b)(A). Although mother testified that she had come to Oregon with N to collect her belongings and that she had intended to return to Indiana and would have done so if DHS had not removed N, the record also shows that mother had lived in Oregon for four years before she returned to Indiana to give birth to N, had received prenatal care in Oregon, and that, in the six weeks that she and N were in Oregon before N was removed from mother’s custody, mother applied for and collected public assistance, which requires that the recipient be an Oregon resident. ***. Mother also had multiple contacts with medical professionals in Oregon with regard to her concerns for N’s health. Mother and N were living in Oregon and collecting public assistance when N was removed from mother’s care in December 9, 2011.

“Further, all of the relevant evidence ‘concerning the child’s care,

protection, training and personal relationships’ was in Oregon: Mother’s contacts with health care institutions and professionals, her interactions with DHS, and her erratic conduct. We therefore conclude that, pursuant to ORS 109.741(1)(b), the Oregon court had jurisdiction to make an initial custody determination for N.

“That standard [for juvenile court jurisdiction] is met if, ‘under the totality of the circumstances, there is a reasonable likelihood of harm[.]’ *Dept. of Human Services v. C.Z.*, 236 Or App 436, 440, 236 P3d 791 (2010). We recognize this is a close case. Had the court’s and agency’s concerns involved only mother’s idiosyncratic theories of infant nutrition (about the risk which there was no medical testimony), her distrust of and hostility toward the agency that was, after all, questioning her drug use and interfering with her

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relationship with her infant daughter, see *State ex rel Dept. of Human Services v. Smith*, 338 Or 58, 83, 106 P3d 627 (2005) (hostility toward DHS should not distract from focus of welfare of child in termination proceeding), or her seeking out unnecessary medical care for N, see *State ex rel Dept. of Human Services v. Shugars*, 202 Or App 302, 312, 121 P3d 702 (2005) (such conduct not sufficient to justify juvenile court asserting jurisdiction), we might well conclude that DHS failed to prove its allegation by a preponderance of the evidence. But this case involves more. In particular, mother's decision to take N out of OHSU before medical personnel cleared her for discharge, her violence and threats against DHS employee, and her conduct at the hearing as reported by the trial court judge persuade us that mother's mental and emotional health, manifesting itself by a pattern of exaggerated, erratic,



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and irrational behavior concerning N, shows an inability to properly assess and make decisions concerning N's needs, and gives rise to a reasonable likelihood of a risk of harm to N."

C.S.C., 253 Or App at 324-326 (emphasis in original).

Jurisdiction and Permanency

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***Dept. of Human Services v. M.M.B.*, 253 Or App 431, _P3d_ (November 7, 2012) (Nakamoto, J.)**

In 2010, the mother strangled A's older sibling, O, in an alcohol-related incident. The department removed A, who was 14 years old at the time, from the mother's care, and sought juvenile court jurisdiction. Subse-

quently, the juvenile court asserted jurisdiction over A based on the mother's admissions that:

"A. Mother entered a guilty plea to Misdemeanor Assault IV and Strangulation of said child or said child's sibling.

"B. Said child and said child's sibling report that mother has an alcohol problem that disrupts her ability and availability to adequately and appropriately parent and that makes her a danger to said child."

M.M.B., 253 at 434.

After the juvenile court established jurisdiction over the mother's child, the mother engaged in all services requested by the department, and complied with the terms of her probation. Thereafter, the mother moved the juvenile court to dismiss jurisdiction over A because the factual bases for jurisdiction no longer existed. The department then notified the parties that it intended to change A's permanency plan from

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reunification to guardianship. At the consolidated hearing on both the mother's motion to dismiss and the department's motion to change A's permanency plan, the department presented evidence that (1) mother and A argued during visits, after counseling sessions, and over the phone; (2) mother became defensive when challenging topics were discussed; (3) mother desired to improve her parenting practices; (4) A wanted to live with his foster parent and did not believe that mother's behavior had changed; (5) A was concerned his future arguments with mother could become physical; and (6) A was concerned that mother would not remain sober after her probation ended. The juvenile court denied the motion to dismiss and changed A's permanency plan from reunification to guardianship.

The mother appealed, arguing that the juvenile court erred in denying her motion to dismiss, because she had ameliorated the adjudicated

bases for jurisdiction, *viz.*, her convictions and alcohol problem. The mother contended that her service provider and probation officer's satisfaction with her progress demonstrated that she had ameliorated the jurisdictional bases. In mother's view, "the [juvenile] court impermissibly relied on A's testimony that 'he did not believe the patterns of [mother's] previous behavior had changed.'" *Id.* at 440. Reasoning that, *inter alia*, the court's implicit factual findings supported the predicate legal conclusions necessary to deny the motion to dismiss and change A's permanency plan, the Court of Appeals affirmed:

"Based on the allegations of the amended petition, the findings in the jurisdictional judgment, and the Action Agreement attached to the judgment, we agree that mother was on notice that she needed to address her alcohol abuse as well as her assaultive behavior and anger management problem. However, the Action Agreement directly con-

tradicts mother's theory that she was not on notice that her progress could be measured by whether other people, including her son, observed a change in her behavior. Mother knew that the changes she must make 'must be noticed over time by significant others, including my child(ren).' Moreover, as DHS contends, the juvenile court's decision to continue jurisdiction and wardship implicitly was based on mother's failure to adequately address her anger management problem, not simply on A's expressed beliefs. DHS also contends that relevant portions of the record besides A's opinion that mother had not changed her behavior supports that decision. We agree with DHS.

"Although there is no evidence that mother physically abused A or expressly threatened to do so during the wardship, the record supports the court's implicit finding that mother continued to have an anger problem, and mother's problem

was significant enough to affect A's psychological adjustment. ** *. And, DHS introduced evidence that mother's anger would likely negatively impact A ***. *Id.* at 440, 441

Dept. of Human Services v. J.N., 253 Or App 494, _P3d_ (November 1, 2012) (Ortega, P. J.)

In 2008, the department removed the father's child, M, from her mother's care. At that time, Johnson was listed as M's legal father. Thereafter, in 2010, the juvenile court changed M's permanency plan from reunification to adoption, and the department filed a petition to terminate the mother's parental rights.

In 2002, the mother contacted the father to inform him he had a daughter, but called back a day later to state that Johnson was M's father. Subsequently, in 2010, the department provided the father with a paternity

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test the results of which showed that he was M's biological father. The juvenile court then asserted jurisdiction over the father, based on the father's admission to the following:

"The father was unable to establish or maintain a relationship with the child which would allow him to act protectively on the child's behalf. The father does not have a custody order which would allow him to protect the child and is in need of juvenile court jurisdiction to protect the child."

(Slip op at 5).

After learning he was M's biological father, the father maintained telephone contact with M and they had two face-to-face visits, one in Oregon, and one in North Carolina. Further, the father and M completed a psychological and parent-child evaluation. The evaluator noted that the father had a "realistic" view of M and had the ability to care for M and meet her needs during a transition

from her foster home into his North Carolina home. Then, in October 2011, the father moved the juvenile court to dismiss jurisdiction and terminate the wardship. Reasoning that moving M from non-relative foster care to live with her father would cause "serious emotional harm" to M, the juvenile court denied father's motion to dismiss, and changed M's permanency plan to guardianship.

The father appealed arguing that the juvenile court erred in denying his motion because no party proved that his lack of custody order or his relationship with M would expose M to a current risk of serious loss or injury that would likely to be realized if the court terminated the wardship. The department responded that the father's lack of custody order created a basis for ongoing juvenile court jurisdiction, and that wardship was necessary to allow for a *gradual* transition of M to the father's care.

The father also argued that the juvenile court erred in changing M's permanency plan to guardianship

because there was no evidence that the father was unfit or that his progress in ameliorating the jurisdictional bases was insufficient, and that the court erroneously made its permanency determination based on M's best interest. The department agreed that the court erred in changing the permanency plan, but argued that the court's determination that "placement with father would cause M 'severe mental and emotional harm' was without support in the record, and thus, it was error for the court to not implement a permanency plan of reunification."

Reasoning that evidence that a "sudden transition" into father's home could be harmful to M was sufficient to warrant continued jurisdiction, but that the record was not sufficient to support the conclusion that M could not be returned to the father's home within a reasonable period of time, the

Court of Appeals affirmed the order denying the motion to dismiss and reversed the permanency judgment. The Court of Appeals ruled, in relevant part:

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“Under the totality of the circumstances * * * DHS established that there was a reasonable likelihood of harm to M’s welfare such that it was not error to continue jurisdiction. M did not meet father until she was eight years old and had been in foster care for more than two years. Their relationship then consisted of two one-week-long visits and some telephone contact. M had lived her entire life with her sister, A, and is significantly bonded to her siblings, with whom she is currently placed. M strongly preferred to continue to live in her foster home and was not aligned with father. Further, there was evidence that a *sudden* transition from her current placement with her ‘psychological’ grandparents and into father’s home could be harmful to M. Accordingly, because juvenile court jurisdiction is focused on the reasonable likelihood of harm to the welfare of *the*

child, continued jurisdiction was appropriate given the combination of M’s particular emotional needs, her background, and the lack of a parent-child relationship between M and father.

“* * * * *

“Taken together, the record does not support the juvenile court’s determination that placement with father within a reasonable time would cause M severe mental and emotional harm. Although there was evidence that any transition would be very difficult and would require services for M and father, that prospect is not unlike the circumstances in most dependency cases where a change in placement will be difficult for the child. Nothing in this record shows a reasonable likelihood that placement with father within a reasonable time would cause M to suffer effects that rise to the level of ‘severe mental and emotional harm.’ Strickland’s assessment, particularly when viewed in light of

father’s psychological evaluation, does not support juvenile court’s finding of ‘severe mental and emotional harm.’ Because that finding is the basis of the court’s determination that guardianship was the appropriate permanency plan and that return to father was not appropriate, we reverse the permanency judgment.”

(Slip op at 10, 18-19) (emphasis in original) (footnote omitted).

Dept. of Human Services v. J.C.G., 253 Or App 588, _ P3d_ (November 21, 2012) (Schuman, P. J.)

The juvenile court asserted jurisdiction over the father’s child, H, based on the following: (1) the child has been physically abused by her stepmother, who admits to abusing the child in the presence of father; (2) the child is vulnerable to future abuse due to developmental delays that prevent her from being able to report how she received extensive injuries; and (3) “despite evidence

that the child has been abused and despite ongoing unexplained injuries, the father and current caregiver are unable or unwilling to acknowledge the above and are therefore unable to protect.” (Slip op at 2).

The father participated in all services requested by the department, but did not acknowledge that H’s stepmother caused H’s injuries and would not end his marriage to the stepmother. However, after the department informed the father that the stepmother could not have contact with H, the stepmother moved out of the family home and the father arranged for a “safety supervisor” to transport H to and from school, provide H with after-school care, and ensure that H had no contact with the stepmother. The father then moved the juvenile court to return H to his care, and dismiss juvenile court jurisdiction. The juvenile court denied both requests.

The father appealed, arguing that the juvenile court erred in denying his motion to return H to his care and erred in denying his motion to

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dismiss wardship. The Court of Appeals affirmed:

“* * * [T]he juvenile court did not err in continuing the wardship. At the time of the permanency hearing, father had not acknowledged that the stepmother had caused the child’s injuries. The safety plan involving the neighbor was newly proposed and had not been reduced to writing or implemented. We conclude that, on this record, the juvenile court could reasonably be concerned about father’s ability to protect the child from the stepmother and could conclude that the original bases for jurisdiction had not yet been fully ameliorated and that the wardship should continue.”

(Slip op at 4-5).

Per Curiam Cases

***Dept. of Human Services v. R.V.*, 252 Or App 567, 287 P3d 1281 (September 26, 2012) (Per Curiam)**

The juvenile court asserted jurisdiction over the mother’s child, as to the mother, on the following grounds: (1) the mother had a history of choosing violent or unsafe partners; (2) the mother had knowingly failed to protect her child from sexual abuse by her partner; (3) the mother continued to have contact with her partner; and (4) the mother had possessed pornography within reach of the child.

The mother appealed and argued that the juvenile court erred in asserting jurisdiction over her child because the department failed to prove that her child was exposed to a *current* threat of serious loss or injury that was likely to be realized. The department confessed error.

Citing *Dept. of Human Services v. S.T.S.*,

236 Or App 646, 654, 238 P3d 53 (2010), the Court of Appeals reversed.

***Dept. of Human Services v. L.G.*, 252 Or App 626, 290 P3d 19 (October 3, 2012) (Per Curiam)**

The department petitioned for reconsideration of the decision in *Dept. of Human Services v. L.G.*, 251 Or App 1, 281 P3d 681 (2012), in which the Court of Appeals held there was not a basis for jurisdiction over the mother’s child, L. In that case, the juvenile court asserted jurisdiction over L because the mother had been subjected to domestic violence by L’s father, and the “mother had failed to obtain regular and adequate medical care for L’s sibling, J, ‘and has a pattern of not meeting [J’s] medical needs[.]’” The Court of Appeals held in that case that jurisdiction was not warranted because the department failed to prove that L was exposed to a *current* risk as is necessary for the court’s jurisdiction:

“In particular, there is no evidence that mother is subject to harm from father, who no longer has a relationship with mother or with L. Accordingly, there is no current threat of harm to L based on exposure to domestic violence.”

L.G., 252 Or App at 627

The department petitioned for reconsideration arguing that the court’s opinion overlooked the mother’s failure to provide J with appropriate medical care as a separate basis for jurisdiction. The Court of Appeals modified its opinion to include its conclusions that “there is no evidence that mother’s past medical neglect of J poses a current risk of harm to L,” but otherwise adhered to its former opinion. *Id.*

***Dept. of Human Services v. I.J.R.*, 253 Or App 603, _ P3d _ (November 21, 2012) (Per Curiam)**

After the child’s parents relinquished

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their parental rights, the juvenile court terminated the child's commitment to DHS and appointed the child's grandparents as her guardians under ORS 419B.366. The child appealed arguing that the juvenile court's appointment of the child's grandparents as guardian was defective because the juvenile court failed to follow the statutory requirements under ORS 419B.366(1)-(4); that the juvenile court erred by failing to issue guardianship letters as required by ORS 419B.367; and that the juvenile court erred in refusing to order visitation between the child and her

half-brother. Respondent, the CASA, confessed error.

Concluding that the juvenile court erred in failing to follow the statutory requirements under ORS 419B.366(1)-(4), erred in failing to issue guardianship letters as required by ORS

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419B.367, and erred in failing to enter an order of visitation between the child and her half-brother, the Court of Appeals reversed and remanded.

Dept. of Human Services v. D.L.H., 253 Or App 600, _ P3d_ (November 21, 2012) (Per Curiam)

The mother and the father appealed separately from the combined permanency judgment changing the permanency plan for mother and father's child, A. The Court of Appeals issued a written opinion concluding that the department made

active efforts to reunify the mother with A, but failed to make active efforts to reunify A with the father. *Dept. of Human Services, v. D.L.H., 253 Or App 787, 804, 284 P3d 1233 (2012)*. The court "reversed and remanded the judgment 'as to father' * * * [and] 'otherwise affirmed' the judgment." (Slip op at 1).

The mother petitioned the court for reconsideration arguing that the juvenile code contemplated that a ward would be subject to only one court-approved permanency plan and did not contemplate different permanency plans for a ward *vis à vis* each of a ward's parents. The department agreed that "the child can have only one permanency plan implemented at any particular time and that the entire judgment as to A must be reversed and remanded."

The Court of Appeals allowed reconsideration, agreed with the department and the mother, withdrew its former disposition, and reversed and remanded the entire permanency judgment as to the mother's child A.

The court reasoned:

"Following a permanency hearing, the court's order must include a 'determination of the permanency plan for the ward.' ORS 419B.476(5)(b). 'Permanency plan,' as used in ORS 419B.476, specifically refers to a singular plan for the child, rather than a plan for each parent. *See also* OAR 413-040-0005(14) (defining a permanency plan as 'a written course of action for achieving safe and lasting family resources for the child,' suggesting one active permanency plan at a time); ORS 419B.343(2)(b) (when the case plan is reunification, DHS shall include a concurrent permanency plan 'to be implemented' if the parent does not make the changes necessary for the child to return home safely within a reasonable time)."

(Slip op at 1-2). ●

PDSC 2013-15 Budget Request

By Nancy Cozine, Executive Director, Office of Public Defense Services

The PDSC submitted three policy option packages with the agency's budget request, two of which focus on improving representation at the trial court level.

If funded, Policy Option Package 100 will provide additional resources for reducing dependency caseloads. OPDS estimates that workloads exceed acceptable levels by approximately 20%, and is taking a multi-biennial approach by requesting incremental improvements over three biennia. This policy package would permit OPDS to reduce current caseload levels in juvenile dependency and termination of parental rights cases by approximately 7%. OPDS has followed with interest an ongoing effort in Washington State to address similar issues. Significant caseload reduction was a key component of a highly successful parent representation pilot project in that state. What began as

a pilot project in three counties has now been extended to twenty-five counties. If this policy package were funded, OPDS would ensure that reduced caseloads actually resulted in improved representation by making such reductions conditional upon agreement to implement established best practices, participation in mandatory training sessions, and rigorous evaluation.

Policy Option Package 101 would provide one third of the funding required for PDSC to carry out the statutory directive to adopt a compensation plan for the Office of Public Defense Services that is commensurate with other state agencies.



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ORS 151.216(1)(e).

Policy Option Package 102 has three components, the first of which would ease the difficulty that nonprofit, public defender organizations have attracting and retaining qualified attorneys by increasing compensation for attorneys, primarily in Deschutes, Jackson, Lane, Multnomah, and Washington Counties. A comparison of public defender attorney salaries and prosecution salaries in the same counties (based on the Oregon District Attorneys Association 2012 salary survey) showed that, based upon average salaries, public defender salaries for eight of eleven nonprofits were less than those for

prosecuting attorneys. It is also important to note that both prosecutor and public defender salaries lag significantly behind the average salaries of attorneys engaged in other types of practice. The Oregon State Bar's 2012 Economic Survey report noted that average full-time public defense attorneys' and prosecutors' salaries (\$68,246 for public defenders, and \$93,979 for public prosecutors) were well below any area of private practice. (Business and corporate litigation lawyers reported an average salary of \$192,715. Family law practitioners received an average salary of \$99,637 and private criminal defense lawyers received an average of \$134,779).

The December 2012 revenue forecast, released on November 20th, indicates that Oregon's economy will most likely continue to experience slow growth that does not keep pace with Oregon's growing cost of providing public services, which means there will be limited General Fund resources available during the next biennium.

The Governor's Recommended Budget (GRB) includes PDSC's

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current service level minus three percent. While this is better than the last two biennia, it is not an amount sufficient to fund policy option packages. Additionally, the Governor's budget relies on the passage of other expense-saving policy packages.

We continue to communicate with legislators and the Legislative Fiscal Office regarding the important work of criminal and juvenile providers in Oregon, and the need for funding to reduce caseloads and increase compensation. Please let us know if you would like information to share with your legislator. •

Save the Date

Juvenile Law Section CLE

Oregon State Bar

Feb 8, 2013, 8:00 a.m. to 5:00 p.m.

Tigard, Oregon

http://osb-jl.org/?ai1ec_event=juvenile-law-section-cle&instance_id=9 •



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from all of us at

Youth, Rights & Justice

Save the Date

5TH Annual

Wine & Chocolate Extravaganza

November 16, 2013