Ethics! Navigating Issues in Juvenile Law

Cosponsored by the Juvenile Law Section

Friday, February 26, 2016
8:30 a.m.–4:30 p.m.

3.5 Ethics credits, 2.5 General CLE credits, and 1 Personal Management credit
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   — Kari Rieck, CASA—Voices for Children, Corvallis, Oregon

   — Amy Miller, Office of Public Defense Services, Salem, Oregon

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      Services, Salem, Oregon

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    — Inge Wells, Department of Justice, Salem, Oregon
SCHEDULE

8:00  Registration

8:30  CASA: Behind the Curtain
♦ Working collaboratively with CASAs
♦ Special considerations
♦ The inner workings of CASA: duties and responsibilities
Lené Garrett, CASA of Marion County, Inc., Salem
Kari Rieck, CASA—Voices for Children, Corvallis

9:15  Representation Expectations
♦ Yamhill, Linn, and Clatsop counties’ Parent Child Representation Pilot Program
♦ Public Defense Services Consortium (PDSC) standards for representation
♦ PDSC intersection with the Oregon Rules of Professional Conduct and ABA model rules
Amy Miller, Office of Public Defense Services, Salem

9:45  Break

10:00 Dependency Representation: Balancing Zealous Advocacy with Legal Ethics Expectations
♦ Practical application of representation standards (now with fun skits!)
♦ Expressed wishes, considered judgment, best interests . . . Wait, what am I supposed to be doing?
Moderator: Sarah Robbins, Southern Oregon Public Defenders, Inc., Medford
Lorianne Frodsham, Southern Oregon Public Defenders, Inc., Medford
Greta Lilly, Southern Oregon Public Defenders, Inc., Medford
Jennifer Kimble, Attorney at Law, Prineville
Brandon Thueson, Jackson County District Attorney's Office, Medford

11:00 Juvenile/Family Law Crossover: Caution! Legal Ethics Pitfalls Ahead
♦ Staying within the boundaries of juvenile court representation
♦ Dipping your toes in family law: how to avoid drowning
Liann Crane, Law Office of Alan W. Karpinski PC, Portland
Robin Wright, Gevirtz Menashe PC, Portland

12:00 Lunch

1:00  Weathering Trauma: Self-Care and the Oregon Rules of Professional Conduct
♦ Primary and secondary trauma: it doesn’t affect just our clients
♦ Traumatic material and the significance of legal involvement (for all)
♦ How to take care of ourselves under the ORPC
Kyra Hazilla, Oregon Attorney Assistance Program, Portland

2:00  Break
2:15  Delinquency Legal Ethics Considerations: Averting Disaster
   ♦ Ethical issue spotting in delinquency cases
   ♦ Alternatives to adjudication: understanding the options and communicating them to your client
   ♦ Crossover cases: avoiding a crash
   Andy Abblitt, Benton County Juvenile Department, Corvallis
   Kevin Ellis, Youth Rights & Justice, Portland
   Kristen Farnworth, Benton County District Attorney’s Office, Corvallis
   Livia Goetz, Sacks & Goetz PC, Portland
   Jennifer Stoller, Youth Rights & Justice, Portland

3:15  Appellate Update: You Can’t Argue What You Don’t Know
   Shannon Storey, Office of Public Defense Services, Salem
   Inge Wells, Department of Justice, Salem

4:30  Adjourn
FACULTY

Andy Abblitt, Benton County Juvenile Department, Corvallis. Mr. Abblitt is a Juvenile Court Counselor with the Benton County Juvenile Department, where he manages the “Intensive Supervision” caseload in addition to many cases under Juvenile Department supervision for sexual offending behaviors.

Liann Crane, Law Office of Alan W. Karpinski PC, Portland. Ms. Crane practices in the areas of family, criminal, and juvenile law.

Kevin Ellis, Youth Rights & Justice, Portland.

Kristen Farnworth, Benton County District Attorney’s Office, Corvallis.


Lené Garrett, CASA of Marion County, Inc., Salem. Ms. Garrett has 20 years of experience with CASA programs in three counties in Oregon. She was a CASA volunteer for 12 years, joined the staff in 2000, and has held the positions of trainer, program manager, and executive director. She is on the Oregon CASA Network Board and serves as its Legislative Chair. During her time with CASA, she has served on numerous committees working with partner and community agencies dedicated to child safety and wellbeing and system change and has participated on legislative workgroups. Ms. Garrett is a member of the Governor’s External Child Safety Committee.

Livia Goetz, Sacks & Goetz PC, Portland. Ms. Goetz has handled hundreds of cases in the areas of criminal, delinquency, dependency, and termination of parental rights matters, as well as appeals and family law matters. She is a member of the Oregon State Bar Juvenile Law Section and Family Law Section.

Kyra Hazilla, Oregon Attorney Assistance Program, Portland. Ms. Hazilla is an Attorney Counselor with the Oregon Attorney Assistance Program. She was a public defender practicing juvenile law for most of her legal career, advocating for children and families struggling with myriad challenges. She is a trained counselor whose experience includes crisis intervention, working with victims of sexual assault, drug and alcohol dependency, and helping domestic violence survivors and their children. In addition to her JD, Ms. Hazilla holds a Masters in Social Work degree from University of Michigan School of Social Work.

Jennifer Kimble, Attorney at Law, Prineville. Ms. Kimble is a court-appointed attorney with the 22nd Circuit Defenders in Crook and Jefferson counties. She previously worked at Juvenile Rights Project and as a Deputy District Attorney in Deschutes County. She serves on the Oregon State Bar Disciplinary Board Trial Panel and chairs the Deschutes/Crook/Jefferson County Judge Pro Tem Screening Committee.


Amy Miller, Office of Public Defense Services, Salem.

Kari Rieck, CASA—Voices for Children, Corvallis. Ms. Rieck has been involved with CASA—Voices for Children since 2003. She has served as an advocate, program supervisor, and executive director. She also has experience as an advocate in Linn County. She is President-Elect and Legislative Chair for the Oregon CASA Network. She participates on Juvenile Court Improvement Project at both the county and state levels. Ms. Rieck has also served as the Oregon CASA Network Governance Chair and as a member of the DHS Child Welfare Youth Dependency Workgroup.
Sarah Robbins, Southern Oregon Public Defenders, Inc., Medford. Ms. Robbins represents parents and children in juvenile dependency cases and youth in juvenile delinquency cases. She serves on the Oregon State Bar Juvenile Law Section Executive Committee, Casey Family Initiative Foundation, Juvenile Court Improvement Program/Model Court, and Crossover Youth Project. She is also a mentor through the New Lawyer Mentoring Program and helps train CASAs on the anatomy of a dependency case. In 2010, she won a new attorney Advocacy Award from the Oregon State Bar.

Jennifer Stoller, Youth Rights & Justice, Portland. Ms. Stoller represents parties in delinquency and dependency cases. She also represents undocumented minors from foreign countries who qualify for juvenile court protection. Prior to joining Youth Rights & Justice in 2013, she practiced with Legal Aid in Ohio and Oregon.

Shannon Storey, Office of Public Defense Services, Salem. Ms. Storey is the Chief Defender for the Juvenile Appellate Section of the Office of Public Defense Services, where she has worked as an appellate defender since 2003.

Brandon Thueson, Jackson County District Attorney’s Office, Medford. Mr. Thueson has been working in juvenile law since 2009, first as a court-certified law clerk with the Marion County District Attorney’s Office and now as a Deputy District Attorney in Jackson County. He serves on the Oregon State Bar Juvenile Law Section Executive Committee.

Inge Wells, Department of Justice, Salem. Ms. Wells has been an assistant attorney general in the Appellate Division of the Oregon Department of Justice since 2007. The primary focus of her practice has been the division’s juvenile dependency caseload. Beginning March 1, she will relocate to Bend and will be splitting her time between the Appellate Division and the Child Advocacy Section.

Robin Wright, Gevirtz Menashe PC, Portland. Ms. Wright’s practice emphasizes juvenile and family law cases. Prior to her current position, she spent two years in private practice focusing on family law cases and five years with Metropolitan Public Defenders. Before that, she served as a pro tem juvenile court judge in Washington County and spent nine years with Metropolitan Public Defenders. Ms. Wright is a member of the Oregon State Bar Juvenile Law Section Executive committee, is cofacilitator of the Oregon Women Lawyers Family Law Mentoring Circle, and serves as a mentor as part of the Oregon State Bar Mentoring Program.
Chapter 1

CASA: Behind the Curtain—Presentation Slides

LENÉ GARRETT
CASA of Marion County, Inc.
Salem, Oregon

KARI RIECK
CASA—Voices for Children
Corvallis, Oregon
Chapter 1—CASA: Behind the Curtain—Presentation Slides

**CASA**

**Court Appointed Special Advocates**

Lené Garrett, Marion County Executive Director
Kari Rieck, Benton County Executive Director

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**Court Appointed Special Advocate**

- History of CASA
- CASA in Oregon & Mandate
- CASA as a Legal Party
- Advocate Qualifications
- Advocate Roles, Responsibilities, Expectations
- CASA Local Program Structure
CASA History

- 1977—Judge David Soukup of Seattle dreamed of an objective way to advocate for children in dependency court; he created CASA.
- His vision allows for everyday citizens to focus solely on a child’s best interest
- Today there are over 75,000 volunteers Nationwide

CASA in Oregon

- Mid-1980s—pilot programs began in Josephine and Multnomah counties
- 1985 - legislative mandate that states that all children dependency court “shall” have a CASA appointed to their case
- Currently there are 23 local CASA programs serving all 35 counties
ORS 419B.112
Statute Requirements

- CASA Advocates must be court appointed
- Are legal parties to a case with full access to all of the child’s information
- Duties of the CASA: investigate, advocate, monitor, facilitate
- Are bound by strict confidentiality
- Serve until a child’s permanency is achieved

Qualifications

- Meet all security check qualifications: criminal and abuse history
- Successfully completed 35+ hours of specialized training
- Sworn in by the court
- Complete 12 hours of training annually
**INVESTIGATE**

- Talk to people involved with the child and request records (child, parents, relatives, case workers, teachers, attorneys, therapists, foster parents, medical/dental/vision, teachers)
- Read all discovery, review and assess all documents
- Understand relevant history, environment, relationships, and current needs of the child
- Determine what a child needs to be placed in a safe and permanent home as quickly as possible

**ADVOCATE**

- Make recommendations regarding the child’s best interests; both in and out of court
- Attend any and all meetings that relate to ensuring the child’s needs are being met (DHS, school, treatment, placement, visitations)
- Bring together those who support a child and family to explore options
- Share thoughts and opinions with those who provide services to a child and family
**MONITOR**

- Communicate with:
  - DHS caseworker to ensure services/progress for child and family
  - foster families to ensure educational, medical, physical and emotional needs are being met
  - schools to ensure educational success
- Request documentation from providers
- Track court orders to ensure compliance by the parties and report status to the court
- May request hearings

**FACILITATE**

- Identify resources and services that are in the child’s best interest
- Ensure communication between service providers
- Request meetings and encourage communication; reduce barriers for families and promote permanency
- Support and ensure communication with foster parents
**Additional Expectations**

- Ensure services for child and make recommendations for services for parents
- Visit appointed child at least every 30 days
- Professional relationship with legal parties, service providers, and others involved with the child
- Attend court hearings, CRBs, & meetings pertaining to the child
- Provide court reports to all legal parties
- Maintain consistent communication with CASA staff
- Mandatory reporter

**Educational surrogate**

ORS 419.220

- Advocates may be appointed as Educational Surrogates if the court finds that the child may be eligible for special education programs because of a disabling condition as provided in ORS 343
- Advocates are trained in educational surrogacy
ADVOCATES DO NOT

- Provide direct services to the child or the child’s family
- Supervise visits
- Make placement arrangements for the child
- Act as a Big Brother/Big Sister or a mentor
- Provide case management

HOW AN ADVOCATE IS APPOINTED

- The Court appoints an Advocate
- DHS Caseworkers, parents, relatives, foster parents and attorneys may request an Advocate
- CASA staff assigns an available advocate, matching strengths and interests of both the advocate and child
  * Appointment process may vary by county
Local Program Reporting

Benton County Court Report

Proven and/or Admitted Allegations:

Mother:
- D. The mother has an addictive or habitual use of controlled substances which renders her incapable of parenting for extended periods of time and/or impairs her ability to provide minimally adequate care, compromising the health, safety, and well-being of the child.

Father:
- A. The father has an addictive or habitual use of controlled substances which renders him incapable of parenting for extended periods of time and/or impairs his ability to provide minimally adequate care, compromising the health, safety, and well-being of the child.
- C. The father is presently incarcerated and has a history of criminal behavior, which impairs his ability to parent and protect the child at risk of harm.

History:
- DHS has had twenty-three reports regarding this family in which seven were closed at screening. Fifteen of those reports were assigned and of those, five were founded for physical abuse and neglect.


Current:
- Sam will be turning 7 in July and is small for his age. He appears to be thriving in his foster placement and enjoys the family dog. He enjoys soccer, riding bikes, and drawing. Sam enjoys school and aside from emotional outbursts is doing well academically and with his peers. Outbursts occur during quick transitions, unexpected changes in routine and loud or chaotic surroundings. Sam is making progress in therapy and sessions will go to every other week in April. The therapist, foster parents, and school staff are communicating to ensure consistency and supports are in place for Sam. Additional relevant information as needed.

Medical/Dental/Vision/Mental Health:
- Medications: None at this time.
- Vision exam: August 2015, currently wears glasses.
- Physical: August 2015
- Dental: December 2015
- Therapy: Every other week.

CANS Level 2 last assessment August 2016

Children’s Development and Rehabilitation Center (CDRC) and Children’s Program diagnoses include disruptive behavior disorder, not otherwise specified and attention deficit hyperactivity disorder. The report states that Sam had significant elevations that were noted for withdrawn and emotionally reactive.

Julie Cole:
- Ms. Cole continues to struggle with regular attendance in drug treatment and has had 2 dirty UA’s for methamphetamine in the past three months. Her treatment provider is recommending residential treatment at this time. She has been consistent in her attendance in parenting classes and it has been reported that she is making progress. The intake supervisor reports that Ms. Cole is applying parenting skills during visits.

Jason Jones:
- Mr. Jones is currently serving a 6 month sentence; he is scheduled for release on June 17, 2016. He has weekly Skype visits with Sam.
Concerns:
1. Sam needs a safe, stable, nurturing and permanent home that is free from drugs, violence and criminal behavior.
2. Sam has a mental health diagnosis that impacts his daily functioning.
3. Sam is on an Independent Education Plan (IEP) that needs to be followed.
4. Ms. Cole continues to struggle with drug use.
5. Mr. Jones will be released in June and will need to engage in services.

Recommendations:
1. Sam remains in his current foster placement.
2. Sam’s service providers’ recommendations are followed, including CDRC, therapists and doctors.
3. Sam continues to receive therapy through Old Mill.
4. Sam continues to receive appropriate supports in school.
5. Ms. Cole enter a drug and alcohol residential treatment program.
6. Ms. Cole continue with parenting classes.
7. Mr. Jones work with Child Welfare to begin transitioning for his release and planning for services.

Respectfully submitted,
Susan Smith
CASA Volunteer

Date: March 1, 2016

cc: DDA:
AAG:
DHS:
Child’s Attorney:
Mother’s Attorney:
Father’s Attorney:

Note: picture of child is provided to Court at Dispo and permanency hearings. If the child is under the age of 2 pictures are to be submitted at each review hearing.

Take Aways

- Each legal party has their role within the system
- Advocates are community volunteers who are trained to work for the child’s best interest
- Local programs MAY have different process / procedures and policies regarding their work
- Any feedback regarding an Advocate should be directed to CASA staff
- Offer to speak to a new training class or at an in-service training to share your responsibilities
Questions?

- Thank you for inviting us to speak to you today

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Court Appointed Special Advocates
FOR CHILDREN

CASA
Chapter 2


Amy Miller
Office of Public Defense Services
Salem, Oregon

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Representing Parents and Children

CONTRACT OBLIGATIONS, PERFORMANCE STANDARDS, AND THE OFFICE OF PUBLIC DEFENSE SERVICES

AMY MILLER
DEPUTY GENERAL COUNSEL
OFFICE OF PUBLIC DEFENSE SERVICES

Agenda

- Public Defense Services Commission
- Attorneys for parents and children
  - Contract Obligations
  - Complaint Policy
- Rules and Standards governing practice
  - Oregon Rules of Professional Conduct
  - Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases
  - Oregon State Bar Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases
- OPDS Update: Parent Child Representation Program
- Resources
ORS 151.216: PDSC Duties

The Public Defense Services Commission shall

- Establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.

Attorneys for parents and children

- Independent contractors
  - 350 attorneys (2014 juvenile)
  - 67% 10+ years of experience
  - 3 entities represented
    - Consortium
    - Public Defender
    - Law Firm

- By the numbers
  - 7,535 case credits (appointment through disposition)
  - 39,973 case credits (post-dispositional proceeding)
  - 1,038 case credits (termination of parental rights)

- 25% of trial-level expenditures (non death-penalty)
- 35% of public defense caseload
### Contract Obligations

**Model Contract: General Terms**

- **7.1.1 Standard of Representation**
  - Fulfill applicable state and national standards of performance
  - Satisfy the requirements of the Oregon Rules of Professional Conduct

- **7.1.3 Client Contact**
  - In-custody clients: conduct initial interview within 24 hours of appointment
  - Out-of-custody clients: arrange for contract, including notification of scheduled interview time or process for scheduling interview, within 72 hours of appointment

### Updated Model Contract Terms (1.1.2016)

- **7.1.2.1 Pre-appointment representation**
  - Subject to the express prior approval of PDSC, contractor may commence representation of a client prior to appointment by the court in order to protect and preserve the rights of a client where the client would be eligible if charged with a crime or served with a petition. (exigent circumstances required)

- **7.1.2.2 Appearance at first proceedings**
  - Contractor shall provide representation at all arraignments, shelter hearings and other initial appearances.

- **7.2.2 Case assignment and workload**
  - Contractor shall ensure that the attorney assigned to represent a client has a current workload, including private practice cases, which will not interfere with competent and diligent representation that fulfills the Standard of Representation set forth in 7.1.1.

- **7.2.3 Continuing Legal Education requirements**
  - 12 hours per calendar year of juvenile (or juvenile and criminal apportioned by percentage of case type).
Complaints

- **PDSC Complaint Policy and Procedures**
  - **Policy**
    - OPDS has an independent duty to oversee the quality and cost of public defense services and to take appropriate action to ensure quality and cost effectiveness.
    - The PDCPP governs the procedure for receiving, investigating, and responding to complaints regarding (1) the quality of services provided by public defense attorneys, and (2) payment from public funds of attorney fees and non-routine fees and expenses incurred in cases.
Complaint Procedures

- Procedures
  - Initial determination: Does the complaint raise a “facially reasonable issue” regarding the quality of services provided? (1.c.)
  - Current concern which may be capable of informal resolution (1.e.)
    - Provide attorney and administrator with copy of complaint
    - Attempt to resolve the complaint
  - Past or continuing conduct which cannot be resolved by OPDS intervention (1.f.)
    - Inform complainant of more appropriate venue (eg: OSB or the court) and inform attorney and administrator complainant has been so advised
  - Complaint not capable of informal resolution and not properly the subject of a court or bar proceeding (1.i. and 1.j.)
    - OPDS shall review information submitted and may perform its own investigation to determine whether the representation has been unsatisfactory and may take corrective action including suspension from appointment

Complaint Details (2014-2015)

- Total number of complaints: 120
  - 51% juvenile dependency or delinquency
  - 49% criminal/other
- Majority required no action or informal resolution
  - 2 determined unsatisfactory
- Common complaints
  - Communication
  - Preparation
  - Competence (usually related to the role of an attorney)
Performance Obligations: Client Contact

The Lawyer for Children

- Standard 2: Relationship with the child client
  - The child’s lawyer should ensure that the child is aware that he or she has a lawyer and communicate with the child before all court appearances, case status conferences, pretrial conferences and mediations, and any important decision affecting the child’s life, and following (and, when possible, before) significant transitions including, but not limited to, initial removal and changes in placement.
  - When is contact required? (see 2A. Actions)
    - Must meet within 72 hours of appointment
    - At change of placement
    - Before court
    - When a significant change of circumstance occurs which warrants consultation
    - At least quarterly (unless extraordinary circumstances)
  - Why does contact matter? (see 2A. Commentary)
    - Foundation of representation.
    - Trust harder to obtain with children than adults.
    - May be the only constant in the child’s life.
  - What about non-verbal children? (see 2A. Commentary)
    - Equally important. Children convey information non-verbally.
    - The ability to provide input changes with time and development.

The Lawyer for Parents

- Standard 2: Relationship with the parent client
  - The parent’s lawyer must meet and communicate regularly with the parent. (2A)
  - When is contact required? (See 2A. Actions)
    - Should make initial contact within 24 hours and, when feasible, initial interview within 72 hours
    - Before court and CRB
    - In response to parent’s request
    - When a significant change of circumstance occurs which warrants consultation
  - Why does contact matter? (See 2B. Commentary)
    - A trusting relationship allows lawyer to better gather information, support the parent in addressing barriers, and manage the case.
  - What about an absent parent? (See 2I. Action)
    - The parent’s lawyer should take diligent steps to locate and communicate with missing parent.
    - If, after diligent steps, the lawyer is unable to communicate with the parent client, the lawyer should assess whether the parent’s interests are better served by advocating for the parent’s last clearly articulated position, or declining to state a position in further court proceedings and should act accordingly.
Performance Obligations: Investigation

- **Standard 5: Investigation**
  - Thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery.
  - Is reliance on the caseworker and CASA sufficient? No.
    - **Lawyers for children (see Standard 5)**
      - Contact lawyers for other parties and CASA for background information, interview individuals involved with the child, regularly review agency file.
    - **Lawyers for parents (See Standard 5)**
      - Regularly review agency file, interview parent as soon as possible, contact and interview potential witnesses (service providers, family members, etc.).
  - **Investigators are an additional resource**
    - Investigators used in 2% of juvenile dependency cases (2014)

Performance Obligations: Role of Child’s Attorney

- **Presumption: The child has decision-making capacity. (Standard 1B.)**
  - Factors to consider in determining whether the child has diminished capacity (See 1B., commentary):
    - Ability to communicate a preference
    - Whether the child can articulate reasons for the preference
    - The decision-making process used to arrive at the decision
    - Whether the child appears to understand the consequences of the decision
  - A child may have the ability to make some decisions but not others.
### Role of Child’s Attorney

<table>
<thead>
<tr>
<th>Decision-making capacity</th>
<th>Diminished capacity</th>
</tr>
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<tbody>
<tr>
<td>• Normal attorney-client relationship</td>
<td></td>
</tr>
<tr>
<td>• Counselor &amp; advisor</td>
<td></td>
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<tr>
<td>• Do not confuse inability to express a preference with unwillingness to do so</td>
<td></td>
</tr>
<tr>
<td>• Vigorous advocate for child’s position &amp; goals</td>
<td></td>
</tr>
<tr>
<td>• Normal attorney-client relationship as much as possible</td>
<td></td>
</tr>
<tr>
<td>• Thoroughly investigate circumstances and determine what actions will protect child’s interests in safety and permanency</td>
<td></td>
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<tr>
<td>• May wish to seek guidance from professional working with the child and experts</td>
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### Excellent resource for children’s attorneys

- **Representing Children in Juvenile Court: Rules of Professional Conduct, Performance Standards and Practical Challenges**
  - FREE audio webinar developed by OPDS in partnership with the Oregon Judicial Department
    - Panel discussion by experienced attorneys
    - 10 complicated hypothetical situations
    - Approved for 1.5 hours of ethics credit
Parent Child Representation Program

- Launched in August 2014 – Linn and Yamhill counties; Expansion 2015 – Columbia County
  - Reduced caseload: No more than 80 cases
  - Enhanced oversight by OPDS
  - Multidisciplinary training and support
  - Partner collaboration and system improvement
  - Independent social work assistance: Case managers in 10-15% of cases

Year One Observations

- PCRP Annual Report
  - Modeled on ABA Indicators of Success Evaluation Tool and adapted for the PCRP
  - Promising Themes
    - Improved quality of legal representation through practice changes
    - Preservation of families through reunification and guardianship
    - Reduced number of children in foster care

- Next steps
  - Further examination of metrics
  - Continuous quality improvement
  - Independent data analysis/program evaluation
  - Program expansion
Chapter 2—Contract Obligations, Performance Standards, and the Office of Public Defense Services

Notable Observations: Case outcomes

- **Reunification rate**
  - Statewide increase of 1.7% (2014: 59% June 2015: 60%)
  - PCRP county (average) increase 6.5% (2014: 59% June 2015: 63%)

- **Guardianship rate**
  - Statewide increase of 12.5% (2014: 8% June 2015: 9%)
  - PCRP county (average) increase 111% (2014: 4.5% June 2015: 9.5%)

- **Adoption rate**
  - Statewide decrease of 14.3% (2014: 21% June 2015: 18%)
  - PCRP county (average) decrease of 20% (2014: 22.5% June 2015: 18%)


Notable Observations: Children in foster care

<table>
<thead>
<tr>
<th>County</th>
<th>2014</th>
<th>2015 (June)</th>
<th>% change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Linn</td>
<td>255</td>
<td>216</td>
<td>-15%</td>
</tr>
<tr>
<td>Yamhill</td>
<td>118</td>
<td>105</td>
<td>-11%</td>
</tr>
<tr>
<td>Statewide</td>
<td>7539</td>
<td>7572</td>
<td>.44%</td>
</tr>
</tbody>
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Chapter 2—Contract Obligations, Performance Standards, and the Office of Public Defense Services

Resources

- Seen, Heard and Engaged: Children in Dependency Court Hearings (National Council of Juvenile and Family Court Judges, August 2012) http://www.ncjfcj.org/sites/default/files/CIC_FINAL.pdf
- One Judge’s Perspective on Children in Court (Judge Nan Waller, Presiding Judge, Multnomah County Circuit Court, Oregon) http://www.casaforchildren.org/site/c.mtjSj7MP1sE/b.8173525/k.97E7/JP_3_Waller.htm

State of Oregon
Office of Public Defense Services

http://www.oregon.gov/OPDS
1175 Court Street NE
Salem, OR 97301
Phone: 503-378-3349

amy.miller@opds.state.or.us
503-378-3495
LINKS TO DOCUMENTS FOR DISCUSSION

Report of the Task Force on Standards of Representation in Juvenile Dependency Cases
http://tinyurl.com/JUV16-3B-1

Oregon Public Defense Legal Services Contract General Terms
http://tinyurl.com/JUV16-3B-2

PDSC Complaint Policy and Procedures
http://tinyurl.com/JUV16-3B-3
Chapter 3

Juvenile/Family Law Crossover: Caution! Legal Ethics Pitfalls Ahead

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Scenario 1
You are consulting with a domestic violence victim about filing a restraining order and divorce action. Before you file, the Department of Human Services shows up at your client’s door and removes the child due to ongoing violence. What do you do?

1. Allow your client to take advantage of the Constitutional protections of a public defender, knowing the amount of money that your client will incur in juvenile court.
2. Continue to advise your client while your client is working with a public defender.
3. Take on the case directly.

Ethical considerations: 1.1 Competence, 1.2 Scope of representation, 1.3 Diligence, 1.18 Duties to prospective client

Scenario 2
You are a public defender attorney representing a parent in juvenile court. You talk to your client about child support issues and agree to do some research. You call a domestic relations attorney you know and ask about child support.

Ethical considerations: 1.1 Competence, 1.2 Scope of representation, 1.3 Diligence, 1.4 Communication, 1.6 Confidentiality of information, 1.18 Duties to prospective client

Scenario 3
You are an attorney for a parent that has been uninvolved in a child’s life for 4 years. The parent is not legal, but steps up fully to take responsibility for the child. The Court suggests that the case should be dismissed and the child should go with the parent. The parent is scared about domestic relations type of issues. What do you advise?

Ethical considerations: 1.1 Competence, 1.2 Scope of representation, 1.3 Diligence, 1.18 Duties to prospective client

Scenario 4
You are a child’s attorney. The child is returned to a parent and the parents have a date set for a divorce hearing, at which time the juvenile case will be dismissed. The parent attorneys in the juvenile case are not going to attend. The child has very strong feelings about the parenting plan that will result from this hearing. What do you do?

Ethical considerations: 4.2 Communication with person represented by counsel, 4.3 Dealing with unrepresented persons
Scenario 5

A juvenile case is commenced in Clackamas County. The Department places the child of the parents in the home of the Grandparents. The child is there for a year. The Department calls a family meeting and announces to the Grandparents that the child will be returning to the parents within 30 days. Grandparents seek legal advice.

Independent legal counsel files a motion to intervene in the dependency case, citing 109.119. This statute gives standing to ANYONE who has the child continuously in their care for a period of one year to intervene in an existing proceeding. If the grandparents wanted to do so, they could apply for relief under 109.119 at 6 months of continuous care of the child. However, non-related foster parents must wait a year.

The court must determine if the Petitioner/Intervener actually has the day to day care within the 6 months prior to filing. If a foster parent waits too long to file under this statute, hoping that things will work out after the return to parent, they are out of luck no matter how long they had the child outside of the relevant time period.

Then the Court MUST make findings that the presumption that a legal parent acts in the best interest of the child is overcome. If the Department says that they are returning the child, because the parent IS acting in the best interest of the child, Grandparents lose, unless they show the Department is wrong.

In this scenario, it is unlikely grandparents win, because the Department will support return to the parents. However, IF the grandparents convince the Department or the Court that a return is not imminent, the grandparents may be able to become involved in the case.

Technically, the any domestic relations relief requested would be “stayed” until the juvenile case was closed. At the time the case was closed, the court could say that there is another plan, better suited to the needs of the child, dismiss the dependency case and immediately order the custody of the child to go the grandparents.

For some practitioners, this may be a way to actually get children to permanency when endless delays continue to keep the case open, while the State prepares a termination of parental rights case. ORS 109.119 does not terminate parental rights. The court can ORDER the contact that the parents have with the child. In cases were ongoing contact is desired, but you don’t have cooperative family members, this may be the only way to maintain desired relationships.

Ethical considerations: As the grandparent’s attorney, you are in hearings that have confidential information shared. Do you have different considerations than the other parties to the case? If one parent is not involved in the juvenile case, but defaulted, what is your duty to that parent when you intervene requesting relief under a different statute?
SELECTED OREGON RULES OF PROFESSIONAL CONDUCT

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer’s own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;
(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer’s own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer’s own interests.
FORMAL OPINION NO. 2011-183

Scope of Representation; Limiting the Scope

Facts:

Lawyer A is asked by Client X for assistance in preparing certain pleadings to be filed in court. Client X does not otherwise want Lawyer A’s assistance in the matter, plans to appear pro se, and does not plan to inform anyone of Lawyer A’s assistance.

Lawyer B has been asked to represent Client Y on a unique issue that has arisen in connection with complex litigation in which Client Y is represented by another law firm.

Lawyer C has consulted with Client Z about an environmental issue that is complicating Client Z’s sale of real property. Client Z asks for Lawyer C’s help with the language of the contract, but intends to conduct all of the negotiations with the other party and the other party’s counsel by herself.

Question:

1 May Lawyers A, B, and C limit the scope of their representations as requested by the respective clients?

Conclusion:

1. Yes, qualified.

Discussion:

In each example, the prospective client seeks to have the lawyer handle only a specific aspect of the client’s legal matter. Such limited-scope representation\(^1\) is expressly allowed by Oregon RPC 1.2(b):

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

As the examples herein reflect, a lawyer may limit the scope of his or her representation to taking only certain actions in a matter (e.g., Lawyer A’s drafting or reviewing pleadings), or to only certain aspects of, or issues in, a matter (e.g., Lawyer B’s representation on a unique issue in litigation, or Lawyer C’s advising

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\(^1\) This is sometimes described as the “unbundling” of legal services, or as discrete task representation.
in a single issue in a transactional matter). In order to limit the scope of the representation, Oregon RPC 1.2 requires that (1) the limitation must be reasonable under the circumstances, and (2) the client must give informed consent.\(^2\)

With respect to the requirement that the limitations of the representation be reasonable, comment [7] to ABA Model Rule 1.2 offers the following guidance:

If, for example, a client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer’s services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The second requirement of Oregon RPC 1.2 is the client’s informed consent to the limited scope representation. Oregon RPC 1.0(g) defines informed consent as:

> [T]he agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Obtaining the client’s informed consent requires the lawyer to explain the risks of a limited-scope representation. Depending on the circumstances, those risks may include that the matter is complex and that the client may have difficulty identifying, appreciating, or addressing critical issues when proceeding without legal counsel.\(^3\) One “reasonably available alternative” is to have a lawyer involved

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\(^2\) A lawyer providing a limited scope of services must be aware of and comply with any applicable law or procedural requirements. For example, if Lawyer A drafts pleadings for Client X, the pleadings would need to comply with Uniform Trial Court Rule (UTCR) 2.010(7), which requires a Certificate of Document Preparation by which a pro se litigant indicates whether he or she had paid assistance in selecting and completing the pleading.

\(^3\) A limited-scope representation does not absolve the lawyer from any of the duties imposed by the RPCs as to the services undertaken. For example, the lawyer must provide competent representation in the limited area, may not neglect the work undertaken, and must communicate adequately with the client about the work. See, e.g., Oregon RPC 1.1, 1.3, 1.4. Likewise, a lawyer providing limited assistance to a client must take steps to ensure there are no conflicts of interest created by the representation. See, e.g., Oregon RPC 1.7, 1.9.
in each material aspect of the legal matter. The explanation should also state as fully as reasonably possible what the lawyer will not do, so as to prevent the lawyer and client from developing different expectations regarding the nature and extent of the limited scope representation.

By way of example, Oregon RPC 4.2 generally prohibits a lawyer from communicating with a person if the lawyer has actual knowledge that the person is represented by a lawyer on the subject of the communication.\(^4\) Mere knowledge of the limited-scope representation may not be sufficient to invoke an obligation under Oregon RPC 4.2.\(^5\) Accordingly, the lawyer providing the limited-scope...
representation should communicate the limits of Oregon RPC 4.2 with the client. If the client wants the protection of communication only through the lawyer on some or all issues, then the lawyer should be sure to communicate clearly to opposing counsel the scope of the limited representation and the extent to which communications are to be directed through the lawyer.  

In the case of Lawyer A, even if the lawyer’s participation was announced in compliance with court rules (such as by compliance with UTCR 2.010(7)), Oregon RPC 4.2 would not be implicated because Lawyer A is not counsel of record and the limited assistance in preparing pleadings is not evidence that Lawyer A represents Client X in the matter. In the case of Lawyer C, the lawyer should make clear to Client Z that that the limited-scope representation does not include communication with the opposing counsel.

acts reasonably in proceeding as if the opposing party is not represented, at least until informed otherwise.).

While not required, it may be advisable to clarify the scope of the limited-scope representation in writing to opposing counsel. Cf. Washington RPC 4.2 comment [11] (providing “[a]n otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation”).

See, e.g., Kansas Bar Association Legal Ethics Op. No. 09-01 (2009): “Attorneys who provided limited representation must include on any pleadings a legend stating ‘Prepared with Assistance of Counsel.’” But “[a]n attorney who receives pleadings or documents marked with the legend ‘Prepared with Assistance of Counsel’ has no duty to refrain from communicating directly with the pro se party, unless and until the attorney has reasonable notice that the pro se party is actually represented by another lawyer in the matter beyond the limited scope of the preparation of pleadings or documents, or the opposing counsel actually enters an appearance in the matter.”

See also State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 34 (2009) (an ostensibly pro se litigant assisted by a “ghost-lawyer” is to consider the pro se litigant “unrepresented” for purposes of the RPCs, which means that the communicating attorney must comply with Rule 4.3 governing communications with unrepresented persons).
Finally, while the client’s informed consent to the limited scope representation is not generally required to be in writing, an effective written engagement letter minimizes any such risks if it “specifically describe[s] the scope of representation, how the fee is to be computed, how the tasks are to be limited, and what the client is to do.”\(^8\) \textit{The Ethical Oregon Lawyer} §15.16 (Oregon CLE 2006).

\textbf{Approved by Board of Governors, February 2011.}

\(^8\) Since Oregon RPC 1.2 does not require a writing, Oregon RPC 1.0 does not require a recommendation to consult independent counsel. It is worth noting, however, that if the lawyer is providing a limited-scope representation with respect to a contingency matter, such an arrangement would need to be in writing. See ORS 20.340. See also \textit{Fee Agreement Compendium} ch 8 (Oregon CLE 2007).

\(^9\) In addition, “when a lawyer associates counsel to handle certain aspects of the client’s representation, the division of responsibility between the lawyers should also be documented in a written agreement.” See \textit{Fee Agreement Compendium} ch 9 (Oregon CLE 2007). See also Oregon RPC 1.5(d) (discussing when fees may be split between lawyers who are not in the same firm).
FORMAL OPINION NO 2005-81  
[REVISED 2014]

Communicating with Represented Persons:  
Information Relating to the Representation of a Client,  
Second Opinions

Facts:

Lawyer A is approached by Potential Client. Potential Client tells Lawyer A that Potential Client is unhappy with work being done for Potential Client by Lawyer B. Potential Client asks Lawyer A for a second opinion.

Questions:

1. May Lawyer A provide the second opinion?
2. May Lawyer A inform Lawyer B of Potential Client’s request?

Conclusions:

1. Yes.
2. No, qualified.

Discussion:

Oregon RPC 4.2 provides:

In representing a client or the lawyer’s own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;
(b) the lawyer is authorized by law or by court order to do so; or
(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person’s lawyer.

This rule applies when a lawyer is representing a client or the lawyer’s own interests in a matter, but not when the lawyer is approached by a prospective client. Neither this rule or its predecessor, former DR 7-104, has ever been interpreted to prohibit a lawyer from providing a
second opinion to a represented party. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS\(^1\) and ABA Model Rule 4.2.\(^2\)

Whether Lawyer A can inform Lawyer B of Potential Client’s request depends on ORS 9.460(3)\(^3\) and Oregon RPC 1.6.\(^4\) Cf. State v.

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\(^1\) A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer’s representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99 comment c (2003).

\(^2\) “[T]his Rule [does not] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” ABA Model Rule 4.2 comment [4] (2002).


\(^3\) ORS 9.460(3) provides that a lawyer shall “[m]aintain the confidences and secrets of the lawyer’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.”

\(^4\) Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to
Keenan/Waller, 307 Or 515, 771 P2d 244 (1989). Potential Client’s request for a second opinion would be information relating to the representation of the client. Consequently, Lawyer A cannot reveal this request to Lawyer B unless Potential Client consents or one of the other allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
exceptions to the duty of confidentiality within Oregon RPC 1.6 applies. Cf. OSB Formal Ethics Op No 2005-23.

Approved by Board of Governors, April 2014.

COMMENT: For additional resources on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§5.1-5.8, 6.1-6.6 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§99-100, 102 (2003); and ABA Model Rules 1.6, 4.2.

191-A
2014 Rev
Bar Counsel

WHITHER ZEAL?

Defining 'zealous representation'

By Sylvia Stevens

The 1908 ABA Canons of Professional Ethics required lawyers to pursue their client's objectives with "warm zeal." The 1969 ABA Code of Professional Responsibility (adopted in Oregon in 1970) exhorted us to represent clients "zealously within the bounds of law."\(^1\)

The ABA Model Rules of Professional Conduct take a decidedly different view. No rule requires zealous representation. Rather, the emphasis is on competent and diligent representation. The term "zeal" appears in the preamble, both times in reference to litigation,\(^2\) and in the comment to Model Rule 1.3. The rule itself requires that a lawyer act with reasonable diligence and promptness in representing a client. Comment (1) explains that "(a) lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf." That suggestion is at the same time diluted by the next sentence: "A lawyer is not bound, however, to press for every advantage that might be realized for a client."

The Oregon RPCs arguably require even less. Unlike Model Rule 1.3, which requires a lawyer to act with reasonable diligence and promptness, Oregon RPC 1.3 retains the language of former DR 6-101(A) and prohibits a lawyer only from neglecting a legal matter entrusted to the lawyer.\(^\) Moreover, because the Oregon RPCs have no preamble or comment, they are devoid of any reference to zeal or zealous representation.

It certainly appears that we can no longer be disciplined for failing to provide zealous representation. Does this mean that lawyers no longer have a duty of zealous representation? I think not.

The concept of zealous representation has a long tradition in the profession. I suspect, if asked to describe in one word the primary responsibility of lawyers, most of us would say it is zealousness. I also believe that our clients expect us to provide zealous representation. There are other clues that also suggest zealousness is not a historical relic, and that even the Model Rules recognize the its continuing validity. "The Rules do not...exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." Scope (16). In the same vein, one well-known commentator has observed that despite the differences in language, "the ethical obligation was implicit under the Code... and the obligation is confirmed and put more directly in Model Rule 1.3."\(^3\) Apparently, however, we are to derive by interpretation that which is not expressed clearly in the rules.

How did we come to this point of having such a tepid standard of zeal? Some critics suggest that the Model Rules were crafted in the late 1970s and 1980s to improve the image of the profession.\(^4\) Given the public perception of lawyers in response to the perceived and real abuses of the legal system uncovered by Operation Greylord and Watergate, that view is not so far-fetched. There were, nevertheless, other, more widely accepted reasons for drawing back from the express commitment to zeal.\(^5\)

For one thing, despite the clear prohibition in the rules about exceeding the bounds of law or the rules themselves, there was concern that "zeal" might be misinterpreted to mean zealotry,\(^6\) which would excuse unethical or otherwise improper conduct carried out in the name of furthering a client's interests. Even within the bounds of law, it is argued, client loyalty cannot justify fanatic or extremist behavior. Another objection to the term "zeal" is that it can be misunderstood as requiring a personal emotional involvement with a client's cause instead of an objective and independent professional commitment. Finally, it is not clear how zealousness applies in so-called nonadversarial situations, such as office advice and transactional work.

Our emphasis on professionalism and civility in recent years has focused on courtesy, fairness and fair dealing. We have tended to characterize professionalism as the opposite of zealous representation. At the same time, clients expect a lawyer to provide more than technical competence and diligence. They want an advocate or counselor who cares about their success. Every study of client attitudes about lawyers reveals that clients don't gauge the value of lawyers by how they dress, by the decor in their office or even by whether they prevail on the client's behalf; they value us by the extent to which we care about their legal matters and how we manifest that concern. Stated another way, people don't care how much you know until they know how much you care.

A lawyer need not identify with or even agree with a client's goals in order to be a zealous advocate. The lawyer-client relationship...
is one of agency in which two different and independent people have a unity of interest. Just as an agent is not required to do anything and everything a principal requests, the role of agent is not inconsistent with the role of advisor. Too much identification with the client may cause the lawyer to be a zealot instead of zealous. In fact, the professional ideal is a lawyer who disagrees fundamentally with the client but who can nevertheless provide independent advice and pursue the client's objectives with eagerness, diligence and a degree of passion for the cause. At the other end of the spectrum is the lawyer who is dismissive of the client's objectives, whose personal dislike for the client or the client's aims causes the lawyer to act half-heartedly.

The fact that even a virtue taken too far can become a fault, that unchecked zeal might become zealotry, doesn't mean that zeal is bad – or that we should abandon it as a professional norm. What, then, is the lawyer's duty of zealous representation? I offer a two-part definition. First, there must be partisanship, in the sense of caring that the client prevails in whatever is at stake, combined with emotional energy and commitment to the representation. Second, there must be a degree of independence, which allows for dispassionate judgment to prevent losing sight of legal and ethical boundaries as well as the risks of contemplated actions.

In a nutshell, zealousness means doing your best and being dogged in pursuit of the client's aims within the bounds of the law and the ethical rules. It is compatible with civility and courtesy and, in my humble opinion, the highest manifestation of professionalism.

Endnotes

1. This phrase was Canon 7 of the ABA Model Code, which became the title of Disciplinary Rule 7 in the Oregon Code of Professional Responsibility. The title of DR 7-101(A) was "Representing a Client Zealously." The language of the actual rule did not mention zeal, however, and was cast in negative and passive terms: a lawyer was not to intentionally "fail to seek the lawful objectives of a client through reasonably available means permitted by law and these disciplinary rules." This was further tempered in Oregon by language clarifying that a lawyer did not violate DR 7-101(A) by "avoiding offensive tactics" or by treating others with "courtesy and consideration."

2. "As advocate, a lawyer zealously asserts the client's position..." Preamble cmt. (2). "...When an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is begin done." Preamble cmt. (8).


4. See, e.g., M. Freedman, Understanding Lawyers' Ethics, (Matthew Bender: 1990) at pp. 5-6.

5. G. Hazard & W. Hodes, supra.

6. According to Webster Illustrated Encyclopedic Dictionary, (Tormont Publications: 1990), zeal is synonymous with passion: "enthusiastic and diligent devotion...fervent adherence...ardent commitment."

7. Zealotry is "excessive zeal, fanaticism." Webster's, supra.

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ABOUT THE AUTHOR
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REFERRAL RESOURCES

Family Law Resources

- OSB Bar Books—Family Law
  Access through the OSB website

- OregonLawHelp.org
  (multiple sponsors throughout Oregon)
  Includes multiple languages/general descriptions of process

- Oregon Department of Justice Website—Family Law Forms
  http://courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Forms.aspx

- Supplemental Local Rules—Chapter 8 (and other sections)

- County Websites/In-court Assistance Centers
  www.co.washington.or.us/LawLibrary/
  Multnomah County Circuit Court—FAQ re Family Law

- Oregon Child Support Division
  Division of Child Support or Local DA’s Office
  www.oregonchildsupport.gov/offices/pages/index.aspx
  503-947-4388

- OWLS Family Law Mentoring Circle
  www.oregonwomenlawyers.org/

Finding a Family Law Attorney

- Oregon State Bar Modest Means Program
  503-684-3763 or 800-452-7636

- OSB Military Assistance Panel
  https://www.osbar.org/_docs/ris/militaryflier.pdf
  503-684-3763 or 800-452-7636

- Legal Aid Services of Oregon
  lasoregon.org
  https://www.portlandoregon.gov/gatewaycenter/article/304528

  Child support (hotline)—800-383-1222

  Family law cases involving domestic violence—Call the local office for more information
- St. Andrew Legal Service (Portland metro area)
  www.salgroup.org/
  SALC—Multnomah/Clackamas Counties: 503.281.1500
  SALC—Washington, Columbia, and Yamhill Counties: 503.648.1600

- Unbundled Legal Service/Consultation with Private Attorney
Establish Paternity

Establishing paternity is the legal term for determining the biological father of the child. If a father is not listed on the birth certificate, legal paternity must be established in order to:

- Obtain a support order for the child.
- Obtain an order for health care coverage or cash medical support.
- Protect the child's rights to benefits if the father dies, such as money or property left in a will, Veteran's benefits or Social Security benefits.
- Allow the child access to the father's family medical history.

When parents are married to each other paternity is automatically established by the marriage. When parents are not married, paternity can be established by submitting paperwork or through a court or administrative legal process.

When the father and mother agree that the child is his, paternity may be legally established by the completion of a "Voluntary Acknowledgment of Paternity" form. This form must be signed by both parents, notarized and filed with Oregon Vital Records. Your local child support office can help parents complete this process.

If the mother would like to establish paternity for her child, she may fill out an "Affidavit in Support of Establishing Paternity" form with or without the other parent's voluntary acknowledgment. If applying for public assistance, she will fill one out at a local Department of Human Services (DHS). The form is available at your local child support office as well. DHS or Child Support will be in contact after receiving the affidavit to discuss the next steps necessary for establishing paternity.

When the alleged father does not believe he is the biological parent, the Child Support Program will help take steps, such as genetic testing, to determine whether he is or not. These genetic tests are simple, accurate and will determine if the man tested has the genetic markers required to be the biological father.

The program can also assist a man who wants to be declared the biological father of the child but needs help establishing paternity.

For more information on establishing paternity, see Steps to Establishing Paternity or contact your local child support office.
Statement of Rights and Responsibilities, Voluntary Acknowledgment of Paternity

If parents are considering signing the Voluntary Acknowledgment of Paternity Affidavit, they need to be aware of their rights and responsibilities. The video below explains their rights. Those rights and responsibilities are also listed on the back of the Voluntary Acknowledgment form (Spanish: dorso del formulario de Reconocimiento Voluntario).

A Spanish language video is available here: Declaración de los Derechos y Responsabilidades, de Reconocimiento Voluntario de Paternidad.

For detailed instructions about how to complete the Voluntary Acknowledgment of Paternity, click here.

The Oregon Paternity Project - is an effort to ensure that every Oregon child has access to his or her rights, including important health information, social and legal benefits, and services that promote their well-being. Learn more at www.oregonpaternityproject.org.
Application for Establishing Paternity Only

DO NOT COMPLETE THIS APPLICATION IF YOU ARE APPLYING FOR CHILD SUPPORT, ENFORCEMENT OF AN ORDER AND ESTABLISHMENT OF PATERNITY, OR IF YOUR CHILD WAS BORN IN ANOTHER STATE

If you wish to apply for child support services, including establishment of paternity, a child support order and enforcement of the child support order, please complete CSF 03 0574 (Application for Child Support Services)

To apply for establishment of paternity only services, complete, sign and date this application. The child support office will contact you if more information is needed to work your case.

The attachment explains information about the Child Support Program (CSP) that you need to know.

You can take the application to your local child support office or mail it to: CSP, 4600 25th Ave NE, Suite 180, Salem Oregon 97301.

Applicant’s Name (Please print) ____________________________

Is there a pending legal action in Oregon or any other state for child support? [ ] Yes [ ] No

If yes, Court Case #______________ County______________ State______________

Are you and the other parent willing to sign a legal paper known as a Voluntary Acknowledgment of Paternity to have the father’s name added to the birth record? [ ] Yes [ ] No

If a Voluntary Acknowledgment of Paternity cannot be completed do you want parentage tests to be done in order to establish paternity? [ ] Yes [ ] No

Information about Non-Custodial Parent

Full name ____________________________
Address ____________________________
Phone (_____) _______________________
Soc. Sec. #______________ Birth Date______
Employer (Non-Custodial Parent) ____________________________

Information about Custodial Parent/Guardian

Full name ____________________________
Address ____________________________
Phone (_____) _______________________
Soc. Sec. #______________ Birth Date______
Employer (Custodial Parent) ____________________________
If you do not speak or read English, what language do you speak? ______________________________

What language do you read? ______________________________

Do you need an interpreter? [ ] Yes [ ] No

If the other party does not speak or read English, what language does he/she speak? ______________________________

What language does he/she read? ______________________________

Does he/she need an interpreter? [ ] Yes [ ] No

Read #2 on the attachment and if you want to use a “contact address,” provide it below:

________________________________________________________________________

Complete this information for any child(ren) born in Oregon whose paternity needs to be established
(use additional sheets if necessary)

If paternity has been established for a child, do not complete this section for that child.

<table>
<thead>
<tr>
<th>Full Name of child</th>
<th>Date of Birth</th>
<th>City/County in Oregon where child born</th>
<th>Social Security Number</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

I certify that the above information is true and correct to the best of my knowledge and belief.

Signature: ____________________________ Date: ____________________________
Chapter 3—Juvenile/Family Law Crossover: Caution! Legal Ethics Pitfalls Ahead

Information about the Oregon Child Support Program (CSP)

**NOTE:** You are applying to establish paternity only

1. **Your rights and responsibilities**
   You are applying for establishment of paternity only. If you decide during this action that you want a child support order and enforcement services you must notify the Oregon Child Support Program (CSP) office handling your case to request establishment and enforcement services.

   Under the Oregon Child Support Program (CSP), each county District Attorney (DA) and Division of Child Support (DCS) office provides services that include establishing paternity.

   The CSP cannot act as a lawyer for any party in child support cases. You should talk to a lawyer if you have any legal questions about your case.

   All parties have equal status in child support cases. Any party can ask questions, raise issues or request changes, with or without assistance from a lawyer.

   When establishing paternity only, DCS or the DA’s office will serve parties with copies of papers whenever necessary. The papers will be served by regular mail, certified mail or in person. These papers will let you know what is happening with your case. Accepting the papers does not mean you agree with what is in them and does not take away your legal right to dispute any actions or decisions.

2. **The law requires that information about you, including your address, be on judgments.**
   If public access to this information could put you or your child at risk, you can ask that this information not be included on these documents by making a “claim of risk”. If you do not want your residence or mailing address to be given to the other party or appear in court records, you can give another address at which you will receive legal papers. This is known as a “contact address” and must be in the same state as your home address. Any time DCS or the DA begins a legal action to enter a court order in your case, you will be given the opportunity to file a “claim of risk” and a “contact address”.

   You are responsible for keeping the CSP informed of your current address. If the CSP cannot contact you for 60 days, the office may close your case. Your case may also be closed if you do not provide necessary information, sign legal documents or cooperate when asked.

   You are required to provide your social security number to the CSP at various times. This is mandatory under federal law [42 USC §405(c)(2)(C) and 42 USC §666(a)(13)]. Your social security number will be used by the CSP as one of the identifiers to find you and your records for purposes of establishing paternity and establishing, modifying and enforcing support obligations. You may be asked for your case number or your social security number when you call the CSP so that we are able to correctly identify your case. We may also ask for your social security number on forms you need to complete in order for the CSP to help you.
3. **Fees**
   You may be required to pay a one-time fee of $1 for processing your application. The cost of parentage tests, if any, will be paid by the Child Support Program. The child support program will pay the filing fee to add the father to the Oregon birth record, if applicable.

4. **Information for Alleged Fathers Requesting to Establish Paternity Only**
   The state will not pursue this paternity action if:
   • Adoption of the child is final, or
   • Paternity has already been established for the child, or
   • Paternity is presumed under ORS 109.070, the husband and wife are cohabiting and they do not consent to the challenge, or
   • The Child Support Program Director determined that establishing paternity is not in the best interests of the child.

   The mother may deny you are the father, or may say that someone else could be the father.

   You may be required to submit a parentage test to provide evidence of paternity
   • Any information provided to the state can be used in any future action to establish a support order

5. **Grievance Process**
   The CSP is committed to providing quality service in a professional manner. If you have a dispute with a child support office, please try to resolve it with the office staff or management. If you cannot resolve the matter, you may complete and file a grievance form. Grievance forms are available by calling one of the following numbers

   From the Salem area: 503-378-5567   From other areas of the state: 1-800-850-0228
Application for Child Support Services

To apply for child support services, complete, sign and date this application. Within two days after we receive your application, we will enter your case in our computer system. The child support office will contact you if more information is needed to work your case.

The attachment explains information about the Child Support Program (CSP) that you need to know.

You can take the application to your local child support office or mail it to: CSP, 4600 25th Ave NE, Suite 180, Salem Oregon 97301

Applicant’s Name (Please print)____________________________________________________

Has paternity been established for all children? [ ] Yes [ ] No

Is there an existing support order? [ ] Yes [ ] No

If yes: Court Case # _______ County _______ State _______

Do you want the existing order reviewed for a possible modification? [ ] Yes [ ] No

Are there arrears owed under the existing support order? [ ] Yes [ ] No

If there are arrears, do you want collection of these arrears? [ ] Yes [ ] No

Have you ever had a child support case with another state. If yes, which state? __________________________

Are there any other support, custody, divorce or juvenile court orders about your child(ren) or about you and the other parent? [ ] Yes [ ] No

If yes, Court Case # _______ County _______ State _______

Is there a pending legal action in any state for child support? [ ] Yes [ ] No

If yes, Court Case # _______ County _______ State _______

Information about Non-Custodial Parent

Full name ____________________________________________

Address _____________________________________________

Phone (_____)______________________________

Soc. Sec. Number__________________________

Birth date _________________________________

Employer name and address

---------------------------------------------------------------------

Information about Custodial Parent/Guardian

Full name ____________________________________________

Address _____________________________________________

Phone (_____)______________________________

Soc. Sec. Number__________________________

Birth date _________________________________

Employer name and address

---------------------------------------------------------------------
If you do not speak or read English, what language do you speak? ______________________________

What language do you read? _____________________ Do you need an interpreter? [ ] Yes [ ] No

If the other party does not speak or read English, what language does he/she speak? ________________

What language does he/she read? _____________ Does he/she need an interpreter? [ ] Yes [ ] No

The Child Support Program can provide you with information from forms and other notices in your own language free of charge. This also includes Braille, large print, and the use of interpreters. To find out more, contact your child support office.

Read #2 on the attachment and if you want to use a “contact address,” provide it below:

________________________________________________________________________________________

[ ] I have been making/receiving support payments through an escrow agent and by my signature below, authorize the Child Support Program to get copies of support payment information from the escrow company.

Name of escrow company ______________________________ Address ______________________________ Phone number ______________________________

**Information about children of this relationship** (use additional sheets if necessary)

<table>
<thead>
<tr>
<th>Full name &amp; sex (M or F)</th>
<th>Birth date</th>
<th>Soc. Sec. No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>________________________</td>
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<td>________________________</td>
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<td></td>
</tr>
</tbody>
</table>

Is there health care coverage for the children? [ ] Yes [ ] No

If yes: Who is policy holder? [ ] Non-custodial parent [ ] Custodial parent [ ] Other ________________

Insurance Company ______________________________ Policy number ______________________________

Address ______________________________

Phone number ______________________________

Has the custodial parent or the child(ren) ever received cash assistance in any state? [ ] Yes [ ] No

If yes, what state? ______________________________

Who received the cash assistance? ______________________________

Dates: __________________ to __________________

I certify that the above information is true and correct to the best of my knowledge and belief.

Signature: ______________________________ Date: ______________________________
Information about the Oregon Child Support Program (CSP)

NOTE: All applicants for services will be provided all appropriate services as decided by the child support office. An applicant for services cannot limit which services will be provided.

1 Your rights and responsibilities
Under the Oregon Child Support Program, each county District Attorney (DA) and Division of Child Support (DCS) office provides services that include establishing paternity, and establishing and modifying child support orders. The CSP enforces orders to collect child support payments and obtain medical support. The CSP will also enforce spousal support if it is included with a child support order. You have a legal right to have your child support order reviewed to see if the amount should be increased or lowered. If you want a review, you must ask the office assigned to your case. (Note: In some Oregon counties, DCS provides these services instead of the DA's office.)

The CSP cannot act as a lawyer for any party in child support cases. The CSP does not provide services or make decisions regarding parenting time and custody as these matters are decided in the court system. You should talk to a lawyer if you have any legal questions about your case.

All parties have equal status in child support cases. Any party can ask questions, raise issues, or request changes, with or without assistance from a lawyer.

When enforcing a child support case, DCS or the DA's office will serve parties with copies of papers whenever necessary. The papers will be served by regular mail, certified mail or in person. These papers will let you know what is happening with your case. Accepting the papers does not mean you agree with what is in them and does not take away your legal right to dispute any actions or decisions.

2 The law requires that information about you, including your address, be on support orders and other judgments.
If public access to this information could put you or your child at risk, you can ask that this information not be included on these documents by making a “claim of risk”. If you do not want your residence or mailing address to be given to the other party or appear in court records, you can give another address at which you will receive legal papers. This is known as a “contact address” and must be in the same state as your home address. Any time DCS or the DA begins a legal action to enter a court order in your case; you will be given the opportunity to file a “claim of risk” and a “contact address”.

You are responsible for keeping the CSP informed of your current address. If the CSP cannot contact you for 60 days, the office may close your case. Your case may also be closed if you do not provide necessary information, sign legal documents, or cooperate when asked.

You are required to provide your social security number to the CSP at various times. This is mandatory under federal law [42 USC §405(c)(2)(C) and 42 USC §666(a)(13)]. Your social security number will be used by the CSP as one of the identifiers to find you and your records for purposes of establishing paternity and establishing, modifying and enforcing support obligations. You may be asked for your case number or your social security number when you call the CSP so that we are able to correctly identify your case. We may also ask for your social security number on forms you need to complete in order for the CSP to help you.

3 How we disburse child support payments
When a person receives services from the CSP, all child support must be paid to Department of Justice, Division of Child Support. DCS keeps the accounting records of the case.

If the child(ren) is not in the care and custody of the state, DCS sends the money electronically to whomever is owed the support. This could be the obligee, the child attending school, another state,
or a caretaker.

The state keeps the money if the child(ren) is in the care and custody of the state.

If the child(ren) is receiving TANF benefits, the state may send some of the money to the family, and keep the rest of the payment. This is a pass-through, as defined in OAR 137-055-6010.

For general disbursement information, see Oregon Administrative Rule (OAR) 137-055-6021.

4 **Fees for services**
A one-time fee of $1 for processing your application will be deducted from the first collection made. The program also charges fees for some other services. Fee amounts can change each year, so they are not included on this form. The CSP can give you more information about fees. For example, the CSP works with the Internal Revenue Service and the Oregon Department of Revenue to obtain tax refunds claimed by parents who owe child support. Fees for these services are deducted from the money collected. These tax refund actions are automatically performed by the program. If tax refunds cannot be collected by the program, no fee is charged.

5 **Annual fee**
The CSP will collect a $25 fee from some obligees. Charging a fee is required by federal law (45 CFR 302.33). The fee will be charged each year that the CSP has sent to the family at least $500 in a federal fiscal year (October 1 through September 30). The fee will be collected only in cases in which the obligee, the child, or a child attending school has never received “cash assistance” from any state. “Cash assistance” means only TANF (Temporary Assistance to Needy Families) or AFDC (Aid to Families with Dependent Children). It does not include food stamps, housing subsidies, general assistance, or Social Security Administration or Veterans’ Administration benefits.

If the child support program does not collect at least $500 in a federal fiscal year, there is no fee for that year.

6 **Grievance process**
The CSP is committed to providing quality service in a professional manner. If you have a dispute with a child support office, please try to resolve it with the office staff or management. If you cannot resolve the matter, you may complete and file a grievance form. Grievance forms are available by calling one of the following numbers.

From the Salem area: 503-378-5567
From other areas of the state: 1-800-850-0228

The Child Support Program (CSP) provides services for the State of Oregon. We cannot represent you or give you legal advice. You may contact your own lawyer at any time. Low cost legal services may be available. For information, you may visit the CSP website at oregonchildsupport.gov.
SELECTED LOCAL COURT RULES (APPOINTMENT OF COUNSEL FOR CHILDREN)

Multnomah County

8.085 APPOINTMENT OF COUNSEL FOR CHILDREN

The Court may appoint counsel for children in cases arising under ORS Chapter 107 upon its own motion or upon motion of either party pursuant to ORS 107.425(3), and shall appoint counsel if requested to do so by one or more of the children. A reasonable fee may be imposed by the Court against either or both of the parties or as a cost in the proceedings.

The procedure for appointment of counsel for children in cases arising under ORS Chapters 107-109 shall be as follows:

1. In its sole discretion, the Court may appoint counsel for the children on its own motion with or without prior notice to the parties.

2. A party or child seeking such appointment shall file a motion (or for a child, other appropriate request) with the Court.

3. The Court will appoint counsel where requested to do so by one or more children.

4. Orders appointing counsel issued by the Court may contain provision for payment of attorney fees and terms for payment. No Order will be issued until counsel has agreed to accept such appointment upon the fee terms set forth.

5. To the extent possible, appointed counsel will represent their clients' legal interests in obtaining a secure, stable home life and a balanced relationship with both parents and will be answerable only to their client and to the Court. The parents or persons having physical custody of the child shall cooperate in allowing counsel opportunity for private consultation with the child or children, including making or assisting with arrangements for the children's transportation to the attorneys' office or some other reasonable meeting place and reasonable phone communication if needed.

6. Counsel to be appointed for children shall meet the Court’s standards for qualification in family law matters and in the resolution of custody/parenting time issues.

Washington County

8.091 APPOINTMENT OF LEGAL COUNSEL FOR MINOR CHILD(REN)

1. When legal counsel is appointed to represent a child in a domestic relations matter pursuant to ORS 107.425(8), the order shall be submitted to the Court in substantially the same form as set out in Form SLR 8.091.

2. The court will define whether the representation is “traditional advocacy” or “best interests” representation. If the attorney, in the course of representation, determines that the role of representation should be changed, the court will endorse the change.
(3) The parties are encouraged to stipulate to an identified attorney, type of representation and method of compensation. If the parties cannot agree, the court will identify an attorney and confirm the attorney’s availability to represent the child.

(4) In the event that an attorney is appointed to represent a child, the child will be considered a party.

(5) The parents are to make the child available to the attorney as requested and are not to monitor the child’s communication with the attorney or interrogate the child about the nature or substance of the communication.

(6) The child’s attorney is expected to be familiar with the contents of ABA Standards for Representation of Children as well as the Washington County video on representation of children.

(7) The attorney representing the child may submit an ORCP 68 statement for fees and costs. The Court retains the authority to require either or both parents to contribute toward the fees and costs incurred, even if the attorney agreed to represent the child on a pro bono or reduced fee basis.
IN THE CIRCUIT COURTS OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

ORDER APPOINTING LEGAL COUNSEL
FOR MINOR CHILD(REN)
(FAMILY LAW CASE)

In the Matter of

___________________________________

Petitioner

and

___________________________________

Respondent

Case No. ___________________________

ORDER APPOINTING LEGAL COUNSEL
FOR MINOR CHILD(REN)
(FAMILY LAW CASE)

THIS MATTER came before the court:

☐ at the request of the child(ren) referenced below.
☐ at the request of counsel for the petitioner/respondent.
☐ on the court's own motion.

IT IS HEREBY ORDERED that:

1. Under the provisions of ORS 107.425(6), (attorney name and phone number) is appointed as attorney for the minor child(ren) (name and age of child(ren)) in this proceeding until resolution of pending pleadings. Only the court can relieve the attorney of representation.

2. The child shall be treated as a party

3. The attorney shall act as a:
   ☐ best interest attorney.
   ☐ traditional, advocacy attorney.
   However, if after meeting the child(ren), the attorney concludes a different type of representation is more appropriate, the attorney shall move the court to modify the type of appointment (in cases involving a child age 12 or older, the court presumes at the outset that a traditional, advocacy attorney is appropriate).
4. Payment of the attorney shall be handled as follows:
   - The court-appointed attorney has volunteered to perform services at no initial expense to the parties. The attorney shall keep track of the time expended. The court reserves jurisdiction to assess a child’s attorney fees to either or both parents at the conclusion of the proceeding. The court may decline to order any award for attorney fees and/or costs.
   - The court-appointed attorney shall be paid by one parent. The payment arrangements are to be made between the attorney and the parent.
   - The court-appointed attorney shall be paid by both parents. The parent shall pay a retainer of $___________. Absent other order of the court, both parents are liable for 50 percent of the reasonable attorney fees of the court-appointed attorney. The court shall retain jurisdiction to apportion the cost of the child’s attorney between the parents as is equitable.

5. If the court-appointed attorney does report time, the attorney shall submit only summary bills to the parties to protect all attorney-client confidences.

6. The court-appointed attorney shall have access to all information regarding the child(ren) without the necessity of any further order of release. Such information includes but is not limited to records of social services, drug and alcohol treatment, medical records, school records, and law enforcement records. Further, the attorney has authorization of the court to obtain medical records for a parent upon a showing of an explanation of relevance pursuant to federal law.

7. Each of the parties is ordered to facilitate and encourage access and communication between the child(ren) and the attorney appointed for representation in this proceeding. Neither party shall interfere in any way with any communication between the attorney and the child(ren). Neither party shall monitor or record attorney/child(ren) communications. Both of the parties are enjoined from discussing with the child(ren) the nature, extent, or content of any communication between a child’s appointed attorney and the child.

8. By accepting appointment in this case, the attorney represents he or she is familiar with the ABA Standards of Practice for Lawyers Representing Children (email wsh.familylaw.ojd.state.or.us to request link) and has reviewed the training video prepared by the Washington County Family Law Bench/Bar Committee.

Dated this _________ day of ______________________, 20 ______.

_______________________________________________________
Circuit Court Judge
107.425 Investigation of parties in domestic relations suit involving children; physical, psychological, psychiatric or mental health examinations; parenting plan services; counsel for children. (1) In suits or proceedings described in subsection (4) of this section in which there are minor children involved, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties for the purpose of protecting the children’s future interest. The court may defer the entry of a general judgment until the court is satisfied that its judgment in such suit or proceeding will properly protect the welfare of such children. The investigative findings shall be offered as and subject to all rules of evidence. Costs of the investigation may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for public defense services.

(2) The court, on its own motion or on the motion of a party, may order an independent physical, psychological, psychiatric or mental health examination of a party or the children and may require any party and the children to be interviewed, evaluated and tested by an expert or panel of experts. The court may also authorize the expert or panel of experts to interview other persons and to request other persons to make available to the expert or panel of experts records deemed by the court or the expert or panel of experts to be relevant to the evaluation. The court may order the parties to authorize the disclosure of such records. In the event the parties are unable to stipulate to the selection of an expert or panel of experts to conduct the examination or evaluation, the court shall appoint a qualified expert or panel of experts. The court shall direct one or more of the parties to pay for the examination or evaluation in the absence of an agreement between the parties as to the responsibility for payment but shall not direct that the expenses be charged against funds appropriated for public defense services. If more than one party is directed to pay, the court may determine the amount that each party will pay based on financial ability.

(3) (a) In addition to an investigation, examination or evaluation under subsections (1) and (2) of this section, the court may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans. The services provided to the court and to parents under this section may include:

(A) Gathering information;
(B) Monitoring compliance with court orders;
(C) Providing the parents, their attorneys, if any, and the court with recommendations for new or modified parenting time provisions; and
(D) Providing parents with problem solving, conflict management and parenting time coordination services or other services approved by the court.

(b) Services provided under this section may require the provider to possess and utilize mediation skills, but the services are not comprised exclusively of mediation services under ORS 107.755 to 107.795. If only mediation services are provided, the provisions of ORS 107.755 to 107.795 apply.

(c) The court may order one or more of the parties to pay for services provided under this subsection, if the parties are unable to agree on their respective responsibilities for payment. The court may not order that expenses be charged against funds appropriated for public defense services.

(d) The presiding judge of each judicial district shall establish qualifications for the appointment and training of individuals and panels and the designation of programs under this section. In establishing qualifications, a presiding judge shall take into consideration any guidelines recommended by the statewide family law advisory committee.

(4) The provisions of this section apply when:

(a) A person files a domestic relations suit, as defined in ORS 107.510;
(b) A motion to modify an existing judgment in a domestic relations suit is before the court;
(c) A parent of a child born to an unmarried woman initiates a civil proceeding to determine custody or support under ORS 109.103;

(d) A person petitions or files a motion for intervention under ORS 109.119;

(e) A person or the administrator files a petition under ORS 109.125 to establish paternity and paternity is established; or

(f) A habeas corpus proceeding is before the court.

(5) Application of the provisions of subsection (1), (2) or (3) of this section to the proceedings under subsection (4) of this section does not prevent initiation, entry or enforcement of an order of support.

(6) The court, on its own motion or on the motion of a party, may appoint counsel for the children. However, if requested to do so by one or more of the children, the court shall appoint counsel for the child or children. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for public defense services.

(7) Prior to the entry of an order, the court on its own motion or on the motion of a party may take testimony from or confer with the child or children of the marriage and may exclude from the conference the parents and other persons if the court finds that such action would be likely to be in the best interests of the child or children. However, the court shall permit an attorney for each party to attend the conference and question the child, and the conference shall be reported.

Chapter 109—Parent and Child Rights and Relationships

DOMESTIC RELATIONS

PARENT AND CHILD RELATIONSHIP

109.070 Establishing paternity. (1) The paternity of a person may be established as follows:

(a) A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other at the time of the child’s birth, without a judgment of separation, regardless of whether the marriage is void.

(b) A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment or dissolution or after entry of a judgment of separation.

(c) By the marriage of the parents of a child after the birth of the child, and the parents filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.098.

(d) By filiation proceedings.

(e) By filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.098. Except as otherwise provided in subsections (4) to (7) of this section, this filing establishes paternity for all purposes.

(f) By having established paternity through a voluntary acknowledgment of paternity process in another state.

(g) By paternity being established or declared by other provision of law.

(2) The paternity of a child established under subsection (1)(a) or (c) of this section may be challenged in an action or proceeding by the husband or wife. The paternity may not be challenged by a person other than the husband or wife as long as the husband and wife are married and cohabiting, unless the husband and wife consent to the challenge.

(3) If the court finds that it is just and equitable, giving consideration to the interests of the parties and the child, the court shall admit evidence offered to rebut the presumption of paternity in subsection (1)(a) or (b) of this section.

(4) (a) A party to a voluntary acknowledgment of paternity may rescind the acknowledgment within the earlier of:

(A) Sixty days after filing the acknowledgment; or
(B) The date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the acknowledgment is also a party. For the purposes of this subparagraph, the date of a proceeding is the date on which an order is entered in the proceeding.

(b) To rescind the acknowledgment, the party shall sign and file with the State Registrar of the Center for Health Statistics a written document declaring the rescission.

(5) (a) A signed voluntary acknowledgment of paternity filed in this state may be challenged and set aside in circuit court at any time after the 60-day period referred to in subsection (4) of this section on the basis of fraud, duress or a material mistake of fact.

(b) The challenge may be brought by:

(A) A party to the acknowledgment;

(B) The child named in the acknowledgment; or

(C) The Department of Human Services or the administrator, as defined in ORS 25.010, if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B and the department or the administrator reasonably believes that the acknowledgment was signed because of fraud, duress or a material mistake of fact.

(c) The challenge shall be initiated by filing a petition with the circuit court. Unless otherwise specifically provided by law, the challenge shall be conducted pursuant to the Oregon Rules of Civil Procedure.

(d) The party bringing the challenge has the burden of proof.

(e) Legal responsibilities arising from the acknowledgment, including child support obligations, may not be suspended during the challenge, except for good cause.

(f) If the court finds by a preponderance of the evidence that the acknowledgment was signed because of fraud, duress or material mistake of fact, the court shall set aside the acknowledgment unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable.

(6) Within one year after a voluntary acknowledgment of paternity form is filed in this state and if blood tests, as defined in ORS 109.251, have not been completed, a party to the acknowledgment, or the department if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B, may apply to the administrator for an order for blood tests in accordance with ORS 416.443.

(7) (a) A voluntary acknowledgment of paternity is not valid if, before the party signed the acknowledgment:

(A) The party signed a consent to the adoption of the child by another individual;

(B) The party signed a document relinquishing the child to a public or private child-caring agency;

(C) The party’s parental rights were terminated by a court; or

(D) In an adjudication, the party was determined not to be the biological parent of the child.

(b) Notwithstanding any provision of subsection (1)(c) or (e) of this section or ORS 432.098 to the contrary, an acknowledgment signed by a party described in this subsection and filed with the State Registrar of the Center for Health Statistics does not establish paternity and is void. [1957 c.411 §2; 1969 c.619 §11; 1971 c.127 §2; 1975 c.640 §3; 1983 c.709 §37; 1995 c.79 §37; 1995 c.514 §7; 1999 c.80 §20; 2001 c.455 §17; 2003 c.576 §136; 2005 c.160 §§11,17; 2007 c.454 §1]

109.072 Petition to vacate or set aside paternity determination. (1) As used in this section:

(a) “Blood tests” has the meaning given that term in ORS 109.251.

(b) “Paternity judgment” means a judgment or administrative order that:

(A) Expressly or by inference determines the paternity of a child, or that imposes a child support obligation based on the paternity of a child; and

(B) Resulted from a proceeding in which blood tests were not performed and the issue of paternity was not challenged.
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(c) “Petition” means a petition or motion filed under this section.

(d) “Petitioner” means the person filing a petition or motion under this section.

(2) (a) The following may file in circuit court a petition to vacate or set aside the paternity determination of a paternity judgment, including any child support obligations established in the paternity judgment, and for a judgment of nonpaternity:

(A) A party to the paternity judgment. 

(B) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B. 

(C) The Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the paternity judgment have been assigned to the state.

(b) The petitioner may file the petition in the circuit court proceeding in which the paternity judgment was entered, in a related proceeding or in a separate action. The petitioner shall attach a copy of the paternity judgment to the petition.

(c) If the ground for the petition is that the paternity determination was obtained by or was the result of mistake, inadvertence, surprise or excusable neglect, the petitioner may not file the petition more than one year after entry of the paternity judgment.

(d) If the ground for the petition is that the paternity determination was obtained by or was the result of fraud, misrepresentation or other misconduct of an adverse party, the petitioner may not file the petition more than one year after the petitioner discovers the fraud, misrepresentation or other misconduct.

(3) In the petition, the petitioner shall:

(a) Designate as parties:

(A) All persons who were parties to the paternity judgment; 

(B) The child if the child is a child attending school, as defined in ORS 107.108; 

(C) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B; and

(D) The Administrator of the Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the paternity judgment have been assigned to the state.

(b) Provide the full name and date of birth of the child whose paternity was determined by the paternity judgment.

(c) Allege the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested.

(4) After filing a petition under this section, the petitioner shall serve a summons and a true copy of the petition on all parties as provided in ORCP 7.

(5) The court, on its own motion or on the motion of a party, may appoint counsel for the child. However, if requested to do so by the child, the court shall appoint counsel for the child. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceeding, but may not be charged against funds appropriated for public defense services.

(6) The court may order the mother, the child and the man whose paternity of the child was determined by the paternity judgment to submit to blood tests. In deciding whether to order blood tests, the court shall consider the interests of the parties and the child and, if it is just and equitable to do so, may deny a request for blood tests. If the court orders blood tests under this subsection, the court shall order the petitioner to pay the costs of the blood tests.

(7) Unless the court finds, giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable, the court shall vacate or set aside the paternity determination of the paternity judgment, including provisions imposing child support obligations, and enter a judgment of nonpaternity if the court finds by a preponderance of the evidence that:
(a) The paternity determination was obtained by or was the result of:

(A) Mistake, inadvertence, surprise or excusable neglect; or

(B) Fraud, misrepresentation or other misconduct of an adverse party;

(b) The mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct was discovered by the petitioner after the entry of the paternity judgment; and

(c) Blood tests establish that the man is not the biological father of the child.

(8) If the court finds that the paternity determination of a paternity judgment was obtained by or was the result of fraud, the court may vacate or set aside the paternity determination regardless of whether the fraud was intrinsic or extrinsic.

(9) If the court finds, based on blood test evidence, that the man may be the biological father of the child and that the cumulative paternity index based on the blood test evidence is 99 or greater, the court shall deny the petition.

(10) The court may grant the relief authorized by this section upon a party’s default, or by consent or stipulation of the parties, without blood test evidence.

(11) A judgment entered under this section vacating or setting aside the paternity determination of a paternity judgment and determining nonpaternity:

(a) Shall contain the full name and date of birth of the child whose paternity was established or declared by the paternity judgment.

(b) Shall vacate and terminate any ongoing and future child support obligations arising from or based on the paternity judgment.

(c) May vacate or deem as satisfied, in whole or in part, unpaid child support obligations arising from or based on the paternity judgment.

(d) May not order restitution from the state for any sums paid to or collected by the state for the benefit of the child.

(12) If the court vacates or sets aside the paternity determination of a paternity judgment under this section and enters a judgment of nonpaternity, the petitioner shall send a court-certified true copy of the judgment entered under this section to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit. Upon receipt of the court-certified true copy of the judgment entered under this section, the state registrar shall correct any records maintained by the state registrar that indicate that the male party to the paternity judgment is the father of the child.

(13) The court may award to the prevailing party a judgment for reasonable attorney fees and costs, including the cost of any blood tests ordered by the court and paid by the prevailing party.

(14) A judgment entered under this section vacating or setting aside the paternity determination of a paternity judgment and determining nonpaternity is not a bar to further proceedings to determine paternity, as otherwise allowed by law.

(15) If a man whose paternity of a child has been determined by a paternity judgment has died, an action under this section may not be initiated by or on behalf of the estate of the man.

(16) This section does not limit the authority of the court to vacate or set aside a judgment under ORCP 71, to modify a judgment within a reasonable period, to entertain an independent action to relieve a party from a judgment, to vacate or set aside a judgment for fraud upon the court or to render a declaratory judgment under ORS chapter 28.

(17) This section shall be liberally construed to the end of achieving substantial justice. [2007 c.454 §9]

Note: 109.072 was added to and made a part of ORS chapter 109 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

109.119 Rights of person who establishes emotional ties creating child-parent relationship or ongoing personal relationship; presumption regarding legal parent; motion for intervention. (1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship; presumption regarding legal parent; motion for intervention.

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relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

(2)  (a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

(b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.

(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

(3)  (a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

(4)  (a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The petitioner or intervenor is or recently has been the child's primary caretaker;

(B) Circumstances detrimental to the child exist if relief is denied;

(C) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

(D) Granting relief would not substantially interfere with the custodial relationship; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The legal parent is unwilling or unable to care adequately for the child;

(B) The petitioner or intervenor is or recently has been the child's primary caretaker;

(C) Circumstances detrimental to the child exist if relief is denied;

(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(5) In addition to the other rights granted under this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation under this section or may petition the court for the county in which the child resides for adoption of the child. The stepparent may also file for post-judgment modification of a judgment relating to child custody.

(6)  (a) A motion for intervention filed under this section shall comply with ORCP 33 and state the grounds for relief under this section.

(b) Costs for the representation of an intervenor under this section may not be charged against funds appropriated for public defense services.
(7) In a proceeding under this section, the court may:

(a) Cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist the parties in creating and implementing parenting plans under ORS 107.425 (3).

(b) Assess against a party reasonable attorney fees and costs for the benefit of another party.

(8) When a petition or motion to intervene is filed under this section seeking guardianship or custody of a child who is a foreign national, the petitioner or intervenor shall serve a copy of the petition or motion on the consulate for the child’s country.

(9) This section does not apply to proceedings under ORS chapter 419B.

(10) As used in this section:

(a) “Child-parent relationship” means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child’s psychological needs for a parent as well as the child’s physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

(b) “Circumstances detrimental to the child” includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.

(c) “Grandparent” means the legal parent of the child’s legal parent.

(d) “Legal parent” means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(e) “Ongoing personal relationship” means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality. [1985 c.516 §2; 1987 c.810 §1; 1993 c.372 §1; 1997 c.92 §1; 1997 c.479 §1; 1997 c.873 §20; 1999 c.569 §6; 2001 c.873 §§1,1a,1e; 2003 c.143 §§1,2; 2003 c.231 §§4,5; 2003 c.576 §§138,139]

FILATION PROCEEDINGS

109.124 Definitions for ORS 109.124 to 109.230. As used in ORS 109.124 to 109.230, unless the context requires otherwise:

(1) “Child attending school” has the meaning given that term in ORS 107.108.

(2) “Child born out of wedlock” means a child born to an unmarried woman or to a married woman by a man other than her husband.

(3) “Respondent” may include, but is not limited to, one or more persons who may be the father of a child born out of wedlock, the husband of a woman who has or may have a child born out of wedlock, the mother of a child born out of wedlock, the woman pregnant with a child who may be born out of wedlock, or the duly appointed and acting guardian of the child or conservator of the child’s estate. [1979 c.246 §4; 1983 c.762 §1; 1995 c.79 §38; 1995 c.343 §24; 1995 c.514 §18; 1997 c.704 §56; 2005 c.160 §§14,20; 2007 c.454 §3]

109.125 Who may initiate proceedings; petition; parties. (1) Any of the following may initiate proceedings under this section:

(a) A mother of a child born out of wedlock or a woman pregnant with a child who may be born out of wedlock;

(b) The duly appointed and acting guardian of the child, conservator of the child’s estate or a guardian ad litem, if the guardian or conservator has the physical custody of the child or is providing support for the child;

(c) The administrator, as defined in ORS 25.010;

(d) A man claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock; or
(e) The minor child by a guardian ad litem.

(2) Proceedings shall be initiated by the filing of a duly verified petition of the initiating party. The petition shall contain:

(a) If the initiating party is one of those specified in subsection (1)(a), (b), (c) or (e) of this section:

(A) The name of the mother of the child born out of wedlock or the woman pregnant with a child who may be born out of wedlock;

(B) The name of the mother’s husband if the child is alleged to be a child born to a married woman by a man other than her husband;

(C) Facts showing the petitioner’s status to initiate proceedings;

(D) A statement that a respondent is the father;

(E) The probable time or period of time during which conception took place; and

(F) A statement of the specific relief sought.

(b) If the initiating party is a man specified in subsection (1)(d) of this section:

(A) The name of the mother of the child born out of wedlock or the woman pregnant with a child who may be born out of wedlock;

(B) The name of the mother’s husband if the child is alleged to be a child born to a married woman by a man other than her husband;

(C) A statement that the initiating party is the father of the child and accepts the same responsibility for the support and education of the child and for all pregnancy-related expenses that he would have if the child were born to him in lawful wedlock;

(D) The probable time or period of time during which conception took place; and

(E) A statement of the specific relief sought.

(3) When proceedings are initiated by the administrator, as defined in ORS 25.010, the state and the child’s mother and putative father are parties.

(4) When a proceeding is initiated under this section and the child support rights of one of the parties or of the child at issue have been assigned to the state, a true copy of the petition shall be served by mail or personal delivery on the Administrator of the Division of Child Support of the Department of Justice or on the branch office providing support services to the county in which the suit is filed.

(5) A man whose paternity of a child has been established under ORS 109.070 is a necessary party to proceedings initiated under this section unless the paternity has been disestablished before the proceedings are initiated.

[1969 c.619 §1; 1971 c.191 §1; 1971 c.401 §3; 1971 c.779 §79; 1973 c.823 §105; 1975 c.458 §15a; 1975 c.640 §4a; 1979 c.90 §3; 1979 c.246 §5; 1983 c.762 §2; 1993 c.596 §21; 2001 c.334 §6; 2003 c.73 §56; 2007 c.454 §4]

109.135 Circuit court jurisdiction; equity action; place of commencement. (1) All filiation proceedings shall be commenced in the circuit court and shall for all purposes be deemed actions in equity. Unless otherwise specifically provided by statute, the proceedings shall be conducted pursuant to the Oregon Rules of Civil Procedure.

(2) All filiation proceedings shall be commenced and tried in the county where either party or the child resides.

[1969 c.619 §§2,3,7; 1971 c.191 §2; 1979 c.246 §6; 1981 s.s. c.3 §104; 1983 c.762 §3; 1999 c.80 §22; 2013 c.1 §5; 2013 c.126 §3]

109.145 Court may proceed despite failure to appear; evidence required. If a respondent fails to answer or fails to appear at trial, the court shall have the power to proceed accordingly. In such case, the court may make a determination of paternity and may impose such obligations on the respondent as it deems reasonable. In all such cases corroborating evidence in addition to the testimony of the parent or expectant parent shall be required to establish paternity and the court may, in its discretion, order such investigation or the production of such evidence as it deems appropriate to establish a proper basis for relief. The testimony of the parent or expectant parent and the corroborating evidence may be presented by affidavit.

109.155 Hearing; order for payment for support of child and other costs; policy regarding settlement; enforcement of settlement terms; remedies. (1) The court, in a private hearing, shall first determine the issue of paternity. If the respondent admits the paternity, the admission shall be reduced to writing, verified by the respondent and filed with the court. If the paternity is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required.

(2) If the court finds, from a preponderance of the evidence, that the petitioner or the respondent is the father of the child who has been, or who may be born out of wedlock, the court shall then proceed to a determination of the appropriate relief to be granted. The court may approve any settlement agreement reached between the parties and incorporate the agreement into any judgment rendered, and the court may order such investigation or the production of such evidence as the court deems appropriate to establish a proper basis for relief.

(3) The court, in its discretion, may postpone the hearing from time to time to facilitate any investigation or the production of such evidence as it deems appropriate.

(4) The court may order either parent to pay such sum as the court deems appropriate for the past and future support and maintenance of the child during the child’s minority and while the child is attending school, as defined in ORS 107.108, and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, which may include expert witness fees, and reasonable attorney fees at trial and on appeal. The provisions of ORS 107.108 apply to an order entered under this section for the support of a child attending school.

(5) An affidavit certifying the authenticity of documents substantiating expenses set forth in subsection (4) of this section is prima facie evidence to establish the authenticity of the documents.

(6) (a) It is the policy of this state:

(A) To encourage the settlement of cases brought under this section; and

(B) For courts to enforce the terms of settlements described in paragraph (b) of this subsection to the fullest extent possible, except when to do so would violate the law or would clearly contravene public policy.

(b) In a proceeding under this section, the court may enforce the terms set forth in a stipulated judgment of paternity signed by the parties, a judgment of paternity resulting from a settlement on the record or a judgment of paternity incorporating a settlement agreement:

(A) As contract terms using contract remedies;

(B) By imposing any remedy available to enforce a judgment, including but not limited to contempt; or

(C) By any combination of the provisions of subparagraphs (A) and (B) of this paragraph.

(c) A party may seek to enforce an agreement and obtain remedies described in paragraph (b) of this subsection by filing a motion, serving notice on the other party in the manner provided by ORCP 7 and, if a remedy under paragraph (b)(B) of this subsection is sought, complying with the statutory requirements for that remedy. All claims for relief arising out of the same acts or omissions must be joined in the same proceeding.

(d) Nothing in paragraph (b) or (c) of this subsection limits a party’s ability, in a separate proceeding, to file a motion to set aside, alter or modify a judgment under ORS 109.165 or to seek enforcement of an ancillary agreement to the judgment.

(7) If a man’s paternity of a child has been established under ORS 109.070 and the paternity has not been disestablished before proceedings are initiated under ORS 109.125, the court may not render a judgment under ORS 109.124 to 109.230 establishing another man’s paternity of the child unless the judgment also disestablishes the paternity established under ORS 109.070. [1969 c.619 §5; 1971 c.137 §1; 1971 c.191 §3; 1973 c.827 §12h; 1975 c.640 §15; 1981 c.897 §33; 1983 c.762 §5; 1989 c.417 §2; 1997 c.704 §57; 1999 c.80 §23; 2001 c.203 §6; 2003 c.576 §140; 2007 c.454 §5]

109.165 Vacation or modification of judgment; policy regarding settlement; enforcement of settlement terms; remedies. (1) Upon motion of either party, the court may set aside, alter or modify any portion of the judgment that provides for the support of the minor child or child attending school, as defined in ORS 107.108. As to any installment or payment of money that has accrued up to the time the nonmoving party, other than the state, is served with a motion to set aside, alter or modify the judgment, the judgment is final and the court may not change it. However, the court may allow a credit against child support arrearages for periods of time, excluding reasonable parenting time unless otherwise provided by order or
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judgment, during which the obligor, with the knowledge and consent of the obligee or pursuant to court order, has physical custody of the child. A child attending school is a party for purposes of this section.

(2) The moving party shall state in the motion, to the extent known:

(a) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the child, including a proceeding brought under ORS 25.287, 109.100, 125.025, 416.400 to 416.465, 419B.400 or 419C.590 or ORS chapter 110; and

(b) Whether there exists in this state or any other jurisdiction a support order, as defined in ORS 110.503, involving the child, other than the judgment the party is moving to set aside, alter or modify.

(3) The moving party shall include with the motion a certificate regarding any pending support proceeding and any existing support order other than the judgment the party is moving to set aside, alter or modify. The party shall use a certificate that is in a form established by court rule and include information required by court rule and subsection (2) of this section.

(4) (a) It is the policy of this state:

(A) To encourage the settlement of cases brought under this section; and

(B) For courts to enforce the terms of settlements described in paragraph (b) of this subsection to the fullest extent possible, except when to do so would violate the law or would clearly contravene public policy.

(b) In a proceeding under subsection (1) of this section, the court may enforce the terms set forth in a stipulated order or judgment signed by the parties, an order or judgment resulting from a settlement on the record or an order or judgment incorporating a settlement agreement:

(A) As contract terms using contract remedies;

(B) By imposing any remedy available to enforce an order or judgment, including but not limited to contempt; or

(C) By any combination of the provisions of subparagraphs (A) and (B) of this paragraph.

(c) A party may seek to enforce an agreement and obtain remedies described in paragraph (b) of this subsection by filing a motion, serving notice on the other party in the manner provided by ORCP 7 and, if a remedy under paragraph (b) of this subsection is sought, complying with the statutory requirements for that remedy. All claims for relief arising out of the same acts or omissions must be joined in the same proceeding.

(d) Nothing in paragraph (b) or (c) of this subsection limits a party’s ability, in a separate proceeding, to file a motion to modify an order or judgment under subsection (1) of this section or to seek enforcement of an ancillary agreement to the order or judgment. [1969 c.619 §6; 1973 c.827 §12i; 1983 c.761 §11; 1985 c.671 §42; 1993 c.671 §42; 1995 c.608 §4; 1999 c.59 §25; 1999 c.569 §8; 2001 c.203 §8; 2003 c.116 §10; 2003 c.419 §3; 2003 c.576 §141; 2015 c.298 §95]

109.175 Determination of legal custody after paternity established. (1) If paternity of a child born out of wedlock is established pursuant to a petition filed under ORS 109.125 or an order or judgment entered pursuant to ORS 109.124 to 109.230 or ORS 416.400 to 416.465, or if paternity is established by the filing of a voluntary acknowledgment of paternity as provided by ORS 109.070 (1)(e), the parent with physical custody at the time of filing of the petition or the notice under ORS 416.415, or the parent with physical custody at the time of the filing of the voluntary acknowledgment of paternity, has sole legal custody until a court specifically orders otherwise. The first time the court determines who should have legal custody, neither parent shall have the burden of proving a change of circumstances. The court shall give primary consideration to the best interests and welfare of the child and shall consider all the standards set out in ORS 107.137.

(2) In any proceeding under this section, the court may cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans under ORS 107.425 (3). [1983 c.761 §11; 1985 c.671 §42; 1993 c.608 §4; 1999 c.59 §25; 1999 c.569 §8; 2001 c.833 §3; 2005 c.160 §15,21]

109.225 Notice to Center for Health Statistics after petition filed; filing notice. (1) After filing the petition, the petitioner shall cause the Center for Health Statistics of the Oregon Health Authority to be served by mail with a notice setting forth the court in which the petition was filed, the date of the filing therein, the case number, the full name and address of the child, the date and place of the child’s birth, or if the child is not yet born, the date and place of the child’s conception.
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and the probable date of the child’s birth, the full names and addresses of the child’s alleged parents, and the names and addresses of the petitioner and of the respondents in the proceedings.

(2) The Center for Health Statistics shall file immediately the notice, or a copy thereof, with the record of the birth of the child or in the same manner as its filing of records of birth if the center does not have a record of the birth. The center shall only provide the information contained in the notice to persons whose names appear in the notice or to persons or agencies showing a legitimate interest in the parent-child relationship including, but not limited to, parties to adoption, juvenile court or heirship proceedings. [1975 c.640 §5; 1983 c.709 §40; 1983 c.762 §6; 1991 c.484 §1; 2009 c.595 §69]

109.230 Legality of contract between mother and father of child born out of wedlock. Any contract between the mother and father of a child born out of wedlock is a legal contract, and the admission by the father of his fatherhood of the child is sufficient consideration to support the contract. [Amended by 1961 c.338 §6]

109.231 Records open to public. Records of filiation proceedings filed in circuit court shall be open for inspection by any person without order of the court. [1993 c.138 §2]

Note: 109.231 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 109 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

109.237 Attorney fees. In any proceeding brought to modify or compel compliance with an order of the court issued under ORS 109.124 to 109.230, the court may render judgment awarding to a party, or directly to the party’s attorney, a sum of money determined to be reasonable as an attorney fee and costs and expenses of suit, which judgment may include expert witness fees, in preparation for and at trial and on appeal. [1989 c.417 §1]

Note: 109.237 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 109 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

Chapter 419B—Juvenile Code: Dependency

HUMAN SERVICES; JUVENILE CODE; CORRECTIONS

JUVENILE COURT

(Paternity)

419B.395 Judgment of paternity or nonpaternity. (1) If in any proceeding under ORS 419B.100 or 419B.500 the juvenile court determines that the child or ward has no legal father or that paternity is disputed as allowed in ORS 109.070, the court may enter a judgment of paternity or a judgment of nonpaternity in compliance with the provisions of ORS 109.070, 109.124 to 109.230, 109.250 to 109.262 and 109.326.

(2) Before entering a judgment under subsection (1) of this section, the court must find that adequate notice and an opportunity to be heard was provided to:

(a) The parties to the proceeding;

(b) The man alleged or claiming to be the child or ward’s father; and

(c) The Administrator of the Division of Child Support of the Department of Justice or the branch office providing support services to the county in which the court is located.

(3) When appropriate, the court shall inform a man before the court claiming to be the father of a child or ward that paternity establishment services may be available through the administrator if the child or ward:

(a) Is a child born out of wedlock;

(b) Has not been placed for adoption; and

(c) Has no legal father.

(4) As used in this section:

(a) “Administrator” has the meaning given that term in ORS 25.010.

(b) “Child born out of wedlock” has the meaning given that term in ORS 109.124.

(c) “Legal father” has the meaning given that term in ORS 419A.004 (19). [2005 c.160 §8; 2015 c.254 §10; 2015 c.795 §3]
419B.400 Authority to order support; collection. (1) The court may, after a hearing on the matter, require the parents or other person legally obligated to support a child alleged to be within the jurisdiction of the court under ORS 419B.100 or a ward to pay toward the child or ward’s support such amounts at such intervals as the court may direct, even though the child or ward is over 18 years of age as long as the child or ward is a child attending school, as defined in ORS 107.108.

(2) At least 21 days before the hearing, the court shall notify the Administrator of the Division of Child Support of the Department of Justice, or the branch office providing support services to the county where the hearing will be held, of the hearing. Before the hearing the administrator shall inform the court, to the extent known:

(a) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the child or ward, including a proceeding brought under ORS 25.287, 107.085, 107.135, 107.431, 108.110, 109.100, 109.103, 109.165, 125.025, 416.400 to 416.465 or 419C.590 or ORS chapter 110; and

(b) Whether there exists in this state or any other jurisdiction a support order, as defined in ORS 110.503, involving the child or ward.

(3) The Judicial Department and the Department of Justice may enter into an agreement regarding how the courts give the notice required under subsection (2) of this section to the Department of Justice and how the Department of Justice gives the information described in subsection (2)(a) and (b) to the courts.

(4) The court, in determining the amount to be paid, shall use the scale and formula provided for in ORS 25.275 and 25.280. Unless otherwise ordered, the amounts so required to be paid shall be paid to the Department of Justice or the county clerk, whichever is appropriate, for transmission to the person, institution or agency having legal custody of the child or ward. [1993 c.33 §121; 1997 c.704 §§46,60; 2003 c.116 §16; 2003 c.396 §70a; 2015 c.298 §101]

419B.402 Support order is judgment. Any order for support entered pursuant to ORS 419B.400 shall be entered as a judgment and the court does not have the power to set aside, alter or modify the judgment, or any portion thereof, which provides for any payment of money, either for minor children or the support of a party, which has accrued prior to the filing of a motion to set aside, alter or modify the judgment. [1993 c.33 §122; 2003 c.576 §252]

419B.404 Support for child or ward in state financed or supported institution. Any order for support entered pursuant to ORS 419B.400 for a child or ward in the care and custody of the Department of Human Services may be made contingent upon the child or ward residing in a state financed or supported residence, shelter or other facility or institution. A certificate signed by the Director of Human Services, the Administrator of the Division of Child Support or the administrator's authorized representative shall be sufficient to establish such periods of residence and to satisfy the order for periods of nonresidence. [1993 c.33 §123; 2003 c.396 §71]

419B.406 Assignment of support order to state. When a child or ward is in the legal custody of the Department of Human Services and the child or ward is the beneficiary of an order of support in a judgment of dissolution or other order and the department is required to provide financial assistance for the care and support of the child or ward, the state is assignee of and subrogated to the child or ward’s proportionate share of the support obligation including sums that have accrued whether or not the support order or judgment provides for separate monthly amounts for the support of each of two or more children or wards or a single monthly gross payment for the benefit of two or more children or wards, up to the amount of assistance provided by the department. The assignment shall be as provided in ORS 412.024. [1993 c.33 §124; 1999 c.80 §76; 2003 c.73 §67; 2003 c.396 §72; 2003 c.572 §18; 2003 c.576 §448]

419B.408 Enforcement of support order. (1) An order of support entered pursuant to ORS 419B.400 may be enforced by execution or in the manner provided by law for the enforcement of a judgment granting an equitable remedy or by an order to withhold pursuant to ORS 25.372 to 25.427.

(2) No property of the child or ward’s parents, or either of them, or other person legally obligated to support the child or ward is exempt from levy and sale or other process to enforce collection of the amounts ordered by the court to be paid toward the support of the child or ward. [1993 c.33 §125; 1993 c.798 §31; 2003 c.396 §73]
(B) The parents or guardian of the child or ward;

(C) A putative father of the child or ward who has demonstrated a direct and significant commitment to the child or ward by assuming, or attempting to assume, responsibilities normally associated with parenthood, including but not limited to:

(i) Residing with the child or ward;

(ii) Contributing to the financial support of the child or ward; or

(iii) Establishing psychological ties with the child or ward;

(D) The state;

(E) The juvenile department;

(F) A court appointed special advocate, if appointed;

(G) The Department of Human Services or other child-caring agency if the agency has temporary custody of the child or ward; and

(H) The tribe in cases subject to the Indian Child Welfare Act if the tribe has intervened pursuant to the Indian Child Welfare Act.

(b) An intervenor who is granted intervention under ORS 419B.116 is a party to a proceeding under ORS 419B.100. An intervenor under this paragraph is not a party to a proceeding under ORS 419B.500.

(2) The rights of the parties include, but are not limited to:

(a) The right to notice of the proceeding and copies of the petitions, answers, motions and other papers;

(b) The right to appear with counsel and, except for intervenors under subsection (1)(b) of this section, to have counsel appointed as otherwise provided by law;

(c) The right to call witnesses, cross-examine witnesses and participate in hearings;

(d) The right of appeal; and

(e) The right to request a hearing.

(3) A putative father who satisfies the criteria set out in subsection (1)(a)(C) of this section shall be treated as a parent, as that term is used in this chapter and ORS chapters 419A and 419C, until the court confirms his paternity or finds that he is not the legal or biological father of the child or ward.

(4) If no appeal from the judgment or order is pending, a putative father whom a court of competent jurisdiction has found not to be the child or ward’s legal or biological father or who has filed a petition for filiation that was dismissed is not a party under subsection (1) of this section.

(5) (a) A person granted rights of limited participation under ORS 419B.116 is not a party to a proceeding under ORS 419B.100 or 419B.500 but has only those rights specified in the order granting rights of limited participation.

(b) Persons moving for or granted rights of limited participation are not entitled to appointed counsel but may appear with retained counsel.

(6) If a foster parent, preadoptive parent or relative is currently providing care for a child or ward, the Department of Human Services shall give the foster parent, preadoptive parent or relative notice of a proceeding concerning the child or ward. A foster parent, preadoptive parent or relative providing care for a child or ward has the right to be heard at the proceeding. Except when allowed to intervene, the foster parent, preadoptive parent or relative providing care for the child or ward is not considered a party to the juvenile court proceeding solely because of notice and the right to be heard at the proceeding.

(7) (a) The Department of Human Services shall make diligent efforts to identify and obtain contact information for the grandparents of a child or ward committed to the department’s custody. Except as provided in paragraph (b) of this subsection, when the department knows the identity of and has contact information for a grandparent, the department shall give the grandparent notice of a hearing concerning the child or ward. Upon a showing of good cause, the court may relieve the department of its responsibility to provide notice under this paragraph.
(b) If a grandparent of a child or ward is present at a hearing concerning the child or ward, and the court informs the grandparent of the date and time of a future hearing, the department is not required to give notice of the future hearing to the grandparent.

(c) If a grandparent is present at a hearing concerning a child or ward, the court shall give the grandparent an opportunity to be heard.

(d) The court’s orders or judgments entered in proceedings under ORS 419B.185, 419B.310, 419B.325, 419B.449, 419B.476 and 419B.500 must include findings of the court as to whether the grandparent had notice of the hearing, attended the hearing and had an opportunity to be heard.

(e) Notwithstanding the provisions of this subsection, a grandparent is not a party to the juvenile court proceeding unless the grandparent has been granted rights of intervention under ORS 419B.116.

(f) As used in this subsection, “grandparent” means the legal parent of the child’s or ward’s legal parent, regardless of whether the parental rights of the child’s or ward’s legal parent have been terminated under ORS 419B.500 to 419B.524.

(8) Interpreters for parties and persons granted rights of limited participation shall be appointed in the manner specified by ORS 45.275 and 45.285. [Formerly 419B.115; 2003 c.231 §§1,2; 2003 c.396 §§93a,94a; 2005 c.160 §4; 2005 c.450 §8; 2007 c.454 §11; 2007 c.611 §9; 2013 c.436 §1; 2015 c.216 §1]

Note: Section 4, chapter 436, Oregon Laws 2013, provides:

Sec. 4. Section 3 of this 2013 Act [419B.876] and the amendments to ORS 419B.875 by section 1 of this 2013 Act apply to juvenile dependency proceedings pending or commenced on or after the effective date of this 2013 Act [January 1, 2014]. [2013 c.436 §4]

**419B.876 Visitation or other contact between grandparent and ward; findings; order; appeal.** (1) The grandparent of a ward who has been placed in the legal custody of the Department of Human Services for care, placement and supervision pursuant to ORS 419B.337 and who is in substitute care as defined in ORS 419A.004 may, at any hearing concerning the ward except for a hearing under ORS 419B.500, request that the court order visitation or other contact or communication between the grandparent and the ward, provided the grandparent has notified the department and parties in the proceeding of the grandparent’s intent to make the request at the hearing at least 30 days before the date of the hearing.

(2) If the notice required under subsection (1) of this section has been given, the court may grant the grandparent’s request in whole or in part if the court finds that:

(a) Prior to the establishment of wardship:

(A) An ongoing relationship existed between the grandparent and the ward that included regular visits or other contact or communication; or

(B) Despite the grandparent’s efforts, no ongoing relationship existed between the grandparent and the ward due to circumstances beyond the grandparent’s control;

(b) Ordering visitation or other contact or communication between the grandparent and the ward will support and not interfere with development and implementation of a permanent or concurrent permanent plan for the ward;

(c) Ordering visitation or other contact or communication between the grandparent and the ward will not reduce the frequency or the quality of a parent’s visitation or other contact or communication with the ward;

(d) If the court determines consultation with the ward is appropriate, the ward has been consulted and agrees that the court should allow the grandparent’s request in whole or in part;

(e) Ordering visitation or other contact or communication between the grandparent and the ward is in the ward’s best interests; and

(f) Ordering visitation or other contact or communication between the grandparent and the ward would not unreasonably burden the resources of the Department of Human Services.

(3) Unless otherwise agreed by the Department of Human Services and the grandparent, the costs of transportation, lodging, food or other expenses required to implement visitation ordered by the court under this section shall be the responsibility of the grandparent.
(4) Notwithstanding ORS 419A.200, a grandparent may not appeal from or otherwise challenge on appeal an order or judgment of the court denying in whole or in part a request for visitation or other contact or communication made under this section.

(5) The court may receive testimony, reports or other material relating to the ward’s mental, physical and social history and prognosis without regard to the competency or relevancy of the testimony, reports or other material under the rules of evidence for the purpose of making the findings required by subsection (2) of this section.

(6) As used in this section, “grandparent” means the legal parent of the child’s or ward’s legal parent, regardless of whether the parental rights of the child’s or ward’s legal parent have been terminated under ORS 419B.500 to 419B.524. [2013 c.436 §3; 2015 c.216 §2]

Note: See note under 419B.875.

Note: 419B.876 was added to and made a part of ORS chapter 419B by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

419B.878 Applicability of Indian Child Welfare Act. When a court conducts a hearing, the court shall inquire whether a child is an Indian child subject to the Indian Child Welfare Act. If the court knows or has reason to know that an Indian child is involved, the court shall enter an order requiring the Department of Human Services to notify the Indian child’s tribe of the pending proceedings and of the tribe’s right to intervene and shall enter an order that the case be treated as an Indian Child Welfare Act case until such time as the court determines that the case is not an Indian Child Welfare Act case. [2001 c.622 §22]

419B.881 Disclosure; scope; when required; exceptions; breach of duty to disclose. (1) In all proceedings brought under ORS 419B.100 or 419B.500, each party, including the state, shall disclose to each other party and to a guardian ad litem appointed under ORS 419B.231 the following information and material within the possession or under the control of the party:

(a) The names and addresses of all persons the party intends to call as witnesses at any stage of the hearing, together with any relevant written or recorded statements or memoranda of any oral statements of such persons;

(b) Any written or recorded statements or memoranda of any oral statements made either by the parent or by the child to any other party or agent for any other party;

(c) Any reports or statements of experts who will be called as witnesses, including the results of any physical or mental examinations and of comparisons or experiments that the party intends to offer in evidence at the hearing; and

(d) Any books, papers, documents or photographs that the party intends to offer in evidence at the hearing, or that were obtained from or belong to any other party.

(2) (a) Disclosure under subsection (1) of this section must be made as soon as practicable following the filing of a petition and no later than:

(A) Thirty days after a petition alleging jurisdiction has been filed.

(B) Three days before any review hearing, except for information received or discovered less than three days prior to the hearing.

(C) Ten days before a permanency hearing or a termination trial, except for information received or discovered less than 10 days prior to the hearing or trial.

(b) The court may supervise the exercise of discovery to the extent necessary to insure that it proceeds properly and expeditiously.

(3) (a) When a ward has been placed in the legal custody of the Department of Human Services for care, placement and supervision under ORS 419B.337, the department shall disclose to all parties the case plan developed under ORS 419B.343, modifications to the case plan and any written material or information about services provided to the ward, or to the ward’s parent or parents, under the case plan.

(b) Disclosure under this subsection must be made within 10 days of:

(A) Completion or modification of the case plan; and
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(8) Receipt by the department of the written material or information about services provided under the case plan.

(4) The obligation to disclose is an ongoing obligation and if a party finds, either before or during the hearing, additional material or information that is subject to disclosure, the information or material shall be promptly disclosed.

(5) The following material and information need not be disclosed:

(a) Attorney work product; and

(b) Transcripts, recordings or memoranda of testimony of witnesses before the grand jury, except transcripts or recordings of testimony of a party to the current juvenile court proceeding.

(6) Upon a showing of good cause, the court may at any time order that specified disclosure be denied, restricted or deferred or make such other order as is appropriate.

(7) Upon request of a party, the court may permit a showing of good cause for denial or regulation of disclosure by the parties or the contents of subpoenaed materials, or portion of the showing, to be made in camera. A record shall be made of the proceeding.

(8) If the court enters an order following an in camera showing, the entire record of the showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. The trial court may, after disposition, unseal the record.

(9) When some parts of certain material are subject to disclosure and other parts are not, as much of the material as is subject to disclosure shall be disclosed.

(10) Upon being notified of any breach of a duty to disclose material or information, the court may:

(a) Order the violating party to permit inspection of the material;

(b) Grant a continuance;

(c) Refuse to permit the witness to testify;

(d) Refuse to receive in evidence the material that was not disclosed; or

(e) Enter such other order as the court considers appropriate. [Formerly 419B.300; 2005 c.450 §9; 2013 c.439 §1]

Note: Section 6, chapter 439, Oregon Laws 2013, provides:

Sec. 6. The amendments to ORS 419A.255 and 419B.881 by sections 1 and 7 of this 2013 Act apply to dependency proceedings commenced or pending before, on or after the effective date of this 2013 Act [January 1, 2014]. [2013 c.439 §6; 2013 c.439 §10]
Chapter 4

Weathering Trauma: Self-Care and the Oregon Rules of Professional Conduct

KYRA HAZILLA
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Trauma-Informed Lawyering:
Self-care is key to competent representation

Oregon State Bar Juvenile Section
CLE
February 26, 2016

Introduction

• Oregon Attorney Assistance Program
  – Free, voluntary, and CONFIDENTIAL!
  – Five dually trained Attorney Counselors
  – Group and Individual Support and CLE’s for bar
groups and law firms (public, private, small, large).
  – NOT “The Bar.”
  – Call for yourself, call for your friends, call for consultation.
  • Duty of confidentiality to client under ORCP 1.6 still applies.
Roadmap

- How to be Trauma-Informed for your clients.
- How to be Trauma-Informed for yourself.
- Why is self-care vital when you are working with trauma?

Talk to each other
What is Trauma?

• Actual or threatened severe injury or death to oneself or to significant others.
• Can be threat to attachment relationship, especially for young children.
• Threat to professional identity.
  – The law itself can be traumatizing.
  – Not just for clients.

OSB Professionalism Statement

• As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good.
Handy Model of the Brain

What Does Trauma Do To Our Brains?
Trauma in our Brain

• Trauma rewires our brain and our stress response system in our body to keep us safe.
  – Trauma lowers the threshold for the defensive systems.
  – Neutral Interactions are threatening.
  – Defensive reactions instead of social engagement.
  – Keeps us from co-regulating.
  – Makes us much more likely to flip our lids.

Trauma Can Cause Posttraumatic Stress Disorder

• Lifetime prevalence of PTSD (using DSM-IV criteria) among American adults: 6.8%.
• Women experience PTSD at nearly three times the rate that men do (9.7% compared to 3.6%) and for a longer duration.
  – Women are more likely to report co-occurring internalizing disorders like depression and anxiety.
  – Men are more likely to report externalizing behaviors like substance abuse, irritability, and verbal and physical aggression.
Or Acute Stress Disorder or Adjustment Disorder

- **Acute Stress Disorder**: Like PTSD except duration of symptoms is 3 days to one month.

- **Adjustment Disorder**: Like PTSD except caused by (t)rauma (like spouse leaving, being fired), or like PTSD except the response to the (T)rauma does not meet criteria.

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**Posttraumatic Stress Disorder in Children**

- DSM-V has a new subtype “preschool PTSD” for children younger than six.
Posttraumatic Stress Disorder in Children

- Kids express trauma differently from adults.
  - Impulsivity, distractability, and attention problems (due to hypervigilance), dysphoria, emotional numbing, social avoidance, dissociation, sleep problems, aggressive (often reenactment) play, school failure, and regressed or delayed development.
- Before the DSM-V, PTSD was underrecognized in children.

Posttraumatic Stress Disorder

DSM-V

- Exposure to actual or threatened death, serious injury or sexual violence in one or more of the following ways:
  1. Directly experiencing the traumatic event.
  2. Witnessing, in person, the event happening to others.
  3. Learning that the traumatic event occurred to a close family member or friend. (In cases of actual or threatened death the event must have been violent or accidental).
Posttraumatic Stress Disorder
Vicarious Trauma

4. Experiencing repeated or extreme exposure to aversive details of the traumatic event (e.g., first responders collecting human remains; police officers repeatedly exposed to the details of child abuse).

Vicarious Traumatic Exposure

• Other words to describe this issue or its aftermath: Secondary Traumatic Stress, Compassion Fatigue, “the cost of caring,” Secondary Victimization, Co-Victimization, Vicarious Trauma, Emotional Contagion, Burnout, and for therapists it is called Countertransference.
Chapter 4—Weathering Trauma: Self-Care and the Oregon Rules of Professional Conduct

Vicariously Traumatized Clients

Trauma Through Media Exposure
Not Just (T)rauma, (t)rauma

Lawyers and clients are affected by trauma aside from the facts of the case.

- Traumatized and traumatizing systems.
  - Traumatized systems behave like traumatized people.
  - Everyone working in the juvenile court system is exposed to trauma.

- Caseloads, turnover, not enough resources, working alone.

- Adversarial process.

The Cost of Doing Business

- The more empathy you have, the more at risk you are for vicarious trauma. Some researchers describe it as “inevitable.”
- Personal Trauma History.
- Perfectionism.
- Personal and professional stressors.
- Exposure to children’s trauma is more traumatizing.
- Emotional Contagion.
- Mirror Neurons.
Mirror Neurons

Trauma-Informed Approach

- Medical Model: You are sick.
- Criminal Model: You are bad.
- Trauma-informed Model: You suffered an injury.
- Shift from “What is wrong with you?” to “What has happened to you?”
Trauma-Informed: 6 Key Principles

- Safety
- Trustworthiness and Transparency
- Peer support
- Collaboration and mutuality
- Empowerment, voice and choice
- Cultural, Historical, and Gender Issues

http://www.samhsa.gov/nctic/trauma-interventions

Outward Signs of Trauma

Things you might notice:
- Dissociation, deep blank stare, fixed look.
- Flat affect, little emotion in face or voice.
- Client’s story is hard to track, incoherent, or client can’t remember, especially during emotional content.
- Overreacting to seemingly benign situations or events.
- Startling easily and in a manner that doesn’t fit the situation.
Screening For Trauma

• Your client may mention to you other signs of trauma, such as difficulty concentrating, difficulty sleeping, nightmares, and having disruptive flashbacks of a painful event, signs of depression such as having trouble getting up in the morning, an inability to stop crying, a lack of energy, a feeling of hopelessness, feeling sad most of the time, or having thoughts of suicide.

What to do with a Traumatized Client?
What to do with a Traumatized Client?

• Notice that trauma is affecting client (or you).
  – Co-regulating: Is anyone’s lid flipped?
  – Notice and validate feelings.
• Ask!
  – “Is there anything I should know to help us work together?”
  – “How can I accommodate what you need in this process?”
  – “I notice you are looking overwhelmed, what helps?”
• Create safety.

How?
How to create safety?

Keep an eye toward trauma triggers:
• Physical Space
  – Where are the doors and chairs?
  – Placement of chairs is important, access to exit, no backs to door.
  – Ask person where they want to sit.
  – Can you act as a buffer, a focal point or a physical wall?
  – Play folk music with a female vocalist.

Music

• Modern dissonant music does not engender feelings of safety:
• Folk:
**Body Language**

- Use open body language.
- Don’t tower over a person.
- Be mindful of physical posture, angle your body slightly.
- Ask for consent before touching a person.
- Make sure to stay out of personal space bubble.
- Use gentle eye contact (eye contact can be very triggering).
- Don’t cross arms, put hands on hips or in pockets.
- Move slowly and deliberately.
- Breathe and relax.
• Clear Explanations of what to expect:
  – Explain things in advance.
  – Try to avoid surprises.
  – Balance overwhelming a client with information and not providing enough information.

• Breaks: Take many.
  – Be prepared to ask for recess or breaks in meetings or CRBs if you notice your client experiencing trauma symptoms.

• Choices: Offer many but not too many.

Know your client’s coping strategies and add some more.

• Be thoughtful of the ways clients bring self-soothing into the representation.
  – Help client think about ways to make use of these.

• Offer additional soothing strategies:
  – Have client bring a line or two of a favorite song, poem or prayer.
  – Have client bring tactile things, a square of cloth or a stone.

• Enlist the help of supportive people, live or through notes from loved ones.
How to get in the present moment

• Bring person back to the present moment, either their physical body or the physical space.
  – “I like your shoes, are they comfortable?”
  – “What do you think of the colors in that painting?”
  – “These benches are totally uncomfortable but no one is going to bother us here.”
  – Share the five senses exercise with client.
  – Pause and take a deep breath.

Five Senses
Trauma-Informed for Whom?

• “It is one of the most beautiful compensations of this life that no man can sincerely try to help another without helping himself.”
  — Ralph Waldo Emerson

Why Trauma-Informed Work With Clients Minimizes our Trauma

• First, many trauma symptoms keep us from connecting to other people.
  — Very hard to work with a person who responds in a defensive or distrustful way.
• It is really distressing for helpers to feel like their help is not soothing a suffering person.
• I’m a lawyer not a therapist!! A client’s feeling of emotional safety impacts his ability to participate in his case.
• AND you want to make sure that legal work is not counteracting therapeutic work someone is doing.
Vicarious Trauma Self-Test

<table>
<thead>
<tr>
<th>Individual Indicators of Distress</th>
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</thead>
<tbody>
<tr>
<td><strong>Emotional Indicators</strong></td>
</tr>
<tr>
<td>Anger</td>
</tr>
<tr>
<td>Sadness</td>
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<tr>
<td>Prolonged grief</td>
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<tr>
<td>Anxiety</td>
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<td>Depression</td>
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<tr>
<td><strong>Physical Indicators</strong></td>
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<tr>
<td>Headaches</td>
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<tr>
<td>Stomach aches</td>
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<td>Lethargy</td>
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<tr>
<td>Constipation</td>
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<tr>
<td><strong>Personal Indicators</strong></td>
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<tr>
<td>Self-isolation</td>
</tr>
<tr>
<td>Cynicism</td>
</tr>
<tr>
<td>Mood swings</td>
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<tr>
<td>Irritability with spouse/family</td>
</tr>
<tr>
<td><strong>Workplace Indicators</strong></td>
</tr>
<tr>
<td>Avoidance of certain clients</td>
</tr>
<tr>
<td>Missed appointments</td>
</tr>
<tr>
<td>Tardiness</td>
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<tr>
<td>Lack of motivation</td>
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</tbody>
</table>

What to do with vicarious trauma?

- Every strategy we have discussed to work with traumatized clients can soothe our traumatized brains as well.
- Know the ABC’s
  - Awareness: reflection on what signs or symptoms of trauma you experience.
  - Balance: equalizing work, rest, and play.
  - Connection: to ourselves, to others and/or to something bigger than ourselves.
Compassion is Key

Vicarious Trauma

• Experiencing vicarious trauma means that we have a functioning brain that can still recognize and feel the suffering of other people.
• “The very fact that we are acting for the good of others who are scared and hurt speaks to the best in humanity and ourselves.”
Vicarious Resilience

Supersize your Self-Care!

- Research on Mindfulness for Vicarious Trauma.
- Social Connectedness.
- Play.
- Biohacking.
- Take good care of your physical health and well-being.
Self-Care Inventory and Maintenance

- Use the Self-Care Inventory as a checklist.
- Emergency Self-Care.
- Maintenance Self-Care.
  

Questions?
As lawyers, we belong to a profession that serves our clients and the public good. As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good. Because we are committed to professionalism, we will conduct ourselves in a way consistent with the following principles in dealing with our clients, opposing parties, opposing counsel, the courts, and the public.

- I will promote the integrity of the profession and the legal system.
- I will work to ensure access to justice for all segments of society.
- I will avoid all forms of unlawful or unethical discrimination.
- I will protect and improve the image of the legal profession in the eyes of the public.
- I will support a diverse bench and bar.
- I will promote respect for the courts.
- I will support the education of the public about the legal system.
- I will work to achieve my client’s goals, while at the same time maintain my professional ability to give independent legal advice to my client.
- I will always advise my clients of the costs and potential benefits or risks of any considered legal position or course of action.
- I will communicate fully and openly with my client, and use written fee agreements with my clients.
- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will always be prepared for any proceeding in which I am representing my client.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.
- I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.
- I will support pro bono activities.
Compassion Fatigue Self Test for Practitioners

Please describe yourself:  ____Male  ____Female  ____Years as a Practitioner

Consider each of the following characteristics about you and your current situation. Write in the number for the best response. Use one of the following answers:

1=Rarely/Never  2=At Times  3=Not Sure  4=Often  5=Very Often

Answer all items, even if not applicable. Then read the instructions to get your score.

Items about you:
1. ___ I force myself to avoid certain thoughts or feelings that remind me of a frightening experience.
2. ___ I find myself avoiding certain activities or situations because they remind me of a frightening experience.
3. ___ I have gaps in my memory about frightening events.
4. ___ I feel estranged from others.
5. ___ I have difficulty falling or staying asleep.
6. ___ I have outbursts of anger or irritability with little provocation.
7. ___ I startle easily.
8. ___ While working with a victim I have thought about violence against the person or perpetrator.
9. ___ I am a sensitive person.
10. ___ I have had flashbacks connected to my clients and families.
11. ___ I have had first-hand experience with traumatic events in my adult life.
12. ___ I have had first-hand experience with traumatic events in my childhood.
13. ___ I have thought that I need to “work through” a traumatic experience in my life.
14. ___ I have thought that I need more close friends.
15. ___ I have thought that there is no one to talk with about highly stressful experiences.
16. ___ I have concluded that I work too hard for my own good.

Items about your clients and their families:
17. ___ I am frightened of things traumatized people and their family have said or done to me.
18. ___ I experience troubling dreams similar to a client of mine and their family.
19. ___ I have experienced intrusive thoughts of interactions with especially difficult clients and their families.
20. ___ I have suddenly and involuntarily recalled a frightening experience while working with a client or their family.
21. ___ I am preoccupied with more than one client and their family.
22. ___ I am losing sleep over a client and their family’s traumatic experiences.
23. ___ I have thought that I might have been “infected” by the traumatic stress of my clients and their families.
24. ___ I remind myself to be less concerned about the well-being of my clients and their families.
25. ___ I have felt trapped by my work as a helper.
26. ___ I have felt a sense of hopelessness associated with working with clients and their families.
27. ___ I have felt “on edge” about various things and I attribute this to working with certain clients and their families.
28. ___ I have wished that I could avoid working with some clients and their families.
29. ___ I have been in danger working with some clients and their families.
30. ___ I have felt that some of my clients and their families dislike me personally.
### Items about being a helper and your work environment:

31. ___ I have felt weak, tired, and rundown as a result of my work as a helper.
32. ___ I have felt depressed as a result of my work as a helper.
33. ___ I am unsuccessful at separating work from personal life.
34. ___ I feel little compassion toward most of my coworkers.
35. ___ I feel I am working more for the money than for personal fulfillment.
36. ___ I find it difficult separating my personal life from my work life.
37. ___ I have a sense of worthlessness/disillusionment/resentment associated with my work.
38. ___ I have thoughts that I am a “failure” as a helper.
39. ___ I have thoughts that I am not succeeding at achieving my life goals.
40. ___ I have to deal with bureaucratic, unimportant tasks in my work life.

### SCORING INSTRUCTIONS

- Make sure you have responded to ALL questions.
- Next, circle the following 23 items: 1-8, 10-13, 17-26 and number 29.
- Now ADD the numbers you wrote next to the items circled.

#### Note your risk of Compassion Fatigue

- 26 or LESS = Extremely LOW risk
  - 27 to 30 = LOW risk
  - 31 to 35 = Moderate risk
  - 36 to 40 = HIGH risk
  - 41 or more = Extremely HIGH risk

- To determine your risk of Burnout, ADD the numbers you wrote next to the items NOT circled.

#### Note your risk of Burnout

- 19 or less = Extremely LOW risk
  - 20 to 24 = LOW risk
  - 25 to 29 = Moderate risk
  - 30 to 42 = High risk
  - 43 or more = Extremely high risk

---

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Self-Care Inventory

How frequently do I do the following?

<table>
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<tr>
<th></th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Never</td>
<td>Rarely</td>
<td>Sometimes</td>
<td>Often</td>
</tr>
</tbody>
</table>

**Physical Self-Care**
- _____ Eat regularly (e.g., breakfast, lunch, & dinner)
- _____ Eat healthy foods
- _____ Exercise regularly (3 times per week)
- _____ Get enough sleep
- _____ Preventative medical care
- _____ Medical care when needed
- _____ Take time off work when sick
- _____ Get massages
- _____ Dance, swim, walk, run, play sports, sing, or do other physical activity you enjoy
- _____ Take time to be sexual
- _____ Take vacations

**Psychological Self-Care**
- _____ Decrease stress in your life
- _____ Make time away from demands
- _____ Write in a journal
- _____ Read literature that is unrelated to work
- _____ Do something at which you are not an expert or in charge
- _____ Let others know different aspects of you
- _____ Be curious
- _____ Say no to extra responsibilities

**Emotional Self Care**
- _____ Connect with others whose company you enjoy
- _____ Stay in contact with the people that matter in your life
- _____ Love yourself
- _____ Laugh
- _____ Cry
- _____ Play with animals
- _____ Play with children
- _____ Identify comforting activities, objects, people, relationships, places and seek them

**Spiritual Self-Care**
- _____ Spend time in nature
- _____ Find spiritual connection or community
- _____ Cherish optimism and hope
- _____ Be open to not knowing
- _____ Sing
Chapter 4—Weathering Trauma: Self-Care and the Oregon Rules of Professional Conduct

--- Pray
--- Spend time with children
--- Be open to inspiration
--- Have gratitude
--- Meditate
--- Listen to music
--- Engage in artistic activity
--- Yoga
--- Have experiences of awe
--- Be mindful of what is happening in your body and around you
--- Make meanings from the difficult periods
--- Seek truth

**Workplace or Professional Self-Care**
--- Take time to eat lunch
--- Take time to connect with co-workers
--- Make quiet time to complete tasks
--- Identify projects or tasks that are exciting/rewarding
--- Set limits with clients and colleagues
--- Balance your workload so that you are not "overwhelmed"
--- Arrange your workspace so that it is comfortable and comforting
--- Get regular supervision and consultation
--- Negotiate for your needs (benefits, pay raise)
--- Have a peer support group

**My Maintenance Self-Care Worksheet**

Review the Self-Care Assessment that you just completed, which includes what you are doing now for self-care. On this maintenance self-care worksheet, list those activities that you engage in regularly (like every day or week) under “current practice” within each domain. Identify new strategies that you would like to begin to incorporate as part of your ongoing maintenance self-care—pay particular attention to domains that you have not been addressing in the past. On the last page identify barriers that might interfere with ongoing self-care, how you will address them, and any negative coping strategies you would like to target for change and how you will change them.

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<thead>
<tr>
<th></th>
<th>MIND</th>
<th>BODY</th>
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<tbody>
<tr>
<td></td>
<td>Current practice</td>
<td>Current practice</td>
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<tr>
<td></td>
<td>New practice</td>
<td>New practice</td>
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</tbody>
</table>

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<thead>
<tr>
<th></th>
<th>EMOTIONS</th>
<th>SPIRIT</th>
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</thead>
<tbody>
<tr>
<td></td>
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<td>Current practice</td>
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<td></td>
<td>New practice</td>
<td>New practice</td>
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</tbody>
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My Maintenance Self-Care Worksheet
### My Maintenance Self-Care Worksheet

<table>
<thead>
<tr>
<th>RELATIONSHIPS</th>
<th>OTHER:</th>
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<tbody>
<tr>
<td>Current practice</td>
<td>New practice</td>
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<tr>
<td>WORK</td>
<td></td>
</tr>
<tr>
<td>Current practice</td>
<td>New practice</td>
</tr>
</tbody>
</table>
# My Maintenance Self-Care Worksheet

<table>
<thead>
<tr>
<th>Barriers to maintaining my self-care strategies</th>
<th>How I will address these barriers and remind myself to practice self-care</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negative coping strategies</td>
<td>What I will do instead</td>
</tr>
<tr>
<td>I would like to use less or not at all</td>
<td></td>
</tr>
</tbody>
</table>

(Adapted by Shirley Reiser, LCSW and Lisa D. Butler, PhD from materials provided by Sandra A. Lopez, LCSW, ACSW, University of Houston, Graduate School of Social Work.)
Emergency Self-Care Worksheet

Why do I need to do this? It is very hard to think of what to do for yourself when things get tough. It is best to have a plan ready for when you need it.

What should be in it? You need to consider 3 general areas: what to do, what to think, and what to avoid.

1. Make a list of what you can do when you are upset that will be good for you.
   a. What will help me relax? ________________________________

   For example,
   • Breathing, Muscle relaxation, Music
   • Reading for fun, watching a movie
   • Exercising, Taking a walk

   b. What do I like to do when I’m in a good mood? ________________________________

   • List all the things you like to do so you remember what they are when you need to think of something to do.

   c. What can I do that will help me throughout the day? ________________________________

   For example,
   • Avoid too much caffeine if feeling anxious
   • Remember to breathe
   • Watch my thoughts
   • Stay in the moment

   d. Other: What else do YOU need to do that is specific to YOU?

   ________________________________
   ________________________________
   ________________________________
2. **Make a list of people you can contact if you need support or distraction.**

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________

For example, your best friend, other friends, sibling, parent, grandparent, other relative, therapist, priest/minister/rabbi/imam, etc.

a. Divide the list of people into categories by asking yourself the following questions:
   - Who can I call if I am feeling depressed or anxious?
   - Who can I call if I am lonely?
   - Who will come over to be with me if I need company?
   - Who will listen?
   - Who will encourage me to get out of the house and do something fun?
   - Who will remind me to follow my self-care plan?
   - Other:

3. **Next, make a list of positive things to say to yourself when you are giving yourself a hard time.**

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________

**Examples of negative self-talk:**

   - “I got a B- on the paper; that proves that I shouldn’t be in graduate school.” CHANGE to: “That is a good grade. I will work on getting a better one.”
   - “I do not understand research methods, I am so dumb.” CHANGE to: “A lot of students are having a problem with this course. Maybe we should start a study group to help each other.”
   - “I can’t get all this work done. I should just drop out.” CHANGE to: “I will develop a schedule so that I can get this all done.” “I can check with other students for ideas.” “I can get some feedback from the professors that might help me do the assignments.”

You get it. Try to think about what you would say to a client with the same struggles and apply it to yourself.
4. **Next, make a list of who and what to avoid when you are having a hard time.**

_____________________________________________________________________________
_____________________________________________________________________________
_____________________________________________________________________________

**Examples of people to avoid:**

- My boy(girl)friend broke up with me. I will not call my sister as she always hated him. She’ll be happy he’s gone.
- I didn’t get my assignment in on time and I’m worried about my grade. I will not call my dad. He is a stickler for doing things in advance so that they are never late. He’ll just give me a hard time.
- I am discouraged about my grades. I won’t call my best friend because she’ll just tell me not to worry about it and to quit school if it’s such a hassle.

You get this too. Not everyone can be supportive or helpful with every situation. Go to the ones who can be supportive about the specific issue you are dealing with.

**Examples of things to avoid:**

- I should not stay in the house all day.
- I should not stay in bed all day.
- I should open the shades and let the light in.
- I should not listen to sad music.
- I should not drink too much alcohol.
- Other:
  Again, you get it.

5. **Write this plan on a 3x5” card. Keep it in your purse/wallet (and on your phone if you can). Look at it often. Add any good ideas to it whenever you can. USE IT!**

(Prepared by Elaine S. Rinfrette, PhD, LCSW-R)
A TRAUMATIC TOLL ON LAWYERS AND JUDGES

As a Deputy District Attorney, “Mike” was required by county policy to share the DA Office’s on-call responsibility to respond to the scene of all unattended deaths, deaths involving suspicious circumstances, and fatal traffic accidents. In his first several years on the job, Mike responded to the scene of a number of fatalities, including some gruesome fatal accidents. Over time, witnessing these events began to eat away at him, especially when the fatal event involved a child. He became more and more concerned about the safety of his family, often feeling compelled to call home after responding to one of these scenes to make sure that they were okay. He came to dread the two-week periods that he was on call.

Viewing graphic evidence of trauma and investigating and prosecuting child sex abuse cases continued to take an emotional toll on Mike. At the time, he couldn’t identify or find an outlet for the negative feelings that were building up. He thought he had to just “suck it up,” pretend that nothing was bothering him, and try to be tough. The last time Mike was called to respond to a crime scene was in the middle of the night, just a few blocks from his home. A mother and her 13-year-old daughter had been brutally stabbed to death. A younger brother escaped the perpetrator’s detection and found his mother and sister. Mike and the first police officer to respond had arrived so quickly that they searched the pitch-dark backyard by flashlight for the perpetrator, who they thought might still be at the scene.

By the next morning, Mike was not feeling well. He became intensely anxious about his own personal safety and that of his wife and his children—who, he realized, were about the same age as the victim and her brother. He also became intensely anxious and afraid at night or in the dark, when he could not see potential threats. Difficulty sleeping began to take a physical toll on him. The anxiety and hypervigilance triggered by this event would not subside and significantly impaired his ability to perform certain aspects of his job.

Mike was referred to a mental health professional with experience in trauma counseling. The counselor advised against Mike’s resuming his on-call duties of responding to the scenes of fatalities. However, Mike believed that this duty was an essential part of his job and that it would be unfair to his coworkers for him to be relieved of this responsibility. So he transferred to a child support enforcement position. After several more years, Mike retrained in another profession and transitioned to a non-law career.

Mike’s response to the cumulative trauma that he was exposed to was a normal response to horrific events that most of us never witness. The emotional cost he has paid is all too common among those exposed to trauma.

Empathy: A Pathway for Trauma

We are born with the capacity to experience what others experience and participate in their experience by virtue of the way our nervous system is grabbed by their nervous system.¹

Empathy is the capacity to vicariously feel what others are feeling. Our capacity for empathy is produced by clusters of neurons in our brains called “mirror
neurons.” Brain researchers recently discovered that the same mirror neurons that fire in our brains when we experience specific events and perform certain activities also fire when we observe someone else experience that same event or perform that same action. Consequently, we experience vicariously in our minds what we observe someone else do or experience. Mirror neurons are also triggered by hearing stories or reading descriptions of another’s experience.2

Trauma’s Destructive Impact on Lawyers and Judges

*It is impossible to listen and bear witness to the traumatic experiences of trauma survivors and not be changed.*3

Lawyers and judges working in certain practice areas (e.g., criminal, family, and juvenile law) are regularly exposed to human-induced trauma. They are called on professionally to empathetically listen to victims’ stories, read reports and descriptions of traumatic events, view crime or accident scenes, and view graphic evidence of traumatic victimization. These professional tasks trigger their mirror neurons, producing stimulation in their brains similar to that of the trauma victims.

Over time, a significant number of lawyers and judges working in these practice areas experience and exhibit symptoms of posttraumatic stress:

- Elevated anxiety;
- Hypervigilance (being constantly on guard and alert to possible threats to themselves, family members, or loved ones);
- Difficulty concentrating;
- Difficulty sleeping;
- Irritability, anger;
- Disturbing images from cases intruding into thoughts and dreams;
- Avoiding people, places, or events connected with trauma;
- Dreading working with certain types of cases or clients; and
- Avoiding or becoming less responsive to clients, cases, colleagues, family, or their social network.

Many lawyers and judges chose to go to law school because they wanted to help others or make a difference in the lives of others. They began their careers hopeful, optimistic, and confident. They were trained to conceal weaknesses and deny vulnerability. Most assumed that their work would not have an emotional impact on them.

Exposure to stories of trauma, pain, and suffering, in a work environment where unrelenting demands outweigh available resources, can slowly exhaust a person’s capacity for compassion and negatively transform their view of themselves and the world. This progressive erosion from hope and compassion to cynicism, demoralization, and emotional disengagement now has a name: compassion fatigue. Compassion fatigue has been defined as the cumulative physical, emotional, and psychological effects of being continually exposed to traumatic stories or events when working in a helping capacity. The risk of compassion fatigue for those who work with perpetrators or victims of trauma is real but not inevitable.

Compassion Fatigue Risk Factors

- Attorneys and judges with high capacity for empathy are most at-risk;
- Attorneys and judges who work in criminal, family, or juvenile law;
- High caseloads and caseloads involving human-induced trauma;
- Lack of education about the potential impact of ongoing exposure to traumatic material and events;
- Lack of peer support and opportunities to debrief cases involving traumatic material;
- Inadequate resources to meet professional responsibilities and demands; and
- Limited job recognition.

Mitigating Compassion Fatigue – What Lawyers and Judges Can Do

**Awareness.** Understand what compassion fatigue is and periodically self-assess for it using a compassion fatigue checklist of signs and symptoms. (See page 4).

**Debriefing.** Talk regularly with another practitioner who understands and is supportive. This in-
January 2011

In Sight

volves talking about the traumatic material, how you think and feel about it, and how you are personally affected by it.

**Self-care.** Proactively develop a program of self-care that is effective for you. This includes healthy eating, exercising regularly, getting adequate rest, and learning how to turn off the “fight-or-flight response” of your sympathetic nervous system and turn on the “relaxation response” of your parasympathetic nervous system.

**Balance and Relationships.** Take steps to simplify, do less, ask for help, and stop trying to be all things to all people, including your clients. Start thinking about how you can work on balance rather than the reasons you can’t. Working to develop and maintain healthy interpersonal relationships will also increase your resilience.

**Professional Assistance.** Treatment from a licensed provider specializing in trauma may be beneficial. Eye Movement Desensitization and Reprocessing (EMDR) is a counseling approach that has proven effective in helping traumatized and vicariously traumatized individuals. Referrals to mental health professionals, including those certified in EMDR, can be obtained through the OAAP and the EMDR Institute (www.emdr.com).

**Being Intentional.** If you are overwhelmed and struggling with depression, anxiety, substance abuse, or compassion fatigue, put a plan for change in place. Recognize that the attributes that contribute to your professional success (e.g., motivated, perfectionistic, achievement-oriented, driven, fixer) and your work environment may be contributing to an imbalance in your life. Monitor your thoughts, emotions, and behaviors. Seek assistance to help you implement change and redirect the thoughts that tell you, “I should be able to do this by myself.” Your new mantra can become, “I don’t have to do it all by myself.”

**What Firms and Employers Can Do**

Law firms, public employers of lawyers, and the judiciary need to recognize that compassion fatigue impacts the lawyers working for the organization. Prevention strategies include:

- Reducing caseloads (due to the correlation between high caseloads and the prevalence of compassion fatigue);
- Educating legal professionals and staff about compassion fatigue and its impact; and
- Encouraging and training legal professionals and staff to regularly debrief their trauma cases in a supportive atmosphere.

With the current culture of budget deficits, limited resources, and increasing caseloads, it is difficult but imperative for public defenders, prosecutors, criminal defense attorneys, family and juvenile law attorneys, and judges to adopt a strategy for addressing and mitigating their vulnerability to vicarious trauma and compassion fatigue.

If you or someone you know is struggling with compassion fatigue, call the OAAP and ask to speak to an attorney counselor. OAAP assistance is free and confidential. Call 503-226-1057 or 1-800-321-6227.

**Mike Long, OAAP Attorney Counselor**

**Linda Albert, Coordinator of the Wisconsin Lawyer Assistance Program**


**Signs and Symptoms of Compassion Fatigue**

- Perceiving the resources and support available for work as chronically outweighed by the demands
- Having client/work demands regularly encroach on personal time
- Feeling overwhelmed and physically and emotionally exhausted
- Having disturbing images from cases intrude into thoughts and dreams
- Becoming pessimistic, cynical, irritable, and prone to anger
- Viewing the world as inherently dangerous, and becoming increasingly vigilant about personal and family safety
- Becoming emotionally detached and numb in professional and personal life; experiencing increased problems in personal relationships
- Withdrawing socially and becoming emotionally disconnected from others
- Becoming demoralized and questioning one's professional competence and effectiveness
- Secretive self-medication/addiction (alcohol, drugs, work, sex, food, gambling, etc.)
- Becoming less productive and effective professionally

Compassion fatigue has been defined as the cumulative physical, emotional, and psychological effects of continual exposure to traumatic experiences suffered by another while working in a professional helping capacity. The symptoms are similar to posttraumatic stress disorder (e.g., severe anxiety, intrusive thoughts of traumatic event, nightmares, burnout, and cynical world view). A study of the impact of compassion fatigue/secondary trauma on the lawyers and administrative support staff of the Wisconsin State Public Defender Office (SPD) was published in December 2011.*

The study found that the factors of caseload and exposure to other people’s trauma were clearly related to symptoms of compassion fatigue. Three other factors that study participants noted as contributing to experiences of compassion fatigue were (1) lack of respect from the public and other lawyers for the work they did, (2) lack of control in one’s work life, and (3) lack of enough time to process issues and give or get support.

**Specific Findings of This Study**

**Depression** (depressed mood, loss of interest or pleasure, disturbed sleep, loss of appetite, low energy, poor concentration, feelings of guilt or low self-worth):
- General population: 10%
- SPD administrative support staff: 19.3%
- SPD attorneys: 39.5%

**Functional Impairment** (the extent to which exposure to traumatic material negatively impacts functioning in work, recreation, and home life):
- SPD support staff: 27.5%
- SPD attorneys: 74.8%

**Compassion Fatigue/Secondary Traumatic Stress** (the negative impact of caring about another person who has experienced trauma):
- SPD support staff: 10.1%
- SPD attorneys: 34%

**Burnout** (job-induced physical, emotional, or mental exhaustion combined with doubts about one’s competence and the value of one’s work):
- SPD support staff: 8.3%
- SPD attorneys: 37.4%

Linda Albert, Coordinator of the Wisconsin Lawyers Assistance Program and a cofacilitator of the study, observed that it is a testament to the resilience of the lawyers and staff who participated in the study that they continue to meet the requirements of their employment despite that they endure ongoing exposure to trauma and have heavy caseloads. “It’s amazing that they do. They are handling the demands of the job but not easily and not without it having an impact on their lives.”

**Observations of Lawyers and Judges**
- “Many of us who have been around for a while know there can be a cost, emotionally and psychologically, to doing this kind of work. Even for lawyers who know how to maintain an appropriate professional demeanor and distance, this stuff seeps in. It changes
your perspective of the world.” Director of assigned counsel for SPD

- “Our clients have a lot of trauma in their lives: poverty, lack of education, homelessness, mental health and substance abuse issues. . . . You absorb that on a day-to-day basis, and you take it home with you. It can make you irritable and short-fused with your family.” Attorney with 22 years’ experience as a public defender

- A retired deputy district attorney recounted that during her 27 years of practice she regularly saw horrifying evidence of what one human did to another. Those disturbing images often lingered and intruded into her thoughts away from work and even now in retirement. “To this day when I go past a place where a homicide occurred that I prosecuted, I think about it, every time. I drive past and think, ‘That’s where Sarah was killed.’” Retired deputy district attorney

- “Lawyers need to know that what they’re feeling is real, and that it’s something they can discuss – that they don’t have to feel embarrassed or ashamed for feeling this way.” Attorney with 22 years’ experience as a public defender

- “Attorneys are much more closely related to the facts of the case for a much longer period of time than are judges. Still, judges sit on the bench day in and day out hearing about the incidents of trauma inflicted or endured by people in their courtrooms. I can sit here now and call up in my mind with great accuracy all the autopsy photos I’ve ever seen.” Circuit court judge who has spent eight years on the bench

Vicarious trauma and compassion fatigue are not just issues for public defenders; they are issues for the broader legal profession. There is a large community of lawyers and judges who deal with clients and individuals who have experienced trauma. It is critical for these lawyers and judges to be aware of the potential risks of regular exposure to traumatized clients and individuals and to learn and proactively practice strategies that have proven effective in preventing and mitigating compassion fatigue.

Compassion fatigue is not inevitable if you take steps to prevent it. See the box below on Coping with Compassion Fatigue. In addition, the OAAP and the Oregon Criminal Defense Lawyers Association are co-

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**Coping with Compassion Fatigue**

Exposure to clients’ trauma isn’t going to stop. But you can mitigate the effects this exposure has on you. Here are a few strategies.

- **Debrief.** Talk with another lawyer who understands what you’re going through and can offer support. Debriefing can become a part of the office culture. Remember, this is a discussion about how the case is affecting you as a person, not a rehashing of legal strategies.

- **Take care of yourself.** Eat healthy foods. Exercise regularly. Get enough sleep. Learn relaxation techniques so you can let go of stress and disturbing, repetitive thoughts. Know what truly brings you joy in life and make time for it.

- **Strive for balance and interconnection.** Give up the urge to be all things to all people, including clients. Allow time to connect with friends and family to counterbalance the stresses you feel at work and put everything back in perspective.

- **Come up with a plan.** When compassion fatigue is weighing on you, it can be difficult to get off the treadmill and set a new course. Stop long enough to notice how you’re feeling, reacting, and behaving at work and at home. Develop a plan of action for yourself. What needs to change? Where can you start?

- **Seek help.** If you think compassion fatigue is interfering with your work or personal life, reach out for help. A good place to start is the OAAP, at 1-800-321-6227. Or contact Mike Long at 503-226-1057, ext. 11, or at mikel@oaap.org.

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sponsoring upcoming compassion fatigue prevention trainings in various cities throughout Oregon. See the box on this page for more information.

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References:


Chapter 5

Delinquency Legal Ethics Considerations: Averting Disaster

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   Rule 1.14 Client with Diminished Capacity

   a. How do you screen for them?  
   Related: Evaluating whether clients have capacity to understand Miranda rights

   b. What if there is a recommendation from a doctor to have a client evaluated for it but your client doesn't want to go down that path?

   Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

   Rule 1.4 Communication

   c. Releasing an aid and assist evaluation when your client is found unable to aid and assist (can he actually consent to release?)

   Rule 1.6 Confidentiality of Information

   Rule 2.3 Evaluation for Use by Third Persons

   Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

2. Sex Offense Adjudications

   a. Explaining all the ramifications, especially registration

   Rule 1.14 Client with Diminished Capacity

   b. Exploring alternatives to trial (e.g., Formal Accountability Agreements, Conditional Postponements)

   Rule 1.6 Confidentiality of Information

   Rule 2.3 Evaluation for Use by Third Persons

   c. Evaluating whether your client would be successful in a conditional postponement and discussing that with your client

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3. Crossover Issues
   a. Working with dependency counsel (if you don’t represent them in both) and potential confidentiality issues
      
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4. Maintaining Confidentiality (especially from a youth’s pushy parents)
   
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5. Issues Faced by Prosecutors
   a. Contacting represented parties (e.g., crossover youth who are also necessary witnesses for a dependency trial)
      
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RULE 1.0 TERMINOLOGY

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.
RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is implicitly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;
2. to prevent reasonably certain death or substantial bodily harm;
3. to secure legal advice about the lawyer’s compliance with these Rules;
4. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
5. to comply with other law, court order, or as permitted by these Rules; or
6. in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall Oregon Rules of Professional Conduct (02/19/15) Page 6 have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.
7. to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto. (c) A lawyer shall make reasonable efforts to prevent the
 inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**RULE 1.14 CLIENT WITH DIMINISHED CAPACITY**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

**RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

**RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information.
known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

**RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.
Chapter 5—Delinquency Legal Ethics Considerations: Averting Disaster

Ethics! Navigating Issues in Juvenile Law
Chapter 6A

Appellate Update—Juvenile Dependency and Termination of Parental Rights

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I. Jurisdiction and disposition


The parents had three children and lived in the paternal grandparents’ home. The father’s family is Chinese and Mien and, in their culture, grandparents and older relatives often act as primary caregivers to children. After the mother gave birth to their first child, A, the paternal grandparents were A’s primary caregivers, while the parents acted more like close relatives than parents. When the mother gave birth to their second child, E, the mother and E both tested positive for methamphetamine, although E was not “drug-affected.” As with A, the paternal grandparents became E’s primary caregivers.

When the mother gave birth to their third child, H, H’s meconium tested positive for methamphetamine. The department removed H and placed her with the maternal grandfather. The department then filed dependency petitions regarding all three children, alleging that the parents’ drug use, failure to take individual responsibility for their children, and decision to leave the children with the paternal grandparents for extended periods of time required the juvenile court to intervene to protect the children. In the meantime, the paternal grandparents violated a department safety plan by allowing parents to have contact with their children when the parents were not in the grandparents’ line-of-sight, and the paternal grandparents were indicted on drug charges.

At the jurisdictional trial, the department’s theory was that the parents were unfit because they used drugs and did not want to parent independently. The department theorized further that the parents’ reliance on the grandparents was not sufficient to avoid the court’s involvement because: (1) the grandparents’ indictment for drug activity increased the risk that the children would be exposed to other “criminals”; (2) the grandparents’ “drug activity” increased the risk that the family would be subject to armed robbery; (3) the paternal grandfather’s 10-year-old “founded disposition” for physical abuse exposed the children to a “risk of harm”; and (4) the grandparents’ violation of the department’s safety plan evinced a current threat of harm to the children. The juvenile court asserted jurisdiction over the children, and the parents appealed. Reasoning that a parent’s conduct of delegating caretaking of his or her child to another does not authorize dependency jurisdiction unless the substitute caretakers pose a current threat of harm to the children, the Court of Appeals reversed:

“Under ORS 419B.100(1)(c), a juvenile court may assert jurisdiction in a dependency case when a child’s ‘condition or circumstances are such as to endanger the welfare of the child.’ A child is endangered if the child is exposed to conditions or circumstances that ‘present a current threat of serious loss or injury.’ *Dept. of Human Services v. C.J.T.*, 258 Or App 57, 61, 308 P3d 307 (2013). DHS has the burden to prove that the threat is current and nonspeculative; ‘it is not sufficient for the state to prove that the child’s welfare was endangered sometime in the past.’ *Dept. of Human Services v. M.Q.*, 253 Or App 776, 785, 292 P3d 616 (2012). Rather, ‘there must be a reasonable
likelihood that the threat will be realized.’ Dept. of Human Services v. A.F., 243 Or App 379, 386, 259 P3d 957 (2011).

“The key inquiry in this case is “whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare” of the children. Dept. of Human Services v. C.Z., 236 Or App 436, 440, 236 P3d 791 (2010) (internal quotations omitted). DHS also has the burden of proving a connection between the allegedly risk-causing conduct and the harm to the children. C.J.T., 258 Or App at 62. In this case, we reverse, because the record is insufficient to demonstrate that the children were endangered and that any risk of harm was current and nonspeculative.

“There is clearly sufficient evidence in the record that mother and father abuse drugs and lack basic parenting skills and an understanding of how to provide for their children’s basic needs. If they were acting as the children’s primary caregivers, DHS might well have proved a connection between the risk-causing conduct and harm to the children. However, in this case, because parents have entrusted the care of their children to the paternal grandparents, the question is whether— even assuming that DHS proved those parental deficits—the evidence in the record, as a whole, established that the totality of the children’s circumstances or conditions exposed them to a current risk of serious loss or injury that was reasonably likely to be realized.

“DHS identified four pieces of evidence to demonstrate that the paternal grandparents’ care of the children created a risk of harm to them: (1) the paternal grandparents’ indictment for financial participation in a marijuana grow operation; (2) evidence that drug houses have a higher risk of robbery, which creates harm to the children; (3) the 10-year-old founded disposition of physical abuse by the paternal grandfather; and (4) the paternal grandparents’ violation of the safety plan. We address each piece of evidence individually, and then together, to determine whether the totality of the circumstances establish a risk of harm to the children.

“First, an indictment for this type of conduct, without more, is not sufficient to show a current and nonspeculative risk of harm to the children. A DHS caseworker opined that, hypothetically, a person’s engagement in criminal activity opens up ‘possible increased risks of other criminals, other unsafe people having contact with your children.’ However, a search of the paternal grandparents’ home did not reveal any evidence of criminal activity that would create a risk of harm to the children; rather, the only evidence presented was speculative. The detective testified that it ‘would be implied’ that marijuana was transported to the grandparents’ home, even though no marijuana was found during the search. The detective also testified that the firearms found during the search were legal and locked securely in a safe. Indeed, the detective was unable to articulate a specific harm to the children that was present in the paternal grandparents’ home apart from the speculative harm from potential criminal activity. Moreover, the grandparents had an established backup plan to ensure
that the children remained with familiar relative caregivers should the
grandparents be convicted and incarcerated.

“Second, the evidence about the grandparents’ home being at risk for
robbery, likewise, was purely speculative. The detective testified that there is
potential for ‘grow locations or stash locations’ to be robbed and that such crimes
often involve guns, even if not reported to police. However, no evidence of
criminal activity was found in the home, and there was no evidence that the home
was a grow or stash location. Thus, DHS failed to show a nexus between that
circumstance and a risk of harm to the children.

“Third, DHS identified the paternal grandfather’s 10-year-old founded
disposition of physical abuse as evidence of a risk of harm to the children.
However, DHS cited confidentiality concerns and refused to present evidence on
the nature of the abuse in the founded disposition. In evaluating whether an
offender presents a risk of harm to children, we require ‘some nexus between the
nature of the offender’s prior offense and a risk to the child at issue.’ State ex rel
Dept. of Human Services v. N.S., 229 Or App 151, 158, 211 P3d 293 (2009).
Here, there is insufficient evidence to demonstrate a nexus between the paternal
grandfather’s prior physical abuse and a current risk of harm to the children.

“Fourth, DHS identified the paternal grandparents’ failure to act as
appropriate safety plan supervisors as evidence of a current threat of harm to the
children. However, one breach of the safety plan does not rise to the level of
‘current risk of harm’ when the children were not endangered or ‘threatened with
serious loss or injury.’ A.F., 243 Or App at 386. We also find it significant that
the paternal grandparents freely revealed their conduct to DHS and that there is no
other evidence that they otherwise failed to supervise the children.

“Considered in its totality, the evidence that DHS presented was
insufficient to prove a reasonable likelihood of harm to the children, and DHS
could not identify any harm caused to A and E in living with the paternal
grandparents. Instead, the record demonstrates that they were well-adjusted and
happy children before their removal and, indeed, that the greatest harm they
suffered was from the removal itself.

“In addition, DHS’s arguments rest on a mistaken assumption that parents
cannot give custody of their children to people who are not DHS-certified. To the
contrary, the court must have jurisdiction for DHS to change the placement of
children and, for jurisdiction to be warranted, there must a current threat of harm
to the children. ORS 419B.100(1)(c). Because parents have entrusted the
primary care of the children to the paternal grandparents, who do not pose a
current threat of harm, the court did not have a basis for asserting jurisdiction over
the children. See State ex rel Dept. of Human Services v. Smith, 338 Or 58, 86,
106 P3d 627 (2005) (concluding that, where mother’s family did not pose a threat
to the child, that mother’s inability to parent independently did not amount to a condition seriously detrimental to the child).”

A.L., 268 Or App at 397-400.


In 2005, the mother’s future husband attempted first degree rape of an 18-year-old woman. He was convicted for doing so, and the court ordered him to abstain from contact with minors and to complete sex offender treatment. Thereafter, the mother married her husband, and, despite the department’s repeated threats and admonishments, she allowed him to have contact with her child, J. When the department learned of her conduct, it removed five-year-old J from her care and placed him in foster care with strangers. The mother was devastated by the department’s taking of her child, and she attempted suicide. Several months later, the juvenile court determined that jurisdiction was warranted over J on three bases: (1) the mother did not believe that her husband’s status as an untreated sex offender posed a threat of harm to her child; (2) the mother was unwilling to protect the child from her husband until her husband “is deemed safe to have contact with children,” and (3) the mother’s mental health and suicide attempt interfered with her ability to safely parent.

The mother appealed, arguing that neither her husband’s status nor her suicide attempt (precipitated by the department’s conduct) warranted jurisdiction because neither condition endangered her child in any regard. The Court of Appeals agreed:

“On appeal, mother does not dispute that she permitted her husband to have contact with J, even though her husband is an untreated sex offender who is subject to a no-contact-with-minors condition of either post-prison supervision or probation. She also does not dispute that she has some mental health issues or that, several months before the jurisdictional hearing, she responded to the removal of J from her care by swallowing a bottle of codeine in a suicide attempt. However, mother contends that DHS failed to establish facts sufficient to permit the conclusion that that conduct by mother poses a sufficient risk of injury or harm to J so as to allow the juvenile court to exercise jurisdiction over J under ORS 419B.100(1)(c). We agree with mother and, accordingly, reverse.

“On review of a juvenile court’s jurisdictional determination under ORS 419B.100(1)(c), ‘we view the evidence as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court’s [determination] and assess whether, when so viewed, the record was legally sufficient to permit that outcome.’ Dept. of Human Services v. N.P., 257 Or App 633, 639, 307 P3d 444 (2013). ORS 419B.100(1)(c) authorizes a juvenile court to exercise jurisdiction over a person under the age of 18 ‘[w]here condition or circumstances are such as to endanger the welfare of the person or of others[,]’ Dept. of Human Services v. G.J.R., 254 Or App 436, 443, 295 P3d 672 (2013). A person’s ‘welfare’ is ‘endanger[ed]’ within the meaning of the statute if the person’s conditions and circumstances ‘give rise to a current threat of serious loss
or injury to the child.’ G.J.R., 254 Or App at 443. ‘The key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child.’ Id.

“Here, even drawing all inferences in favor of the juvenile court’s ruling, the evidence presented to the juvenile court is not sufficient to permit the conclusion that mother’s act of exposing J to her husband and her mental health issues gave rise to a reasonable likelihood of harm to J at the time of the jurisdictional hearing. With respect to mother’s failure to protect J from contact with her husband, the record is devoid of evidence that would permit a nonspeculative inference that mother’s husband poses a risk to J that would require mother to protect J from her husband. There is no evidence that mother’s husband has ever harmed J or any children in any way. Although mother’s husband has a 2005 conviction for the attempted first-degree rape of an 18-year-old woman and has not completed the sex offender treatment mandated as a condition of his post-prison supervision for that offense, those facts do not permit the conclusion that mother’s husband poses a risk to J because they do not show that J ‘fits within the class of [mother’s husband’s] victims.’ Id. at 445.

“Likewise, although mother’s husband was subject to a no-contact-with-minors condition of probation or post-prison supervision (or both), on the record in this case, that fact is insufficient to permit a nonspeculative inference that mother’s husband poses a risk to J. * * *

“Finally, the evidence regarding mother’s mental health issues also is insufficient to permit the conclusion that those mental health issues create a reasonable likelihood of harm to J. Although mother reported to the DHS caseworker that she has some mental health issues, the record contains no evidence that mother’s mental health issues harmed J, or even risked harming J, while J was in her care. Mother’s most extreme act of instability stemming from her mental health issues—her consumption of a bottle of codeine in a reported suicide attempt—was a singular act in response to the traumatic event of having J removed from her care, and did not pose a risk to J because he was not in her care at the time. And the record contains no evidence that would permit the inference that the unstable mental health condition that caused mother to consume the codeine persisted at the time of the jurisdictional hearing, several months after mother’s suicide attempt.

“In sum, the evidence presented at the jurisdictional hearing is legally insufficient to permit the conclusion that, at the time of the hearing, J’s conditions and circumstances—his exposure to her husband and mother’s mental health issues—presented a current risk of harm to J. The juvenile court’s jurisdictional determinations with respect to mother were, therefore, erroneous. G.J.R., 254 Or App at 445-46.”

D.H., 269 Or App at 865-68.

The father and the mother are also father and daughter. Their incestuous relationship has been longstanding and has produced two children, Z, and C. At the hearing on the department’s petition requesting the juvenile court to assert jurisdiction over C, mother admitted that she “has another child [Z] for whom she is not a parental resource and the conditions and circumstances that were the basis for the mother not having custody of that child, which include the following: mental health issues, substance abuse, and limited cognitive abilities, have not changed or have ameliorated and interfere with her ability to parent the child.” 270 Or App at 311-12. The father, in turn, “stood silent” and did not contest that he was “involved in a sexually intimate relationship with his daughter [the mother], resulting in the birth of two children, including this child. The child’s sibling suffers from significant medical issues, including a genetic disorder, which may also affect this child. The father has continued to maintain his relationship with the mother, despite a pending criminal investigation, which interferes with his ability to safely parent.” 270 Or App at 312. The court asserted jurisdiction and, over mother’s objection, rendered a dispositional order prohibiting the parents from having contact with one another. The parents appealed, arguing, inter alia, that the juvenile court lacked authority to prohibit them from having contact. The Court of Appeals agreed:

“* * * Mother argues that the trial court’s order was too broad because. Instead of merely ordering parents to have no sexual contact, which mother concedes the court could have ordered, the court ordered that they have no contact whatsoever. In response, DHS argues that the court could have concluded, based on the record, that, ‘if parents maintained any contact, they would continue to engage in the conduct that led to the court’s intervention in their familial relationship in the first place,’ thus justifying the court’s broad order that the parents not have any contact. (Emphasis in original.) We agree with mother that, given the bases for jurisdiction, namely, that parent’s sexual relationship posed a risk of harm to C, the court’s order that parents have no contact was overly broad.

“As noted above, the court asserted jurisdiction over C based, in part, on the fact that father was involved in a sexual relationship with his daughter (mother in this case), that that relationship had resulted in the birth of two children, one of whom suffers from significant medical issues, including a genetic disorder, which may also affect C, and that father continued his relationship with mother despite a pending criminal investigation. Implicit in the court’s assertion of jurisdiction was a determination that those conditions or circumstances posed a risk of harm to C. The court, citing the incest statute, ordered that parents have no contact with one another and found that the no-contact order was ‘directly related’ to the basis for jurisdiction and that it bore ‘a rational relationship to the basis of jurisdiction.’ The problem with the court’s order is that the basis of jurisdiction upon which the court relied in issuing the order was that parents’ sexual relationship posed a risk of harm to C. Given the bases for jurisdiction, the court’s order was overbroad, and the court lacked authority to order parents to have no contact. Because mother concedes that the trial court could order mother and father to have no
sexual contact, we need not reach the question of whether the court could issue such an order.”

E.L.G., 270 Or App at 317.


After the mother gave birth to the parents’ child, N, N lived with the parents and her half-sibling K for three months. The parents then placed N in the paternal grandmother’s care. Thereafter, police stopped the mother for driving without a license and discovered a 16-year-old in the car with the parents as well as marijuana, cocaine, and a gun. Several months later, the father took K with him to buy drugs and was arrested. The department alleged that jurisdiction was warranted over both N and K because of the father’s criminal activity including exposing K to a drug transaction, the mother’s substance abuse, the mother’s conduct of exposing N to persons “who present a risk of harm to the children,” and the mother requiring the department’s assistance to develop parenting skills. At the shelter hearing, the juvenile court approved of the department taking N from the grandmother’s care and into “protective custody.” The department would not certify the grandmother as a foster care provider because, in 1992, a caseworker had determined that a child welfare complaint against grandmother was “founded.” With the assistance of police, the department removed N from grandmother and placed her in stranger foster care. Ultimately, the court asserted jurisdiction. Both of the parents appealed, arguing that, because N was well cared for by the grandmother, the court’s jurisdiction was not necessary to protect N. The Court of Appeals agreed:

“Both parents appeal, contending that, even if their conduct presented a risk to K, who was in their care, that conduct did not present a risk to N because she was not in their care. Parents contend that ‘the totality of N’s circumstances was that she was being cared for by grandmother and aunt and the court had to determine whether grandmother and aunt caring for N would expose her to a threat of serious loss or injury that was likely to be realized.’ (Emphasis in father’s brief.) In parents’ view, DHS failed to demonstrate any nexus between parents’ conduct and a risk of harm to N.

* * * *

“We begin by noting that, in [Debt. of Human Services v. A.L., 268 Or App 391, 342 P3d 174 (2015)], we rejected the view, which DHS expressed during the jurisdictional hearing in this case, that a parent’s decision to turn over his or her child to another person in itself supports a determination that there is a current threat of harm to the child. In A.L., DHS argued, among other things, that the ‘parents leaving [the two older children] with the paternal grandparents for long periods of time’ in in itself contributed to a risk of harm to the children. 268 Or App 397. In rejecting DHS’s argument, we explained that those arguments rest on a mistaken assumption that parents cannot give custody of their children to people who are not DHS-certified.’ Id. at 400. Implicit in our rejection of DHS’s
assumption is the premise that a parent’s decision to allow a responsible person to care for his or her child for the long term, and to allow the child to become bonded to that other person with a ‘parent-child bond,’ does not, in itself, provide support for a juvenile court’s decision to assert jurisdiction over the child.

“We also disagree with DHS that, in cases like this one, where someone other than a parent is the primary caregiver for child, ORS 419B.100(2) excuses DHS from showing a nexus between risk-causing conduct—here, parents’ conduct—and a risk to the child.

“* * * * *

“* * *[S]ubsection (2) does not negate any part of the requirement of subsection (1)—in this case, the requirement that the child’s ‘condition or circumstances are such as to endanger [the child’s] welfare,’ ORS 419B.100(1)(c). Instead, subsection (2) provides additional information about the breadth of the inquiry under subsection (1): The mere fact that the child is being adequately cared for does not prohibit the court from taking jurisdiction if one of the requirements of subsection (1) is satisfied. Accordingly, in considering N’s condition and circumstances, we must consider not only the circumstance of N living with grandmother, but also whether, given that arrangement, parents’ conduct nevertheless poses a current threat of serious loss or injury to N.

“* * * * *

“As to subsection (1)(c), then the relevant inquiry remains, “whether * * * the evidence in the record, as a whole, establish[s] that the totality of the child [ ]’s circumstances or conditions exposed [the child] to a current risk of serious loss or injury that was reasonably likely to be realized.’ A.L., 268 Or App at 398. The effect of ORS 419B.100(2) on that inquiry is that the mere fact that a child is being adequately cared for by a nonparent does not prohibit the court from taking jurisdiction, as long as the totality of the child’s circumstances expose the child to a current risk of serious loss or injury. Here, then, DHS had the burden of alleging and proving that parents’ conduct posed a risk of serious loss or injury to N despite the fact that grandmother was caring for N.

“DHS could have pursued that theory of jurisdiction below. Had DHS done so, it could have presented evidence indicating that parents would take primary caregiving responsibilities back from grandmother; for example, DHS could have ascertained whether parents intended to parent N if they moved in with grandmother, or whether parents would have continued allowing grandmother and aunt to care for N even if they all lived under one roof. Or DHS might have argued that parents’ mere presence in grandmother’s household would have presented a threat to N even if parents did not take over primary caregiving responsibilities. But DHS did not.
“In taking jurisdiction over N, the juvenile court decided that ‘the substance abuse issues and the judgment issues * * * involving K extend to N, because those parenting decisions are going be made for both children.’ In the context of all of the court’s findings, which do not identify or hint at any specific way in which parents’ risk-causing conduct might have affected N, and DHS’s failure to identify any such nexus, we understand the court’s decision to be based on a speculative belief that, as long as parents had legal custody of N, they might remove her from grandmother’s care, at which point she would be exposed to parents’ bad judgment and substance abuse issues. That is not sufficient to support the conclusion that there is a current risk of harm. See Dept. of Human Services v. B.L.J., 246 Or App 767, 774, 268 P3d 696 (2011) (rejecting DHS’s argument that, ‘even if the children will not be at risk in Bingham’s house, mother [and the children] might leave Bingham’s house,’ because there was no evidence demonstrating ‘that it was reasonably likely that mother will leave her current supportive environment”)."

A.B., 271 Or App at 362-73.

**Dept. of Human Services v. M.A.H., 272 Or App 75, 354 P3d 738 (2015) (Douglas County; Julie A. Zuver, Judge).**

The department alleged that jurisdiction was warranted over the parents’ child, M, because the mother suffered from mental health problems, had failed to provide the child adequate food, had subjected the child to “mental, verbal and emotional abuse,” and because the father did not have legal custody. At the trial four months later, the department presented evidence that the mother had suffered from depression for most of her life and that, a few days before the mother gave birth to M, the mother verbalized concern that she would hurt M and, as a result, the mother was hospitalized, evaluated, and released. The department additionally established that the mother left M in the car alone for 20 minutes and that, in the month leading up to the department’s removal of M, the mother sent numerous disturbing messages to the child’s grandmother and the father causing the grandmother and the father to fear for M’s safety. Additional evidence established that the mother did not fit the profile of child abusers, that she had strong intellectual abilities, and that the psychologist who evaluated her believed that her mental health issues did not impair her ability to safely parent but they might do so in the future.

The juvenile court asserted jurisdiction. The mother appealed, arguing that the juvenile court erred when it did so because, even assuming that M required the court’s protection when the department took her from the mother in July, the department failed to prove that M was endangered at the time of the trial in November. The Court of Appeals agreed:

“For a court to take jurisdiction of a child under ORS 419B.100(1)(c), the child’s ‘condition or circumstances’ at the time of the jurisdictional hearing must be such as to endanger the welfare of the child or another person. Dept. of Human Services v. S.P., 249 Or App 76, 84, 90-91, 275 P3d 979 (2012). A child’s condition or circumstances ‘endanger’ the child within the meaning of the statute if they ‘create a current threat of serious loss or injury to the child,’ and the threat is one that is ‘reasonably lik[ely] to be realized absent juvenile court intervention.”
Id. at 84 (internal quotations omitted); Dept. of Human Services v. W.A.C., 263 Or App 382, 402-03, 328 P3d 769 (2014).

“Here, that standard was not met. At the outset, we note that the juvenile court found affirmatively that mother did not have the motivation or intent to harm M. Beyond that, the historical facts in the record do not permit the conclusion that M faced a current threat of serious loss or injury from mother at the time of the jurisdictional hearing. We acknowledge that mother’s text messages and voicemails, combined with mother’s mental health history, gave DHS reason to be concerned for M’s welfare at the time that grandmother contacted DHS in July 2014. The messages clearly demonstrate that mother was struggling in late spring and early summer 2014 with the significant challenge of parenting a toddler on her own. However, the messages, together with the other historical facts about mother and her parenting of M, do not permit the conclusion that mother posed a ‘current threat of serious loss or injury’ to M that was likely to be realized without juvenile court intervention at the time of the jurisdictional hearing four months later.

“It is possible that the text messages and voicemails might have permitted the conclusion in July 2014 that mother’s mental health issues and her ‘emotional abuse’ of M jeopardized M’s welfare at that point in time, but that is not the question presented in this case. A gain, to establish jurisdiction, DHS was required to demonstrate that M’s circumstances in November 2014 endangered her welfare. S.P., 249 Or App at 90-91. Although there are certainly cases in which the child’s circumstances four months earlier will permit the conclusion that the child’s welfare is presently endangered, the evidence here is insufficient to support a conclusion that the danger to M—if any—that existed in July continued to be present in November, even when the record is viewed in the light most favorable to the trial court’s ruling. First, we note that the record contains no evidence that would permit the conclusion that M was, in fact, harmed by mother’s conduct in any nonspeculative way. Notwithstanding mother’s concerning voicemail and text messages, M’s medical records show that M was healthy and meeting developmental milestones at the time that she was removed from mother’s care. The DHS workers who removed M from mother’s care testified that M’s living conditions were clean and appropriate.

“Second, this is not a case in which evidence of mother’s past mental health issues alone are sufficient to support an inference of her present condition. The evidence is uncontroversial that mother continuously has made efforts to eliminate any risk of harm to M posed by mother’s mental health issues. * * *

“Third, and relatedly, the historical facts do not allow for the conclusion that the management of mother’s mental health issues in November 2014 was so inadequate that mother’s mental health conditions posed a serious threat to M or that mother was likely to continue to make the type of statements to M that the juvenile court deemed emotionally abusive.* * * as noted, Truhn testified that as
long as mother continued to work to address her various mental health issues, mother did not present a risk of serious harm to M. Truhn’s only concern was that mother’s mental health condition might put M at risk of harm—in the form of verbal abuse—in the future, if mother did not continue with counseling. DHS introduced no evidence controverting those opinions, opting instead to rely primarily on mother’s voicemail messages and text messages to demonstrate that mother posed a risk to M at the time of the November hearing.

“Under those circumstances, the trial court erred in concluding that mother’s mental health issues or her prior conduct in July 2014 posed a current threat of serious loss or injury to M at the time of the jurisdictional hearing in November 2014. Consequently, father’s lack of a custody order at that time also did not endanger M; father’s lack of custody endangered M only if mother, as the custodial parent, posed a risk to M.”

M.A.H., 272 Or App at 84-86.


The department alleged that jurisdiction was warranted over the parents’ child because the parents were using controlled substances, did not have stable housing, and were not meeting the child’s special behavioral needs. At the subsequent shelter hearing, the department reported that the father had stopped participating in voluntary services and that someone had erected a physical barrier preventing access to the parents’ home and had posted a sign stating, “Go A way. You’re not W elcome. Bye!!! Be Gone! Keep O ut!” In the meantime, the child had missed a week of school and no one could locate the parents or the child. Based upon the department’s representations, the juvenile court awarded emergency custody of the child to the department. The department asked the court to issue an arrest warrant for the parents. But as the department had failed to serve the parents with a summons to appear, the court refused to do so. The juvenile court ordered the department to serve the parents by certified mail and by posting. The department emailed the father, sent the summons to the parents, and posted the summons, petition, and order to appear on the parents’ front door. When it did so, the caseworker noticed that there were pets inside the home and neighbors reported that they had observed the parents frequenting their home late at night. When the parents subsequently failed to appear, the juvenile ruled that the parents had been properly summoned and asserted jurisdiction over the child. The parents appealed, arguing that the court erred when it did so because they were not properly served. Reasoning that the methods of service employed by the department, namely, email, mail, and posting satisfied due process and, hence, the statute, the Court of Appeals disagreed:

“Due process requires that interested parties receive ‘notice reasonably calculated, under all of the circumstances, to appraise [them] of the pendency of the action and afford them an opportunity to present their objections.’ Mullein v. Central Hanover Bank & Trust Co., 339 US 306, 314, 70 S Ct 652, 94 L Ed 865 (1950). The ‘notice required will vary with circumstances and conditions.’
Walker v. Hutchinson, 352 US 112, 115, 77 S Ct 200, 1 L Ed 178 (1956). ‘[T]he constitutionality of a particular procedure for notice is assessed ex ante, rather than post hoc.’  Jones v. Flowers, 547 US 220,231, 126 S Ct 1708, 164 L Ed 2d 415 (2006). Here, the record shows that DHS served parents with summons by posting it on the door to parents’ home, by emailing it to parents, and by mailing it to them at their home. We turn to whether that service complies with the requirements of due process.

“The United States Supreme Court has stated that service by posting a summons or similar notice on a dwelling will, in most cases, ‘offer [a] property owner sufficient warning of the pendency of [a] proceeding.’ Greene v. Lindsey, 456 US 444, 452, 102 S Ct 1874, 72 Ed 2d 249 (1982). The plaintiffs in Greene had been served with summons in forcible entry and detainer (FED) actions by posting copies of writs of forcible detainer on the doors to their apartments. The plaintiffs brought a class-action suit alleging that they had not received constitutionally adequate notice of the FED proceeding because notices posted on apartment doors were ‘not infrequently’ torn down by children or other tenants. Id. at 453 (internal quotation marks omitted). Although the Court concluded that, in light of the removal of posted summons in the community in Greene, posting did not meet the requirements of due process, the Court indicated that posting may nonetheless be sufficient to satisfy due process in other cases. See id. at 455. Here, nothing suggests that the summons, once posted on the door of parents’ home, might be removed by someone other than parents. Furthermore, there is evidence that parents were visiting their home: the property had a sign directing people to stay away, parents’ neighbors told [the caseworker] that parents were visiting the property at night, and parents had left their pets in the home. Those facts suggest that parents were regularly at their home and support a determination that posting the summons would provide parents with notice of the proceeding. However, we need not determine whether posting the summons on the door to parents’ home, without more, would constitute constitutionally adequate notice, because DHS also used other means to serve parents with the summons.

“Service of summons by mail can meet the due process standard for notice of a court proceeding. See, e.g., Greene, 456 US at 455. However, service by mail in this case did not meet the statutory standard specified in ORS 419B.824(4), which states that service by mail in a dependency case ‘is not complete unless the person to be served signs a receipt for the mail.’ The mailing occurred here under circumstances in which it was unlikely that parents would accept delivery of certified mail sent to their home—DHS had previously tried and failed to contact parents at their home during the day, when mail carriers typically deliver certified mail. Mailing the summons and petition to parents nonetheless increased, even if only marginally, the likelihood that they would receive notice of the proceeding and, consequently, it makes it more likely that DHS met the due process standard for service of summons.
“Finally, service of summons by e-mail also may satisfy due process. See Rio Properties, Inc. v. Rio Intern. Interlink, 284 F3d 1007, 1017 (9th Cir 2002) (‘Considering the facts presented by this case, we conclude not only that service by process of email was proper * * * but in this case, it was the method of service most likely to reach [defendant].’). By sending an e-mail note with copies of the summons and petition to an e-mail address at which DHS had recently exchanged e-mail notes with father, DHS measurably increased the likelihood that parents would receive a copy of the summons and petition and, hence, notice of the pendency of the proceedings.

“We recognize that whether parents received constitutionally adequate notice is a fact-specific determination. However, we conclude that, taken together, the methods that DHS used to serve parents were reasonably calculated to appraise them of the proceeding and, hence, that service met the due process standard embodied in the first sentence of ORS 419B.823. Therefore, we conclude that the trial court did not err in entering the jurisdictional judgments that’s premised on service of summons on parents.”


Dept. of Human Services v. J.R., 274 Or App 107, 360 P3d 531(2015) (Curry County; Cynthia Lynnae Beaman, Judge).

The children’s parents had engaged in some form of domestic violence. The mother then obtained a restraining order against the father, took physical custody of the children, and moved with the children from Nevada to Oregon. The father knew of the mother’s plan to move the children from Nevada to Oregon and enlisted the help of the police in Nevada to prevent her from doing so. Citing the nonexistence of a custody order, the police refused to intervene. Thereafter, the Oregon juvenile court asserted jurisdiction over the children based on the mother’s substance abuse and the father’s admission that he had failed to protect the children from the mother’s “neglectful behaviors.” Shortly after the court asserted jurisdiction, the mother was convicted of possession of methamphetamine and signed a limited power of attorney giving the father the right to make all parenting decisions for the children.

The father filed a motion to dismiss dependency jurisdiction and terminate the wardships. In support of the motion, the father testified that, if the court terminated the wardships, he would immediately move the children back to Nevada, file for divorce, and seek sole legal custody of the children. Additionally, the father stated that he would call the police if the mother attempted to remove the children from his care. The mother testified that she had no plans to move back to Nevada and that she wanted to give full custody to the father and planned to have no contact with the children. In opposing the motion, the department’s caseworker testified that the mother intended to visit the children in Nevada. The juvenile court disbelieved the mother’s testimony and denied the motion. The father appealed, arguing that the mother’s unfitness and his lack of a custody order did not warrant jurisdiction. The Court of Appeals agreed:
“According to DHS, the evidence in the record that supports such a finding consists of the facts that (1) because father does not have sole legal custody of the children, mother retains co-equal rights to the children despite the revocable power of attorney, (2) the juvenile court expressly discredited mother’s testimony, including her statement that she would not attempt to visit the children, in light of the fact that mother had previously failed to abide by agreements that restricted her movements and that a DHS worker had testified that mother intended to visit the children, and (3) in the past, police declined to intervene on father’s behalf without a court order when mother had physical custody of the children. We conclude that the facts are legally insufficient to support the juvenile court’s finding that father was unable to protect the children the time of the hearing.

“The first fact identified by DHS—that father did not have sole legal custody—is of no value without support from the remaining facts because, although a fit parent may lack sole legal custody when the other parent is unfit, without evidence that the fit parent is unable to protect the children, the lack of custody order is insufficient to support jurisdiction. D.A.S., 261 Or App at 548; A.L.M., 232 Or App at 16; R.L.F., 260 Or App at 172.

“The remaining facts identified by DHS do not provide a basis for concluding that father is presently unable to protect the children. A DHS worker testified that mother intended to visit the children in Nevada and the trial court discredited mother’s testimony, including her testimony that she would not attempt to visit the children in Nevada. Such evidence is evidence of mother’s intent; it is not evidence of father’s inability to protect the children from mother.

“DHS also relies on the fact that police refused to intervene when mother moved to Oregon, alleging that that fact shows that, ‘if mother tried to remove the children from [father’s] care * * * the police would tell him they would not interfere in a custody dispute without a court order.’ The fact that police declined to intervene on behalf of the parent who lacked physical custody of the children is not a basis for concluding that father would be unable to protect the children. Going forward, the roles would be reversed. Father would be the parent with physical custody.

“In sum, each piece of evidence identified by DHS fails to support the finding that father would be unable to protect the children from mother, and the evidence fares no better when considered as a totality because father’s lack of a custody order is an insufficient basis for jurisdiction without more, D.A.S., 261 Or App at 548; A.L.M., 232 Or App at 16; R.L.F., 260 Or App at 172, and our reading of the record reveals no other possible basis for the court’s finding that father would be unable to protect the children from mother. Without that finding related to father, the remaining allegations are insufficient to support continued jurisdiction. W.A.C., 263 Or App at 394. Accordingly, we reverse.”

**Dept. of Human Services v. J.R., 274 Or App 601, 360 P3d 656 (2015) (J.R. II) (Curry County; Cynthia Lynnae Beaman, Judge).**

While the father’s appeal in J.R. was pending, the department filed an amended petition alleging that the father’s “substance use impaired his judgment and ability to safely parent.” 274 Or App at 605. The evidence presented at trial established that father was a single parent, he had been convicted for DUII four times between 20002 and 2009, he had repeatedly tried and failed to complete substance abuse treatment, at the time of trial he continued to drink on regular basis, and seven months earlier police were called to father’s home because of his conduct toward his son after having consumed “a couple shots of Jagermeister and a couple beers.” 2754 Or App at 605-06. Based upon that evidence, the court asserted jurisdiction on the basis of father substance use. The father appealed arguing that the department had failed to establish a “nexus” between father’s alcohol use a particularized threat of harm to the children at issue. The Court of Appeals disagreed:

“To the extent that the father contends the department failed to establish a ‘nexus’ between his alcohol use and the risk of harm to the children, the department has satisfied its burden of proof as a matter of law. The department presented evidence that father was a single parent, he had been convicted for DUII four times between 20002 and 2009, he had repeatedly tried and failed to complete substance abuse treatment, at the time of trial he continued to drink on regular basis, and seven months earlier police were called to father’s home because of his conduct toward his son after having consumed “a couple shots of Jagermeister and a couple beers.” 2754 Or App at 605-06. Based upon that evidence, the court asserted jurisdiction on the basis of father substance use. The father appealed arguing that the department had failed to establish a “nexus” between father’s alcohol use a particularized threat of harm to the children at issue. The Court of Appeals disagreed:

“Under ORS 419B.100(1)(c), jurisdiction is proper if a child’s ‘conditions or circumstances are such as to endanger the welfare of the child. A child’s welfare is endangered if there are ‘conditions or circumstances that present a current threat of serious loss or injury.’ Dept. of Human Services v. C.J.T., 258 Or App 57, 61, 308 P3d 307 (2013) (citing Dept. of Human Services v. M.Q., 253 Or App 776, 785, 292 P3d 616 (2012)). Under the totality of the circumstances, there must be ‘a reasonable likelihood of harm to the welfare of the child.’ Dept. of Human Services v. CZ., 236 Or App 436, 440, 236 P3d 791 (2010) (internal quotation marks omitted). ‘DHS has the burden to establish a nexus between the allegedly risk-causing conduct* * *and risk of harm to the child.’ Dept. of Human Services v. E.M., 264 Or App 76, 81, 331 P3d 1054 (2014). Moreover, the risk of harm must be present at the time of the jurisdictional hearing and cannot be speculative. Id.

“On appeal, father does not dispute his history of alcohol abuse or that he continues to consume alcohol. He does, however, assert that DHS failed to adduce evidence establishing a nexus between his alcohol use and a risk of harm to JMR and JMLR at the time of the hearing. * * *

“In response, DHS points to the following evidence to establish that father’s alcohol use presented a risk of harm to the children: (1) father’s four DUII convictions, (2) father’s unsuccessful participation in multiple alcohol treatment programs, (3) father’s continued alcohol consumption despite a history of alcoholism, and (4) father’s failure to take current steps to address his substance abuse problem. According to DHS, the children’s ages also made them particularly vulnerable to neglect because, at two and five years old, they were too young to take care of themselves if father was unavailable, and there was no other reliable parent in the home to care for them. Furthermore, DHS argues that the
August 2014 incident was only resolved because a teenager in the home was able to call the police.

“Ultimately, we agree with DHS that, under the totality of the circumstances, there was sufficient evidence in the record to support the juvenile court’s finding that father’s alcohol use posed a current risk of harm to JMR and JMLR.”

J.R., 274 Or App at 607-09

Dept. of Human Services v. M.C.-C., 275 Or App 121, ___P3d ___(2015) (Washington County; Richard Menchaca, Judge).

The father, a Mexican national and resident of Mexico, repeatedly appeared in the juvenile court case involving his four Oregon children. Two-years into the case, he objected to continued jurisdiction arguing that the department’s service of process did not comply with the requirements of the Hague Service Convention. The juvenile court denied the father’s motion and the father appealed. Reasoning that father’s conduct of appearing in juvenile court and requesting various forms of relief from the court waived any objection to the defects in service, the Court of Appeals affirmed:

“Notwithstanding the defects in service under the Hague Service Convention, father appeared in the proceeding—both personally by telephone, and through counsel—for more than two years before raising his objections to the sufficiency of service. During that time period, father participated in a range of different hearings. He also affirmatively involved the assistance of the court by, for example, requesting continuances of hearing dates, and by requesting that the court order disclosure of protected information about his children for the purpose of helping the court and father prepare a plan for reunification of father and his children.

“Under those circumstances, the juvenile court was correct to conclude that father was not entitled to dismissal on the ground that DHS’s service of summons did not comply with the Hague Service Convention. Under Oregon law, it has long been the case that a party claiming that a court lacks personal jurisdiction over the party because of a defect in service must raise that issue at the earliest possible occasion. Pacific Protective Wear Distributing Co. v. Banks, 80 Or App 101, 720 P2d 1320 (1986). If a party appears in a matter and requests relief that could only be granted if the court had jurisdiction, without promptly raising any issues about defects in service or lack of personal jurisdiction, then the party waives the ability to raise those issues. Id.; see also Coleman v. Meyer, 261 Or 129, 131, 493 P2d 48 (1972) (‘[A] party waives all irregularities in the service of process when he appears generally and asks to plead and defend upon the merits of the case.’); Mayer v. Meyer, 27 Or 133, 139, 39 P 1002 (1895) (concluding that a party who appears in court and ‘asks some relief which can be granted only on the assumption that the court has jurisdiction of his person’).
will be deemed to have entered a general appearance, and submitted himself to the jurisdiction of the court, as completely as if regularly served by process.

“If that long standing rule applies here, then father waived his objections to the defects in service by appearing and participating in the proceeding before the juvenile court in the way that he did. We are persuaded that the rule applies. That rule is well-embedded part of Oregon civil practice. The parties point to nothing in the Hague Service Convention that would preclude application of that rule here, and we have identified nothing ourselves. Indeed, other courts likewise have concluded that objections to defects in service under the Hague Service Convention (like most—if not all—other kinds of defects in service) are waived under circumstances similar to those present here. See, e.g., Vanessa Q., 187 Cal App 4th at 136-37, 114 Cal Rptr 3d at 299-301 (father waived objections to defective service under the Hague Service Convention when his lawyer appeared in court to request continuance without raising service defects at that time. Photolab Corp v. Simplex Speciality Co., 806 F2d 807, 811 (8th Cir. 1986) (defendant waived objections to sufficiency of service under the Hague convention when defendant did not raise the issue in an answer or motion to dismiss).

“Additionally, we see nothing in the juvenile code to suggest that the legislature intended for a different rule to apply in dependency proceedings. On the contrary, the juvenile code indicates that the legislature generally intended that defects in service not obstruct the exercise of juvenile court jurisdiction, except when due process requires otherwise. Requiring that a participant in a juvenile dependency proceeding raise any objections to the sufficiency of service at the earliest possible time, upon pain of waiver, is consistent with that expressed legislative intent.”

M.C.-C., 275 Or App at 123-24 (footnote omitted).

II. Permanency

Dept. of Human Services v. T.L., 269 Or App 454, 344 P3d 1123, rev allowed, 357 Or 324 (2015) (Clackamas County; Douglas V. Van Dyk, Judge).

The juvenile court asserted jurisdiction over the father’s children and, thereafter, scheduled a permanency hearing. The father arrived late, and his attorney did not appear at all. Before the father arrived, the juvenile court stated that it intended to change the children’s permanency plans from reunification to APPLA for one and to guardianship for the other two. When the father arrived, he told the court that he “was under the impression that [he] was doing what DHS was requesting of [him].” Thereafter, the juvenile court entered permanency judgments changing the children’s permanency plans. The father appealed, arguing that he was entitled to reversal because his trial attorney’s failure to appear deprived him of adequate assistance of counsel and, in any event, the
absence of counsel rendered the proceeding fundamentally unfair. In a divided opinion, the Court of Appeals disagreed.

The majority reasoned that the father was precluded from raising a claim of inadequate assistance of counsel for the first time on direct appeal because, in enacting ORS 419B.923, the legislature abrogated State ex rel Juv. Dept. v. Geist, 310 Or 176, 796 P2d 1193 (1990), and intended to require a parent in the father’s circumstances to raise his claim of inadequate assistance to the juvenile court in the first instance. The majority did not address the father’s alternative argument that the complete denial of counsel rendered the proceeding fundamentally unfair:

“In sum, the premises upon which Geist is grounded have been negated by the availability of ORS 419B.923 as a mechanism for a parent in a dependency action to challenge the adequacy of his or her trial counsel in the juvenile court. In light of those developments— as well as the recognized need for expeditious resolution of these cases—we conclude that, to preserve a claim of inadequate assistance of appointed trial counsel, a parent in a dependency proceeding must first seek to resolve that issue in the juvenile court by moving, under ORS 419B.923(1), for the court to modify or set aside the judgment or order to which the claim relates. Because father failed to preserve his claim of inadequate assistance of counsel in this case, we affirm the permanency judgments at issue on appeal.”

T.L., 269 Or App at 468.

The dissent contended that the Court of Appeals was bound by Geist, that the juvenile code has long contained a set-aside statute such that, in enacting ORS 419B.923, the legislature did not intend to change the legal landscape since Geist nor did it, and, in any event, that the rationale underlying Geist continues to be correct and applies with equal force to the father’s case:

“In sum, although the juvenile court’s broad statutory authority to modify or set aside any order has undergone minor changes since Geist was decided, there is no indication that the legislature’s actions in the interim have had any effect on the scope of the set aside statutes. Therefore, if, under Geist, the set aside statutes were not a barrier to the court implementing a direct-review remedy of inadequate-assistance-of-counsel challenges that did not require preservation, there is nothing about the changes in the statutes since Geist was decided—including the recent construction in A.D.G. that ORS 419B.923 is ‘broad’—that provides any support for the majority’s conclusion that that statute precludes a parent from utilizing the remedy created in Geist.”

T.L., 269 Or App at 482.
The mother's teen-aged son, K, had been in foster care for two years. Over the course of his term in the department's custody and up until the time of the permanency hearing, K continued to struggle with various mental health infirmities including a proclivity for threatening and engaging in self-harming behaviors. The juvenile court changed K's from reunification to APPLA ruling on the face of the judgment that the mother "made sufficient progress toward meeting the expectations set forth in the service agreement, letter of expectation and/or case plan, and the child cannot be safely returned to [her] care." 270 Or App at 526. The mother appealed, arguing, inter alia, that the juvenile court's ruling that her progress was "sufficient" was inconsistent with its ultimate determination to change K's plan from reunification to APPLA. Noting that whether a parent has made sufficient progress toward meeting the expectations in the department's case plan is a different question from the ORS 419B.476 (2)(a) element of whether the proponent of a change in permanency plan proved that the parent's progress was insufficient to allow the child to safely return home, the Court of Appeals affirmed:

"As to mother's first contention, we conclude that the 'sufficient progress' determination that the juvenile court made in the judgment in this case was not inconsistent with its decision to change the permanency plan from reunification. The judgment form used by the juvenile court allowed the court to check boxes indicating that a parent (1) "has made sufficient progress toward meeting the expectations set forth in the service agreement, letter of expectation and/or case plan,' and (2) the child 'cannot be safely returned to [parent's] care.' The statutorily required determination at issue in this case is 'whether the parent has made sufficient progress to make it possible for the ward to safely return home.' ORS 419B.476(2)(a). Therefore, a court's determination that the permanency plan should be changed because a parent has not made sufficient progress to make it possible for the ward to safely return home is not necessarily inconsistent with a determination that the parent has made 'sufficient progress' toward meeting expectations. That result is consistent with the statutory mandate that the 'reasonable efforts' and 'sufficient progress' determinations required under ORS 419B.476(2)(a) are explicitly 'centered on whether the ward may safely return home, and that the court must make those determinations with the ward's health and safety the paramount concerns.' Dept. of Human Services v. J.B.V., 262 Or App 745, 755, 327 P3d 564 (2014) (quoting ORS 419B.476(2)(a)) (emphasis in original)."

R.S., 270 Or App at 528 (footnote omitted).

The juvenile court asserted jurisdiction over the mother's child, T, when she was five years old because the mother's substance abuse interfered with her ability to safely parent. One year later, the department returned T to the mother's care. Shortly thereafter, the mother
relapsed. Initially, the department allowed T to remain in the mother’s care subject to specific conditions. When the mother violated the department’s terms, it again removed T from the mother’s care. By the time of the permanency hearing four months later, the mother had again tested positive for methamphetamine and had been discharged from substance abuse treatment for noncompliance. The juvenile court changed T’s permanency plan from reunification to adoption. The mother and T appealed, arguing, inter alia, that the juvenile court erred in doing so because T’s opposition to adoption and strong bond with her mother constituted a “compelling reason” for purposes of ORS 419B.498(2)(b) to forego a changing the permanency plan to adoption notwithstanding the mother’s failure to have made “sufficient progress” for purposes of ORS 419B.476(2). The Court of Appeals disagreed:

“Aassuming, without deciding, that the bond between a parent and a child can be a compelling reason to decline to pursue termination, we conclude that the evidence here is legally sufficient to support a determination that the bond between mother and T does not constitute a compelling reason to avoid such a change in plan under ORS 419B.498(2)(b). The evidence they rely on—that is, the caseworker’s testimony that T ‘loves her mother very, very much,’ T’s decision to appeal the change in permanency plan, and mother’s counsel’s statements that mother desired to parent T and be a good parent to her—is inadequate to establish, as the statute requires, a ‘compelling reason * * * for determining that filing such petition would not be in the best interests of the child * * *.’ To be sure, ORS 419B.498(2)(b) calls for a ‘child-centered’ determination, but T’s opposition to adoption at age six does not establish what is in her best interests in light of mother’s persistent problems with substance abuse and her inability to address those problems.

“Moreover, we conclude that T’s argument that DHS’s lack of a proposed adoption placement and mother’s argument that T’s ‘unequivocal opposition to adoption’ precludes a change in plan under ORS 419B.498(2)(b) are unavailing. Both arguments rely on State v. L.C., 234 Or App 347, 352-53, 228 P3d 594 (2010), rev dismissed, 349 Or 603 (2011), in which we held that, because the record demonstrated that an adoptive placement for the children was unlikely to be found, the juvenile court erred by changing the plan to adoption. The record here is dissimilar. Mother’s contention regarding the likely effect of T’s opposition to adoption is speculative and not supported by evidence in the record. To the contrary, relatives in Texas have expressed an interest in adopting T. Moreover, L.C. does not stand for the proposition that DHS must have a plan of adoption by the current caretaker to whom T has an attachment, but rather holds that the plan should not be changed where there is persuasive evidence that adoption is unlikely to be achieved. Id. at 352-53.”

T.M.S., 273 Or App at 295.

The department sought to change the permanency plan for the parents’ child, L, from reunification to adoption. Because L was determined to be an Indian child, the Indian Child Welfare Act (ICWA) applied to this case.

Jurisdiction was based on the parents’ cognitive delays, lack of parenting skills, the father’s inability to control his anger, and the mother’s failure to recognize that the father’s anger problems posed a safety risk to L. The parents engaged in services, including psychological evaluations, visitation, and intensive one-on-one parenting training. The juvenile court determined that the department made “active efforts” toward reunification but that, despite those efforts, the parents had not made sufficient progress for L to return safely home. The juvenile court relied in large part on notes from a parenting mentor, who concluded that the father’s anger problem and the mother’s acquiescence to the father’s angry outbursts were intractable and no further services would make it possible for L to return home.

The parents appealed, arguing that the juvenile court violated their procedural due process rights by admitting four reports into evidence (notes by the parenting mentor, psychological evaluations for each parent relying on the parenting mentor’s notes, and a department report relying on the conclusions made by the psychologist and the parenting mentor) without an opportunity to cross-examine the authors of those reports. The parents also argued that the services provided by the department to reunify the family did not constitute “active efforts” and that the court’s decision to change the permanency plan to adoption was a “foster care placement” under ICWA that required expert testimony establishing that continued custody by the parents was “likely to result in serious emotional or physical damage” to L.

The Court of Appeals affirmed, ruling, first, that the circumstances of the case did not violate the parents’ due process rights under the balancing test set forth in Mathews v. Eldridge, 424 US 319, 334-35, 96 S Ct 893, 47 L Ed 2d 18 (1976). It agreed with the department that, although the “private interest * * * affected by the official action” was important, the government’s “urgent interest” in the welfare of the child was also crucial. And because the purpose of a permanency hearing is to reach a decision about the appropriate permanent plan for the child as expeditiously as possible, the permanency hearing is not a “key juncture” in which heightened protections apply, such as at a termination trial. Further, the court ruled that the “risk of erroneous deprivation” was less than the parents contended as they had the ability to subpoena the authors of the reports to question their credentials and the bases for their recommendations and would have additional opportunity to do so at the termination stage.

Second, the court ruled that the department offered “extensive and appropriate services” to the parents and had a “persistent involvement in attempting to shepherd parents through those services,” which supported the juvenile court’s determination that the department made “active efforts” to make it possible for L to return home. The court also affirmed the juvenile court’s determination that, despite those efforts, the parents did not make sufficient progress to make a return home possible.
Finally, the court ruled that the action changing the plan from reunification to adoption did not constitute a “foster care placement” under ICWA that would trigger a requirement for expert testimony that the parents’ custody was “likely to result in serious emotional or physical damage” to L.

**Dept. of Human Services v. A.A., 276 Or App 233 ___ P3d ___ (2015) (Coos county; Michael J. Gillespie, Judge).**

At the permanency hearing, neither the department nor any other party offered any evidence regarding the department’s reunification efforts. Nonetheless, the juvenile court changed the child’s permanency plan from reunification to guardianship noting in the judgment that it “took ‘judicial notice’ of court reports from the department and [Cour t A ppointed Special A dvocate (C A S A )] and statements made at the hearing by the parties’ attorneys.” The father appealed arguing that the court was not authorized to take judicial notice off the record without providing father with an opportunity to object, and in any event, the statements parties at the hearing and caseworkers in court reports are subject to reasonable dispute and so are not judicially noticeable. The Court of Appeals agreed and reversed.

**III. Guardianship**

**Dept. of Human Services v. B.M.C., 272 Or App 255, 355 P3d 190 (2015) (Douglas County; Julie A. Zuver, Judge).**

On the department’s motion, the juvenile court established the mother’s child, O, in a guardianship with her grandparents and dismissed DHS as a party to the ongoing dependency case. Thereafter, the department’s caseworker discovered that the guardians had allowed mother to live on their property, conduct that the department believed endangered O. Instead of filing a dependency petition alleging that O was not safe in guardians care, the department removed O from the guardians care and moved the juvenile court to vacate the guardianship order. The juvenile court did so and mother and the guardians appealed. Reasoning that the department had no standing to move the court to vacate the guardianship, the Court of Appeals reversed.

**IV. Termination of Parental Rights**

**Dept. of Human Services v. C.M.K., 270 Or App 1, 346 P3d 1254, rev den, 357 Or 324 (2015) (Lane County; Illisa Rooke-Ley, Judge).**

The mother had a lengthy and troubled history with DHS because of her repeated cycles of substance abuse, treatment and relapse, and repeated relationships defined by incidents of interpersonal violence. At the time of the trial on the department’s petition to terminate parents’ parental rights, to their two children I and K, I’s therapist had diagnosed her with Post-Traumatic Stress Disorder, and K’s therapist had diagnosed her with adjustment disorder. Each therapist testified that their respective clients needed "permanency" as soon as possible. The department additionally presented evidence that "[s]tress, demands, and responsibilities of caring for the
children on a full-time basis would be a significant stressor to [mother] and leave her at an increased risk of relapse to drugs, resumed bouts of depression, or being involved with an abusive partner." 270 Or App at 12. And although the father had graduated from treatment and UA's demonstrated that he had not used any controlled substances in the 10 months immediately preceding the trial, his treatment provider believed that he had a "very high relapse potential." 270 Or App at 11. The juvenile court terminated both parents' parental rights. The parents appealed arguing, inter alia, that they were clean and sober at the time of trial and that the evidence did not establish that they were "likely to relapse," to a degree that established that they were presently unfit. The Court of Appeals disagreed:

"Mother contends that DHS failed to prove any detriment to the children at the time of trial. She argues that she had then been clean and sober for four months and had not used methamphetamine for 10 months. Further, she points out that her therapist and drug treatment counselor thought she was approaching her treatment with more motivation and insight than before. In support, mother relies on three cases in which we concluded that a 'risk of relapse' failed to qualify as unfitness under ORS 419B.504. See State ex rel Dept. of Human Services v. D.F.W., 225 Or App 220, 201 P3d 226 (2009) (The parents' sustained work to resolve their problems led to conditions at the time of trial that did not justify termination of either parent's parental rights); State ex rel Dept. of Human Services v. A.M.P., 212 Or App 94, 157 P3d 283 (2007) (it was improper to terminate parental rights where the only evidence regarding the father's condition at the time of trial showed that the father had been making improvements during his incarceration); and State ex rel Dept. of Human Services v. L.S.,211 Or App 221, 154 P3d 148(2007) (despite evidence of a 'very troubling' risk of relapse, evidence did not support conclusion that the mother had used drugs in the fifteen months before trial).

"We conclude that this case is unlike any of the three cited by mother. Those cases may stand for the general proposition that prior substance abuse does not prove present unfitness, particularly where there has been sustained period of abstinence from use and engagement in services. Nevertheless, the evidence in this case consists of much more than prior substance abuse. First, mother has a year-long pattern of drug abuse, sobriety, and relapse. That is so despite engaging in and completing an array of services intended to support her sobriety. Second, the psychological testimony presented by DHS demonstrated that, given mother's personality disorder, her demonstrated pattern is likely to repeat itself, especially because the mental health therapy that she was participating in at the time of trial was unlikely to effectively treat her disorder. Finally, despite the consequences, mother had resorted to using marijuana in response to depression just four months before the termination trial; thus, there is direct recent evidence of the pattern that mother has demonstrated for at least 10 years before trial. For all of those reasons, we have no difficulty concluding that mother's conduct or condition is seriously detrimental to the children. We also conclude that, given the history of this case, mother's prognosis, and the children's circumstances, her conduct or condition is
unlikely to change to allow the children to be integrated into her home within a reasonable time.

"* * * *

"Finally, we conclude that it is in the best interests of the children that we terminate the parental rights of mother and father. Both children have spent the majority of their lives in a series of foster placements and are exhibiting developmental delays and attachment issues. Continued delays in permanency will only further compromise their best interests, particularly under circumstances where both parents have an extended history of recovery and relapse that is likely to repeat itself."

C.M.K., 270 Or App at 20-21 (Emphasis in original).


The mother had a long history of mental illness including many psychiatric hospitalizations. The department removed mother's child from her care ultimately filing a petition to terminate her parental rights. In the meantime, police arrested the mother on various charges and the criminal court found mother unfit to proceed and ordered her committed to the Oregon State Hospital. While being treated at the State Hospital, the department moved the juvenile court to appoint a Guardian Ad Litem to direct mother's defense in the TPR proceeding in her stead. The State Hospital's treatment of the mother was successful in that, three days before the TPR trial, her treating psychiatrist had determined that the mother was fit to aid and her assist her attorney in her defense to the criminal charges. Mother's treating psychiatrist testified to those facts at the TPR trial, but mother's attorney did not object to the continuation of the GAL appointment and the mother did not raise her own pro se objection. After a trial at which the mother did not have any opportunity to personally participate, the juvenile court terminated the mother's parental rights. The mother appealed arguing, inter alia, that the juvenile court erred in continuing the appointment of the GAL in the face of the mother's treating psychiatrist's testimony that he had declared the mother fit to aid and assist her criminal attorney, and that the mother's trial attorney's failure to object to the same constituted inadequate assistance of counsel. Reasoning that the court did not plainly err and that mother's ineffective assistance of counsel claim was foreclosed by Dept. of Human Services v. T.L., 269 Or App 454, 344 P3d 1123, rev allowed, 357 Or 324 (2015), the Court of Appeals affirmed:

"We first address the continuation of the GAL appointment. M other argues that the juvenile court was required to terminate the GAL appointment after mother was determined competent to aid and assist in her criminal proceedings. M other concedes that that issue was not raised below; although she objected to the initial GAL appointment, at no time did mother or her attorney contend that the appointment should be terminated for any reason. A ccordingly, mother requests that we review the continuation of the GAL appointment as 'an error of law apparent on the record.' ORAP 5.45(1); Alies v. Portland Meadows,
Inc., 312 Or 376, 381, 823 P2d 956 (1991). To qualify for review, such an error must meet three criteria: (1) it must be legal error; (2) it must be apparent, such that the legal point is obvious, and not reasonably in dispute; and (3) it must appear on the face of the record, such that we need not go outside the record or choose from competing inferences to find it, and the facts that compromise the error are irrefutable. State v. Jury, 185 Or App 132, 135, 57 P3d 970 (2002) (quoting State v. Brown, 310 Or 347, 355, 800 P2d 259 (1990)) (Internal quotations omitted). But even if an error meets those criteria, we must also exercise our discretion whether 'to consider or not to consider the error.' Ailes, 312 Or at 382. If we choose to consider the error, we must ‘articulate [our]\reasons for doing so.' Id.

"Mother argues that the juvenile court's continuation of the GAL appointment was plain error under ORS 419B.237(2), which provides:

'A party to the proceeding or the attorney for the parent for whom a guardian ad litem has been appointed may request removal of the guardian ad litem. The court:

'(a) Shall remove the guardian ad litem if the court determines that the parent no longer lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; or

'(b) May remove the guardian ad litem on other grounds as the court determines appropriate.'

"Here mother contends that the juvenile court plainly erred in continuing the appointment of the GAL 'after mother had been determined to be competent to proceed' in her criminal case. Mother argues that whether the juvenile court had discretion to continue the appointment is an issue of law, that error 'is readily determined without choosing from competing inferences or looking outside the record' because 'mother's treating psychiatrist and nurse from OSH testified to the court that mother had been determined to be competent to proceed in the criminal matter' and that it was 'undisputed' that mother had been determined to be competent to proceed in her criminal matters.

"As the state correctly points out, however, the statute does not require the juvenile court to make a sua sponte determination as to whether a GAL should be removed. ORS 419B.237(2) states that 'a party to the proceeding or the attorney for the parent* * * may request removal of the guardian ad litem. (Emphasis added.) The language in subsection (a) that the court '[s]hall remove' the GAL if the court makes certain determinations is applicable only after such a 'request' is made of the court. The statute simply doesn't support mother's contention that, in the absence of any request by mother or her attorney, the juvenile court had a sua
sponte obligation to determine whether the GAL appointment should be terminated. For that reason, the juvenile court did not commit plain error.

"** * * * **

"* * *'ORS 419B.923 provides a trial-level mechanism to set aside judgments in dependency cases, and, because that remedy is available to challenge the adequacy of dependency counsel, Geist is inapplicable.' Id. Our decision in T.L. forecloses our consideration of mother's inadequate assistance claim."

M.U.L., 270 Or App at 347-49.


The father used using heroin and Oxycodone several times a day and the living conditions that he had created for his daughter, H, were sub-par including exposure to controlled substances and needles used by people known by father to be infected with Hepatitis C. The department removed H from the father's care and ultimately petitioned the juvenile court to terminate the father's parental rights alleging that the father's substance abuse, inter alia rendered the father unfit. The father did not completed traditional abstinence-based treatment instead electing a program of methadone maintenance. By the time of the TPR trial he had repeatedly tested positive for opiates and other drugs prescribed by physicians who did not know of father's history or his current use of methadone. The juvenile court terminated the father's parental rights and the father appealed. The Court of Appeals affirmed:

"The crux of father's argument on appeal is that he successfully treated his opiate addiction. He argues that, at the time of the termination trial, he was no longer using heroin and that an isolated use of benzodiazepine a few months before trial and his use of prescribed opiates were not examples of substance abuse. He also posits that his 'lackluster' participation in group counseling and his failure to obtain counseling for his grief related to H's mother's suicide are insufficient evidence of a substance abuse problem. According to father, replacement of heroin with prescribed methadone satisfactorily addresses his problems with heroin and illicit opiate use.

"We first address father's use of nonprescription benzodiazepine and prescription opiates in the months preceding trial. Father's characterization of his use of benzodiazepine is not consistent with the more persuasive evidence that his behavior constitutes substance abuse and is highly concerning because of father's history. Father also engaged in doctor shopping for opiates. Father's failure to disclose his methadone use to his prescribing doctors undercuts his insistence that the opiate prescriptions were solely to address his medical conditions. His reasons for the nondisclosures- that he would be 'treated differently' and 'it's none of anybody's business' - are inadequate given the consequences of overdosing and
testing positive for drugs- violating his probation or endangering his treatment plan, both of which could be seriously detrimental to his ability to care for H.

"* * * * *

"Father cites Dept. of Human Services v. C.J.T., 258 Or App 57, 308 P3d 307 (2013), and Dept of Human Services v. C.Z., 236 Or App 436, 236 P3d 791 (2010), for the proposition that his use of prescription medication was insufficient to establish serious detriment to H. This case, however, are readily distinguishable. In C.J.T., we concluded that there was insufficient evidence to support current marijuana use by the mother and that there was an insufficient nexus between the mother's past use of marijuana and a risk of harm to her children. 258 Or App at 63. Similarly, in C.Z., we concluded that the record failed to show that the mother 'had used drugs in the presence of children, or in the home, or that her drug use created a harmful environment for the children' or 'endangered or would likely endanger the children.' 236 Or App at 443. Here, we find that father is unfit because he has not successfully treated his substance abuse problem, a problem that created circumstances dangerous to H."

J.A.M., 270 Or App at 476-77.


The department petitioned the juvenile court to terminate the mother’s and the father’s parental rights to their six children. Thereafter, the mother’s attorney wrote the department’s forensic psychologist (who had earlier evaluated the mother at the department’s request) and queried whether mother should have a Guardian Ad Litem (GAL) appointed for the upcoming TPR trial. The psychologist responded in writing, copying the department’s counsel. Thereafter, the department moved the juvenile court to appoint a GAL to direct the defense against the TPR in the mother’s stead. In support of its motion the department elicited the psychologist’s testimony that the mother had difficulty “containing” her emotions and “staying on track” and that her defense attorney believed that she was delusional. The mother’s defense attorney informed the court that the mother objected to the appointment of a GAL and, further, that the mother had asked him to withdraw. The juvenile court appointed a GAL and, after a six day trial, the juvenile court terminated the mother’s and the father’s parental rights. Both parent’s appealed. The mother argued that the juvenile court’s appointment of the GAL was not supported by a preponderance of the evidence and rendered the subsequent TPR proceeding fundamentally unfair. The Court of Appeals agreed:

“[T]he erroneous appointment of a GAL impaired mother’s ability to meaningfully defend against the termination petition. That is so for two reasons. First, as the state itself points out in arguing that the appointment of he GAL adversely affected mother’s rights, and therefore, should have been appealed separately, ‘the appointment of a [GAL] substantially changed the manner in which mother would be entitled to direct the course of the dependency
Second, the very fact of the GAL appointment contributed to the evidence against the mother in the proceeding. In her closing argument, an attorney for the twins, M and SH, noted that ‘mother has needed a GAL to get through these proceedings. That’s highly unusual and certainly underscores the diminished level at which she’s functioning.’ In addition, when the juvenile court issued its findings of fact supporting the termination of mother’s rights, the court specifically cited, as evidence of mother’s unfitness, the fact that a GAL had been appointed on her behalf.

“In conclusion, although we acknowledge that considerable evidence in the record supports the juvenile court’s ultimate conclusion regarding mother’s fitness. We further conclude that the erroneous appointment of mother’s GAL rendered the termination proceeding fundamentally unfair. Accordingly, we must reverse the judgment terminating mother’s parental rights and remand for further proceedings.”

A.S-M., 270 Or App at 748-49.


The mother had two children, X and R. X and R had different fathers. X was six years old and his father was XZF. R was two years old and his father was RK. X was very bonded to R. The department petitioned the juvenile court to terminate mother’s parental rights as well as the parental rights of XZF and RK. As to each of the parents, the juvenile court did so, and all of the parents appealed. On appeal, the father of X, XZF, argued that the court erred in terminating his parental rights because, inter alia, the state failed to prove that his incarceration (his conduct or condition) was seriously detrimental to X. The Court of Appeals agreed:

“We recently applied Stillman in a case similar to this one, Dept of Human Services v. C.M.P., 244 Or App 221, 260 P3d 654, rev den, 351 OR 254, 264 P3d 1285 (2011). There the mother was incarcerated for killing the children’s father during a domestic dispute. The children were ages two and four at the time of the termination trial and had been removed from the mother’s care at birth and age 14 months, respectively. C.M.P., 244 Or App at 225-26, 229, 260 P3d 654. The mother and children were not bonded, and the mother had 34 months of incarceration remaining. Id. at 233, 260 P3d 654. The evidence relating to detriment was similar to that presented here. One of the children had suffered from behavioral issues ‘outside the norm’ for her age when she was moved from the first foster placement to the grandmother’s home and had been diagnosed with an adjustment disorder. Similar to here, there was general testimony in C.M.P. that the first five years of a child’s life are the ‘primary attachment years’ and that moving the children to another primary caregiver could cause emotional and attachment problems. Id at 236, 260 P3d 654.
We concluded in C.M.P. that the state had not presented clear and convincing evidence of serious detriment. Id at 236-37, 260 P3d 654. We explained:

“[D]ifficulty adjusting to a placement move is not extraordinary in the juvenile system— or, indeed, for many other children (including those who are engaged in military service abroad). Moreover, here, the most recent placement move was not the result of mother’s conduct but rather of DHS’s decision to move the children from a placement that was, by all accounts, stable.’

Id.

“Similarly here, the type of detriment X experienced after his removal from mother’s and R’s home is not the type of serious detriment that provides a basis for terminating parental rights. Additionally, generalized testimony that a lack of permanency could result in emotional distress does not persuade us that X is experiencing serious detriment as a result of continuing in foster care. If X were able to remain in his current foster placement with R in Salem, he could begin to rebuild his relationship with XZF. Through no fault of XZF, the Salem placement is ending, and X and R are moving to Colorado. Although the maternal aunt in Colorado is open to XZF having contact with X, it cannot be disputed that a move to Colorado will impair XZF’s ability to develop his relationship with X. But, as in C.M.P., we cannot conclude that that circumstance is a serious detriment to X, so as to render XZF unfit. Id at 237, 260 P3d 654. Additionally, there is no evidence of unfitness based on XZF’s conduct as a parent. See Stillman, 333Or at 150n.10, 36 P3d 490.”

RK., 271 Or App at 98-99.

Dept. of Human Services v. J.C.H., 272 Or App 413, 358 P3d 294 (2015) (Lane County; Charles D. Carlson, Judge).

The juvenile court asserted jurisdiction over the father’s children because of the father’s inability protect his daughter from sexual abuse, the father’s conduct of exposing the children to domestic violence, because the father’s home was below minimum community standards, and because the father had neglected the children. Thereafter, the department petitioned the juvenile court to terminate the father’s parental rights on numerous grounds unrelated to those upon which jurisdiction was based. Citing Dept. of Human Services v. G.E., 243 Or App 471, 478-79, 290 P3d 891 (2015); Dept. of Human Services v. N.M.S., 246 Or App 284, 294-95, 300, 260 P3d 516 (2011); and Dept. of Human Services v. A.R.S., 256 Or App 653, 660, 303 P3d 963 (2013), the father objected that the court was not authorized to adjudicate the extrinsic allegations unrelated to the adjudicated grounds for jurisdiction because he had not received formal notice in the form of a dependency petition and jurisdictional judgment informing him that he must ameliorate those extrinsic grounds or face termination of his parental rights (TPR). Reasoning that the rule of law clarified in G.E., N.M.S., and A.R.S. only applied at permanency hearings, the
juvenile court rejected the father’s argument and terminated his parental rights on all of the alleged grounds. The father appealed, renewing his argument that the TPR petition and the court’s inquiry at the TPR trial were necessarily circumscribed by the adjudicated jurisdictional bases. Concluding that any error committed by the juvenile court was harmless because the bases for jurisdiction that were alleged in the TPR petition were proven at the TPR trial and were sufficient to terminate the father’s parental rights, the Court of Appeals affirmed:

“On appeal, father renews the arguments he made below. Father contends that the juvenile court’s ruling is inconsistent with our opinions in G.E., N.M.S., and A.R.S. In father’s view, those cases require the conclusion that the allegations in the termination petition did not provide him with constitutionally sufficient notice, and the grounds on which the court based the termination of parental rights were not ‘limited only to those unfitness grounds explicitly stated or fairly implied in the condition or circumstances on which the juvenile court initially obtained jurisdiction.’ Thus, according to father, the juvenile court was precluded from terminating father’s parental rights. In father’s view, ‘[a]dequate notice is not provided by the termination petition itself’ and the ‘proper procedure for addressing new or different parental deficits—which may arise after the jurisdictional judgments are issued—is to amend the dependency petitions.’

“DHS responds that father cites no authority for his argument that such a principle should apply to termination proceedings, and further notes that ‘none exists.’ Instead, DHS contends that father incorrectly relies on language from several permanency cases, ‘which hold that a juvenile court may not change a permanency plan for a child from reunification to adoption based on conditions or circumstances that are not explicitly stated or fairly implied by the jurisdictional judgment.’ DHS contends that our case law expressly declines ‘to extend those holdings to cases other than permanency cases in which the plan at the time of the permanency hearing was reunification’ and that we should decline to extend the holdings to termination cases.

“We need not address the merits of father’s contention because allegations (d), (e), (g), and (k), contained in the termination petition are materially indistinguishable from the grounds on which the court asserted jurisdiction over the children. Consequently, father was on notice of those conditions and circumstances since the entry of the jurisdictional judgment. Furthermore, on de novo review, we conclude that DHS proved allegations (d), (e), (g), (j), and (k) by clear and convincing evidence and those allegations are sufficient to terminate father’s parental rights.”

J.C.H., 272 Or App at 422-23.
The mother’s son, J, was 10 years old and was strongly bonded to his mother. Nonetheless, the department petitioned the juvenile court to terminate the mother’s parental rights, and the court did so. The mother appealed, arguing, inter alia, that the department had failed to prove that terminating her parental rights was in J’s best interests. The Court of Appeals agreed:

“** On de novo review of the record, we conclude that the evidence identified in the state’s brief establishes by clear and convincing evidence the grounds for termination under ORS 419B.504. Further discussion of that evidence would not benefit the bench, bar, or parties.

“Determining whether mother’s parental rights should be terminated, however, requires an additional consideration—the best interest of the child. See ORS 419B.500 (‘The parental rights of the parents of a ward may be terminated as provided in this section and ORS 419B.502 to 419B.524, only upon a petition filed by the state or ward for the purpose of freeing the ward for adoption if the court finds it is in the best interest of the ward.’). As the Supreme Court has explained, termination requires a two-stage analysis:

‘The first stage focuses on the conduct of the parent, i.e., the alleged statutory grounds for termination. The second stage focuses on whether the best interests of the child will be served by termination. In a termination proceeding, if a parent’s conduct justifies termination, then the best interests of the child are considered explicitly, and could even then prevent termination from occurring.’

Mother argues that the department failed to meet its burden to prove by clear and convincing evidence that it is in J’s best interests to terminate mother’s parental rights. We agree. The evidence is not clear and convincing that J’s interests are best served by terminating mother’s parental rights to make way for adoption at this time. Indeed, given the overwhelming evidence of J’s strong attachment to mother, it seems clear that an arrangement that accommodates a continuing relationship with mother would serve J’s best interests.

Prior to trial, psychologist Glenna Giesick conducted an evaluation of J and prepared a report. She noted that, during this ‘Parent Attachment Structured Interview,’ J identified his mother as the ‘most important person in the world.’ J’s permanency case worker, Jose Landin, testified that, when he talked to J about mother, ‘his eyes would light up, and he would always say the same thing: ‘I want to be with my mother.’ Landin also testified:

‘I think the last time when he was placed once more in [nonrelative] foster care, it was very hard for him. He was sad. He cried a lot. I gave
him my business card and I told him, ‘you call me if you need something, if you want to talk about something.’ I would say 90 percent of the phone calls I got from [J] on our voicemail was, ‘I want my mom.’

“We emphasize that the facts establishing mother’s unfitness do not include any abuse of J. Moreover, caseworker Landin testified that he observed a ‘positive’ and ‘nurturing relationship’ between mother and J during J’s visits with mother. Finally, according to psychologist Giesick, ‘[t]he risk of not returning [J] to his mother is that he will continue to mourn his loss in an extended manner which could interfere with his ability to attach to another family.’

“On de novo review of this record, we are not convinced that the state has proved by clear of convincing evidence that it is in J’s best interest to terminate mother’s parental rights.”

M.P.-P., 272 Or App at 504-05.


The department petitioned the juvenile court to terminate the mother’s parental rights to her child A. It alleged, inter alia, that the mother’s substance abuse and mental health rendered her unfit and that termination of the mother’s parental rights was in A’s best interest. At the time of trial, the mother had failed to complete many of the services that the department had wanted her to do. A was a “talkative, active, easy child with no current behavioral concerns.” Nonetheless, the child psychologist who evaluated A believed that A was not bonded to her mother and that her “window for reattaching to another primary caregiver [was] closing.” The juvenile court denied the termination petition, ruling that the department had failed to prove that the mother’s conduct and conditions were seriously detrimental to A and that it had failed to prove that termination of the mother’s parental rights was in A’s best interest. The department and A appealed, arguing that the juvenile court erred in failing to consider the threat of future harm to A. The Court of Appeals agreed:

“The parties’ arguments on appeal are focused on whether DHS met its burden of proof on the ‘seriously detrimental’ requirement for termination. DHS and A both argue that trial court erred by focusing on whether, by the time of the termination trial, A had manifested cognizable harm from mother’s conduct or conditions, instead of assessing the potential future harm to A, which, they argue, is established by the evidence. DHS and A also urge us to reach the two additional inquires for termination on de novo review, because the record is completely developed as to those matters. Mother responds that the juvenile court did, in fact, determine that there was no threat of future harm to A and that we should not disturb that finding on appeal.

“* * * * *
“We conclude that mother has engaged in conduct or is characterized by a condition that is seriously detrimental to A. We agree with the juvenile court that the evidence demonstrates that, up until trial, A has been an easy, resilient, and somewhat adaptable child, after being removed from mother’s care at a young age and placed with stable, nonrelative foster parents for the past three and one-half years. However, A’s well-being in foster care does not preclude our determination that mother’s conduct or conditions are seriously detrimental to A. R.K., 271 Or App at 88-89. As discussed below, we base that determination on the child-specific evidence of harm to A as a result of mother’s conduct and conditions, if A were returned to mother. See, e.g., Dept. of Human Services v. J.L.H., 258 Or App 92, 104, 308, P3d 323 (2013) (‘It is true, as mother asserts, thither is no evidence that KM has experienced significant ill effects as a result of his lifetime in foster care. And, because he came into foster care at birth, there is no evidence as to the effect of mother’s condition on KM. Nonetheless, the evidence in this record shows that reuniting KM with mother would not be in his best interest and would be seriously detrimental to his physical and emotional health.’).

“* * * * *

“In sum, having reviewed the record de novo, we find on clear and convincing evidence that mother’s conduct and condition is seriously detrimental to A and will not be resolved within a reasonable time, and, further, that termination is in A’s best interests.”

E.N., 273 Or App at 149-54.

V. Post-judgment motions


The mother moved to Washington and her attorney did not know how to reach her. During the three months leading up to the mother’s termination-of-parental-rights (TPR) trial, the mother did not have any contact with her children. A couple of weeks before the TPR trial, the mother sent letters to her attorney, the court, and the department informing them each of her correct address and requesting to have the trial set in Washington. Mother’s attorney sent mother a letter in response informing her that the trial could not be moved out of state and asking her to call him immediately. When the mother subsequently failed to appear at the trial on the department’s TPR petition, her attorney moved to withdraw and informed the court that the mother was the subject of an active warrant for her arrest. The juvenile court denied the attorney’s motion and terminated mother’s parental rights in her absence. Thereafter, the mother contacted her attorney, and the attorney filed a motion to vacate the judgment on the ground of excusable neglect. At the hearing on the motion, the mother appeared telephonically and testified that she knew of the trial dates but had been unable to attend. The juvenile court denied her motion, and the mother appealed, arguing that the trial court erred in denying her motion and,
alternatively, that she was entitled to reversal because her attorney’s assistance was inadequate. Citing Dept. of Human Services v. T.L., 269 Or App 454, 468, 344 P3d 1123, rev allowed, 357 Or 324 (2015), the Court of Appeals concluded that the mother’s failure to preserve her claim that her attorney was inadequate precluded appellate review of that claim. Reasoning that the mother had failed to establish excusable neglect, the Court of Appeals affirmed:

“We address claims of excusable neglect in a two-step process. First, we determine ‘whether the parent as established as a matter of law that the nonappearance [at the termination hearing] resulted in excusable neglect.’ Dept. of Human Services v. K.M.P., 251 Or App 268, 271, 284 P3d 519 (2012). Second, even when a parent makes a predicate showing of excusable neglect, the court has discretion to determine whether ‘in the totality of the circumstances, to allow the motion.’ Id. at 272.

“Mother argues that she established excusable neglect because (1) she could not attend the hearing because she lived in Washington and lacked adequate transportation; (2) her letters should be construed by her attorney and the court as mother’s attempt to reschedule the termination hearing; (3) mother was not aware that she could appear at the termination hearing by telephone and that her attorney failed to inform her of that option.

“Under ORS 419B.923(1)(b), the concept of excusable neglect encompasses ‘a parent’s reasonable, good faith mistake as to the time or place of a dependency proceeding.’ G.R., 224 Or App at 141-42. For the following reasons, we conclude that mother has not made that showing.

“First, mother cut off contact with her attorney months before the termination hearing and communicated with DHS only when she called the department’s toll-free number. Even assuming that mother lacked the financial resources to travel to Oregon for the termination hearing, she did not respond to DHS’s evidence that she could have obtained a bus pass or gas voucher from DHS. Second, mother did not suggest in any of her correspondence that she wanted the termination hearing rescheduled or that doing so would make it possible for her to attend. Finally, had mother continued her relationship with her attorney leading up to the hearing, she could well have learned that she could appear by telephone at the hearing. Mother’s lack of knowledge that she could appear by telephone can be laid at her feet, and is not, singularly or in combination with any other circumstance in the case, sufficient to establish excusable neglect.”

K.M.J., 272 Or App 510-11.
Chapter 6A—Appellate Update—Juvenile Dependency and Termination of Parental Rights

**Dept. of Human Services v. K.W., 273 Or App 611, 359 P3d 539 (2015) (Lane County; R. Curtis Conover, Judge).**

The juvenile court terminated the mother’s parental rights to her daughter, S. 16 months later, the mother moved the juvenile court to vacate the TPR judgment arguing that ORS 419B.923 authorized the court to do so because adoption was no longer in S’s best interest due to her increased bond with her mother. The juvenile court denied the motion concluding that ORS 419B.923 did not authorize it to set aside a TPR judgment based upon changed circumstances and that the mother had failed to bring the motion within a reasonable period of time. The mother appealed. Explaining that the broad authority confirmed upon the juvenile court by ORS 419B.923 did not extend to the mother’s claim of changed circumstances, the Court of Appeals affirmed.

**Dept. of Human Services v. A.W., 274 Or App 493, 361 P3d 58 (2015) (Douglas County; Ann Marie Simmons, Judge).**

The mother appeared at the first two days of the trial on the petition to terminate her parental rights. The morning second day of trial, the mother’s attorney requested a continuance so that the mother could seek medical attention for injuries she suffered when the father had assaulted her the evening prior. The juvenile court granted a continuance to the afternoon to allow mother to go to the hospital. By afternoon the mother was still in the hospital and was unable to return to court. The department suggested tracking the remainder of the TPR trial with another dependency case and the court agreed scheduling a “status check” for 11 days later. The mother did not appear at the status check and the court scheduled another hearing for two days later. The mother did not have notice of the subsequent hearing and did not appear and mother’s counsel asked to be excused. Upon her nonappearance, the department moved the court to enter and “order of default,” and the court did so, ultimately terminating her parental rights. The mother appealed arguing that the juvenile court’s ruling error to terminate her parental rights based upon her nonappearance at a hearing of which she had no notice constituted plain error. The Court of Appeals agreed:

“Here, whether ORS 419B.819(7) authorized the juvenile court to terminate mother’s parental rights in her absence, at a hearing of which she had no notice, presents a pure question of law that is not reasonably in dispute. Moreover, our conclusions do not require us to resolve any factual disputes or competing inferences. Accordingly the error is plain; we have concluded that no default occurred, and the statute does not authorize the termination of parental rights in the parent’s absence under those circumstances. We also readily conclude that the error is one that we should exercise our discretion to correct, given the magnitude of mother’s interest in a fundamentally fair termination proceeding. See State ex rel. Juv. Dept. v. Geist, 310 Or 176, 186, 796 P2d 1193 (1990) (noting that the ‘permanent termination of parental rights is one of the most drastic actions the state can take”).

A.W., 274 Or App at 500.
Chapter 6B
Appellate Update—February 2015–February 2016

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Department of Justice
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Jurisdiction and Disposition

**Dept. of Human Services v. A.L.**, 268 Or App 391, 342 P3d 174 (2015) (Washington County). DHS filed petitions seeking to make three children wards of the juvenile court under 419B.100(1)(c), based, among other things, on the parents’ substance abuse and the fact that they left the children “in the care of unsafe persons.” Historically, the children had been cared for by paternal grandparents (mother and father lived with the grandparents as well). They were “happy, healthy, and on target physically and emotionally.” Id. at 397. Shortly after the petition was filed, the grandparents were indicted on charges relating to a marijuana-grow operation. Following a hearing, the court found that the allegations in the petition had been proved. Both parents appealed, contending that there was not a “current threat of harm” at the time of the hearing.

**Held:** Reversed. The court held that “the record is insufficient to demonstrate that the children were endangered and that any risk of harm was current and nonspeculative.” Id. at 398. Ultimately, the court concluded that “[b]ecause parents have entrusted the primary care of the children to the paternal grandparents, who do not pose a current threat of harm, the court did not have a basis for asserting jurisdiction over the children,” despite the evidence that both parents abused drugs and lacked basic parenting skills. Id. at 400.

**Dept. of Human Services v. D.H.**, 269 Or App 863, 346 P3d 527 (2015) (Klamath County). The juvenile court asserted jurisdiction over the child, J, based on allegations that that mother failed to protect him from her husband (the child’s stepfather) who was an untreated sex offender, and that she had “mental health issues” including a suicide attempt after the child was removed from her care.

**Held:** Reversed. First, the court found that stepfather was convicted in 2005 for “the attempted first-degree rape of an 18-year-old woman” and “the record is devoid of evidence that would permit a non-speculative inference that [he] poses a risk to J that would require mother to protect J from [him].” Id. at 866. With respect to mother’s mental health issues, the court found that the child was “happy and healthy” at the time of the removal, and that even though mother attempted suicide by drinking a bottle of codeine in response to that “traumatic event,” “the record contains no evidence that would permit the inference that the unstable mental condition that led mother to consume the codeine persisted at the time of the jurisdictional hearing, several months after mother’s suicide attempt.” Id. at 868.

**Dept. of Human Services v. E.L.G.**, 270 Or App 308, 347 P3d 825 (2015) (Lane County). Both parents appealed from a judgment of jurisdiction and disposition. Jurisdiction over the two-month-old child was based on mother’s admission and father’s agreement to “stand silent and allow a default” to an amended allegation relating to his decision to “maintain his [sexually intimate] relationship with mother (his biological daughter), despite a pending criminal investigation, which interferes with his ability to safely parent.” At disposition, the court imposed a no-contact order between father and mother. On appeal, the parents argued that the juvenile court committed plain
error in asserting jurisdiction over the child absent evidence that the parents’ conditions created a current risk of harm to the child. In addition, mother contended that the court erred in imposing a no-contact order prohibiting any contact at all between the parents (she conceded that the court could prohibit a sexual relationship).

**Held:** Disposition order reversed and remanded, otherwise affirmed. On the issue of jurisdiction, the court held that “even if the error was plain, we would not exercise our discretion to correct it.” *Id.* at 315. First, the court held that the parents’ “failure to object to the sufficiency of the evidence below was a strategic choice.” *Id.* Specifically, the court held that “If parents had wanted to contest jurisdiction, the jurisdictional hearing was the time and place to do that. Instead, parents’ behavior leading up to, and during, the hearing indicates a conscious decision on their part not to contest jurisdiction. Though we recognize that the state bears the burden of establishing jurisdiction regardless of what the parents do at the hearing, in a situation like this, where there is evidence that parents made a strategic choice not to contest jurisdiction and so informed DHS, we are reluctant to consider the alleged error that likely resulted from that strategic choice.” *Id.* at 316. The court also relied on the fact that the parents had not objected to the sufficiency of the evidence, and if they had done so, “the court would have been given an opportunity to reconsider its ruling in light of parents’ argument, potentially avoiding this appeal.” *Id.* On the issue of the no-contact order, the court held that “given the bases for jurisdiction, namely, that parents’ sexual relationship posed a risk of harm to [the child], the court’s order that parents have no contact [at all] was overly broad.” *Id.* at 317.

**Dept. of Human Services v. A.B.,** 271 Or App 354, 350 P3d 558 (2015) (Multnomah County). The child, N, was born in May 2013. She was taken into protective custody in April 2014, after father was arrested as part of a controlled drug buy with N’s half-sister, K, in the back seat of the car. N was removed from her grandmother’s home, where she had lived nearly full-time since August 2013. The juvenile court took jurisdiction over both K and N on grounds related to the parents’ criminal activities and substance abuse. There was no evidence to suggest that N was exposed to a risk of harm while in grandmother’s care. Instead, the juvenile court found that the parents’ “substance abuse issues and judgment issues” that placed K at risk “extended” to N. Both parents appealed, arguing that the state had failed to prove any nexus between their conduct and a risk of harm to N. In response, DHS argued that ORS 419B.100(2) (“The court shall have jurisdiction under subsection (1) of this section even though the child is receiving adequate care from the person having physical custody of the child”) meant the juvenile court could take jurisdiction over a child based on a parent’s conduct even if the child is in the care of someone else and is not at risk of harm.

**Held:** Reversed. First, the court reaffirmed its decision in **Dept. of Human Services v. A.L.,** 268 Or App 391 (2015), rejecting the view that “a person’s decision to turn over his or her child to another person in itself supports a determination that there is a current threat of harm to the child.” *Id.* at 364. The court also rejected DHS’s argument that ORS 419B.100(2) “excuses DHS from showing a nexus between risk-causing conduct – here, parents’ conduct – and a risk to the child.” *Id.*
The court observed that under ORS 419B.100(1)(c), the court must “consider all of the child’s circumstances, including the circumstance that the child being cared for by someone other than the parents and the other specific circumstances attendant to that arrangement.” Id. at 366. Further, the court determined that ORS 419B.100(2) “does not negate any part of the requirements of subsection (1) * * *. Instead, subsection (2) provides additional information about the breadth of the inquiry under subsection (1): The mere fact that the child is being adequately cared for does not prohibit the court from taking jurisdiction if one of the requirements of subsection (1) is satisfied.” Id. at 367 (emphasis in original). In reaching that result, the court distinguished State ex rel Juv. Dept. v. Moyer, 42 Or App 655 (1979), and overruled State ex rel Juv. Dept. v. D., 55 Or App 912 (1982). Applying that interpretation, the court held that “The effect of ORS 419B.100(2) on [the inquiry under ORS 419B.100(1)(c)] is that the mere fact that a child is being adequately cared for by a nonparent does not prohibit the court from taking jurisdiction, as long as the totality of the child’s circumstances expose the child to a current risk of serious loss or injury.” Id. at 372. On these facts, the state failed to meet its burden of proof.

Dept. of Human Services v. M.A.H., 272 Or App 75, 354 P3d 738 (2015) (Douglas County). The child, M, was born in February 2013. Mother had a history of depression, and was hospitalized a few days before M’s birth after mother expressed concern to grandmother and father that she might harm the baby (she later claimed she made this statement in order to get attention). M was removed from mother’s care in July 2014, after she send a series of disturbing voicemails and text messages to grandmother. At the time of removal, M was “physically healthy” and “appeared to be well-cared for.” A petition was filed, alleging, among other things, that mother’s “mental health problems interfere with her ability to safely parent the child.” After M was removed, mother continued in counseling and began a course of DBT treatment. The jurisdiction trial was continued twice at the state’s request, apparently because it was considering dismissing the petition. However, trial was finally held in September 2014. At that time, mother’s therapist testified that she “thought mother was in a position to focus on parenting M.” Dr. Truhn, who evaluated mother in August, diagnosed her with a major depressive disorder and borderline personality features, but said he “did not believe that mother’s mental health issues impaired her ability to safely parent at the current time, but thought that they ‘could’ do so in the future if mother did not continue with treatment.” The juvenile court took jurisdiction, finding that “mother’s mental health issues caused her to seek help with M. in inappropriate, ‘unhealthy’ ways, and to say inappropriate things.”

Held: Reversed. The trial in this case was held in November 2014, four months after M was removed from mother’s care. The court found that although mother was “struggling” in the spring and summer of 2014, her voicemails and text messages did not “permit the conclusion that mother posed a current threat of serious loss or injury” to M that was reasonably likely to be realized without juvenile court intervention at the time of the jurisdictional hearing four months later.” Id. at 84. The court also found that “this is not a case in which evidence of mother’s past mental health issues alone are sufficient to support an inference of her present condition.” Id. at 85. That was so, in the court’s view, because mother had “continuously” made efforts to treat her mental illness, and her
condition was “being managed” at the time of the trial. Ultimately, the court held that “the trial court erred in concluding that mother’s mental health issues or her prior conduct in July 2014 posed a current threat of serious loss or injury to M at the time of the jurisdictional hearing in November 2014.” Id. at 86.

The juvenile court also found that father’s lack of a custody order created a risk of harm. Because the Court of Appeals found that the allegations relating to mother did not support jurisdiction, it necessarily found that the lack of a custody order “also did not endanger” the child.

**Dept. of Human Services v. K.L.,** 272 Or App 216, 355 P3d 926 (2015) (Clackamas County). Both parents appealed from a judgment making their 16-year-old son a ward of the juvenile court. DHS originally filed a petition based on concerns that “the parents were using controlled substances, that they were not providing the child with stable housing, that the child did not live in a safe environment, and that parents were not meeting the child’s behavioral needs.” Father began engaging in services to address these concerns, and the petition was dismissed. DHS filed a second petition after father stopped participating in services and the caseworker was unable to contact the family (apparently, the parents had taken the child to Washington state). DHS then moved for issuance of a warrant pursuant to ORS 419B.842. At that time, the parents had not been served with summons. The court refused to issue a warrant, but instead issued an order directing father to appear in court with the child. The court ordered DHS to send the order by first class and certified mail, to attempt to personally serve father at his residence in Oregon, and to post the order on a sign at the property.

The parents failed to appear as directed by the order, and DHS once again asked the court to issue a warrant. The caseworker explained at the hearing that she had mailed, emailed, and posted the order, summons, and petition. She also said she had seen pets at the family’s home in Oregon, and neighbors had told her the family visited the home late at night. Based on those facts, the court issued a warrant. At a subsequent hearing, which the parents did not attend, the court issued the judgment from which both parents appeal. On appeal, they contended that the judgment is invalid because they were not properly served using one of the methods enumerated in ORS 419B.824.

**Held:** Affirmed. The court rejected the department’s argument that the parents’ claims were unpreserved, and that they were required under ORS 419B.923 to move to set the judgment aside. However, on the merits, the court held that “taken together, the methods that DHS used to serve parents were reasonably calculated to apprise them of the proceeding and, hence, that service met the due process standard embodied in the first sentence of ORS 419B.823.” Id. at 225. In reaching that result, the court analogized ORS 419B.823 and 419B.824 to their ORCP 71 counterparts, and concluded that “absolute compliance” with one of the service methods enumerated in ORS 419B.824 was not required, but what is required is that the manner and method of service comply with ORS 419B.823.

Father’s two children were made wards of the juvenile court in September 2014, based in part on father’s admission that he “had failed to protect the children from mother’s ‘neglectful behavior.’” Id. at 110. Two months later, father filed a motion to dismiss jurisdiction. By that time, mother was incarcerated, and she had signed a limited power of attorney pursuant to ORS 109.056(1) purporting to give father the “authority to make all parenting decisions for the children.” Id. Father testified at the hearing on the motion that he planned to take the children to Nevada, and to file for divorce and seek sole custody. The juvenile court denied father’s motion, and he appealed. **Held:** Reversed. The court held that “the facts are legally insufficient to support the juvenile court’s finding that father was unable to protect the children at the time of the hearing.” Id. at 112. The court reiterated that “although a fit parent may lack sole custody when the other parent is unfit, without evidence that the fit parent is unable to protect the children, the lack of a custody order is insufficient to support jurisdiction.” Id. Moreover, the court found that the remaining facts—that mother might attempt to visit the children in Nevada and that the police would not intervene if she tried to take them from father—did not “provide a basis for concluding that father is presently unable to protect the children.” Id.

**Dept. of Human Services v. J.R.**, 274 Or App 601, ___ P3d ___ (2015) (J.R. II) (Curry County). Father’s two children were made wards of the juvenile court in September 2014, based in part on father’s admission that he had failed to protect the children from mother. In December 2014, a new petition was filed, alleging that father’s “substance abuse impair[ed] his judgment and ability to safely parent.” Id. at 605. That allegation was based on father’s history of DUII convictions, his failure to complete treatment, and a confrontation with his oldest son while he was intoxicated. Father moved to dismiss jurisdiction, and a hearing on that motion and a hearing on the new petition were held in February 2015. The juvenile court denied the motion to dismiss, and “found by a preponderance of the evidence that father’s substance abuse, standing alone, was sufficient to support the assertion of jurisdiction over the children.” Id. at 607. Father appealed. He did not “dispute his history of alcohol abuse or that he continue[d] to consume alcohol.” Id. at 608. However, he claimed that DHS failed to prove “a nexus between his alcohol use and a risk of harm” at the time of the hearing. Id. **Held:** Affirmed. First, the court held that it was “permissible for the juvenile court to infer that father was likely drinking to the point of intoxication,” because he was not engaged in substance abuse treatment, he admitted drinking to “self-medicate,” and he had an “extensive history of alcoholism and drinking to excess.” Id. at 609. Second, the court held that it was “permissible for the trial court to find that father’s substance abuse subjected the children to a current, nonspeculative risk of harm” because father continued to use alcohol and there was not another person in the home to assume father’s “caretaking responsibilities.” Id. at 610.

**Dept. of Human Services v. M. C.-C.**, 275 Or App 121, ___ P3d ___ (2015) (Washington County). Father lives in Mexico, and the children live in Oregon. In August 2012, DHS mailed a summons to father in Mexico, “by a delivery service that required a signature at delivery.” Id. at 123. There was no dispute that this method of service did not comply
with the Hague Service Convention. However, father did not object, and he appeared in the proceeding by telephone and through counsel for more than two years and “affirmatively invoked the assistance of the court” before moving to dismiss for lack of personal jurisdiction. The juvenile court denied the motion, and father appealed.

**Held**: Affirmed. First, the court noted that “it has long been the case that a party claiming that a court lacks personal jurisdiction over the party because of a defect in service must raise that issue at the earliest possible occasion.” *Id.* at 124. Moreover, “if a party appears in a matter and requests relief that could only be granted if the court had jurisdiction, without promptly raising any issues about defects in service of lack of personal jurisdiction, then the party waives the ability to raise those issues.” *Id.* After discussing that “longstanding rule,” the court held that there was nothing in the Hague Service Convention or the juvenile code that required a different result.

**Permanency**

**Dept. of Human Services v. T.L.**, 269 Or App 454, 344 P3d 1123, rev allowed, 357 Or 324 (2015) (Clackamas County). Father appealed from judgments changing the permanency plans for his children to guardianship and APPLA. The juvenile court changed the plans after a hearing at which father’s attorney failed to appear (and father himself failed to appear until after the court determined that the plans should be changed). On appeal, father argued that his trial attorney’s failure to appear constituted inadequate assistance of counsel, and that under *State ex rel Juv. Dept. v. Geist*, 310 Or 176, 796 P2d 1193 (1990), he was entitled to raise that claim on direct appeal. In response, DHS argued that father was required to raise his inadequate-assistance claim in the trial court by moving to set the judgment aside under ORS 419B.923.

**Held**: Affirmed. The court held that “the premises upon which *Geist* is grounded have been negated by the availability of ORS 419B.923 as a mechanism for a parent in a dependency action to challenge the adequacy of his or her trial counsel in the juvenile court. In light of those developments—as well as the recognized need for expeditious resolution of these cases—we conclude that, to preserve a claim of inadequate assistance of appointed trial counsel, a parent in a dependency proceeding must first seek to resolve that issue in the juvenile court by moving to set the judgment aside under ORS 419B.923(1), for the court to modify or set aside the judgment or order to which the claim relates.” *Id.* at 468.

**Dept. of Human Services v. R.S.**, 270 Or App 522, 348 P3d 1164 (2015) (Washington County). Mother appealed from a judgment changing the permanency plan for her 14-year-old son from reunification to APPLA. On the permanency judgment form, the juvenile court checked one box indicating that mother HAD made sufficient progress, but then checked a box indicating that the child CANNOT be safely returned home. Mother claimed that those findings were inconsistent, and that “the court’s conclusion that mother’s progress was ‘sufficient,’ on the face of the judgment, precluded the court from concluding that [the child] could not safely return home.” *Id.* at 526. Mother also argued that the juvenile court “impermissibly based its determination” on the best interest of the child, and that “regardless of any inconsistency” in the form of the judgment, the
Evidence was insufficient to support the court’s determination that the child could not be returned to mother within a reasonable time.” Id. at 526-27.

**Held:** Affirmed. First, the court held that “the ‘sufficient progress’ determination that the juvenile court made in the judgment in this case was not inconsistent with its decision to change the permanency plan from reunification.” Id. at 528. The court concluded that “a court’s determination that the permanency plan should be changed because a parent has not made sufficient progress to make it possible for the ward to safely return home is not necessarily inconsistent with a determination that the parent has made ‘sufficient progress’ towards meeting expectations.” Id. at 528.

The court also rejected mother’s argument that the juvenile court based its decision on the best interests of the child, rather than ORS 419B.476(2)(a). The court found that the juvenile court had correctly applied the statutory criteria, and that it was “required ultimately to address the best interests of the child.” Id. at 529. Finally, the court found that evidence in the record supported the juvenile court’s determination that mother had not made sufficient progress for [the child] to be returned home within a reasonable time. Id. at 531.

**Dept. of Human Services v. T.M.S.,** 273 Or App 286, 359 P3d 425 (2015) (Lane County). The juvenile court asserted jurisdiction over the child, T, in March 2013, based on an allegation relating to mother’s substance abuse. Mother participated in a psychological evaluation, and that evaluation recommended that mother participate in “intensive mental health treatment, medication management, and drug intervention, and a monitored living arrangement.” Id. at 289. Mother followed through with those services, and T was returned to her care in February 2014. Mother relapsed on methamphetamine one month later, and T was removed again in July 2014. Mother “failed to successfully engage in services during the months preceding the permanency hearing,” and she was discharged from a treatment program for noncompliance. Id. at 290. At the permanency hearing, the juvenile court changed the plan from reunification to adoption. Mother and child appealed.

**Held:** Affirmed. First, the court held that the evidence was “legally sufficient to support the court’s determination that mother had not made sufficient progress under ORS 419B.476(2)(a).” Id. at 293. Second, the court held that the evidence was “legally sufficient” to support the juvenile court’s finding that mother’s participation in services did not constitute a “compelling reason under ORS 419B.498(2)(b)(A)” to decline to change the permanency plan to adoption. Id. at 293-94.

Next, the court rejected the argument that T’s bond with mother constituted a compelling reason under ORS 419B.498(2)(b)(B) not to change the permanency plan to adoption, particularly when there was not a “plan for adoption by a current caretaker with whom T has an attachment.” Id. at 294. The court held that “Assuming, without deciding, that the bond between a parent and a child can be a compelling reason to decline to pursue termination, we conclude that the evidence here is legally sufficient to support a determination that the bond between mother and T does not constitute a
compelling reason to avoid such a change in plan under ORS 419B.498(2)(b).” Id. at 294-95. The court held that the child’s “opposition to adoption at age six does not establish what is in her best interests in light of mother’s persistent problems with substance abuse and her inability to address those problems.” Id. at 295. Moreover, the court concluded that the lack of an adoptive placement and the child’s opposition to adoption were not compelling reasons not to change the plan, in the absence of “persuasive evidence that adoption is unlikely to be achieved.” Id. at 296.

Finally, the court rejected the argument that the department’s failure to provide an updated psychological evaluation – which the juvenile court had ordered three months earlier – constituted a compelling reason not to change the plan under ORS 419B.498(2)(c). The court held that “In light of the basis for the juvenile court’s jurisdiction * * * the record does not establish that the juvenile court needed an updated psychological evaluation in order to assess mother’s progress in addressing substance abuse.” Id. at 297.

**Dept. of Human Services v. J.M.,** 275 Or App 429, ___ P3d ___ (2015) (Washington County). The child, C., was made a ward of the juvenile court based on the parents’ admissions that she “sustained an unexplained injury” while in their care, and that their “lack of parenting skills” impaired their ability to provide minimally adequate care. 21 months later, C. was diagnosed with an autism spectrum disorder “as well as language disorder and global developmental delays.” In June and July 2014, the juvenile court held a combined permanency hearing and a hearing on the parents’ motion to dismiss. First, the court denied the motion to dismiss, finding that there was “still no explanation” for the child’s injuries and the parents had made “little progress” in services. Id. at 439-40. Second, the court found that the permanency plan should be changed to adoption, because DHS had made reasonable efforts and a “safe return” could not happen within a reasonable time. Id. at 440. Both parents appealed.

**Held:** Affirmed. With regard to the motion to dismiss, the court rejected “the proposition that there is necessarily an ongoing risk of serious harm any time there is an unexplained injury and DHS asserts that it cannot create a safety plan without knowledge of how the injury occurred.” Id. at 442. However, the court concluded that there was “legally sufficient evidence in the record for the juvenile court to have concluded that the jurisdictional conditions continued to present a sufficient risk.” Id. at 442-43. Specifically, the court reached that conclusion “in light of evidence in this record regarding parents’ failure to substantially benefit from the services they engaged in; parents’ mental health conditions; father’s failure to follow through with services related to his condition; mother’s poor prognosis; and C’s special needs and parents’ failure to engage in services related to those needs during the three months in which they were aware of those special needs.” Id. at 447. With regard to the change in the permanency plan, the court concluded that DHS’s efforts were reasonable, despite a six-month delay in informing the parents of C’s developmental delays, and that the parents’ “progress was insufficient to make a safe return to parents’ care possible.” Id. at 447-50.
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**Dept. of Human Services v. A.A.**, 276 Or App 223, ___ P3d ___ (2015) (Coos County). Father appealed from a judgment changing the permanency plan for his child from reunification to guardianship. At the close of the hearing, the juvenile court took judicial notice of the court reports submitted by DHS and the CASA, and also took judicial notice of the “statements made at the hearing by the parties’ attorneys.” Id. at 224. On appeal, father contended that neither ORS 419A.253 nor OEC 201(b) authorized the court to take judicial notice “off the record,” and that moreover, the “attorney statements and the contents of the reports are subject to reasonable dispute and are not subject to judicial notice.” Id. DHS and the child conceded that the juvenile court “did not comply with ORS 419A.253 because it failed to take judicial notice of the documents and statement on the record at the permanency hearing, and failed to give the parties an opportunity to object.” Id.

**Held:** Reversed. The court accepted the concession, and held that because “the court could not permissibly rely on the information contained in the reports and statements in determining whether DHS had made active efforts to allow the child to return home or whether father had made sufficient progress,” the permanency judgment should be reversed.” Id.

**Guardianship**

**Dept. of Human Services v. B.M.C.**, 272 Or App 255, 355 P3d 190 (2015) (Douglas County). In May 2014, DHS moved to establish a guardianship, naming the child’s maternal grandparents as guardians. The court entered an order establishing guardianship. That order stated “DHS’ custody over the ward is terminated as of the effective date of this order and DHS is dismissed as a party to this proceeding.” One week later, DHS moved to set aside the guardianship under ORS 419B.923(1)(c) (newly discovered evidence). The court granted that motion, and mother and the guardians appealed.

**Held:** Reversed. Because DHS had been dismissed as a party to the juvenile dependency case, it “lacked standing to bring its motion to set aside the May judgment, [and] the trial court had no jurisdiction to enter an order granting that motion and setting aside the judgment.” Id. at 262.

**Termination of Parental Rights**

**Dept. of Human Services v. C.M.K.**, 270 Or App 1, 346 P3d 1254, rev den, 357 Or 324 (2015) (Lane County). Both parents appealed from the termination of their parental rights to their two four-year-old children on the ground of unfitness (ORS 419B.504). On appeal, they contended that termination was inappropriate because they were clean and sober at the time of trial, and that a “risk of relapse” was not a basis to terminate parental rights.
Held: Affirmed. Both parents had a long history of substance abuse and DHS involvement, and both had been diagnosed with personality disorders. With regard to father, the court held that at the time of the termination trial, “father’s past drug abuse, domestic violence, personality disorder, and general instability continued to present conduct or a condition that is seriously detrimental to the children.” Id. at 18. The court also found that the children could not be reintegrated into father’s home within a reasonable time, because his inconsistent participation in services demonstrated “lack of motivation or ability to change.” Id. at 19. Ultimately, the court concluded that “Given the uncertainty that father can effect a lasting change, and given that father has only sporadically engaged in services up to the time of trial, we conclude that it is unreasonable to require the children to wait longer.” Id. at 19-20.

With regard to mother, the court found that she had a history of recovery and relapse, and given her personality disorder, that “demonstrated pattern is likely to repeat itself.” Id. at 20. The court held that “mother’s conduct or condition is seriously detrimental to the children,” and that “given the history of this case, mother’s prognosis, and the children’s circumstances, her conduct or condition is unlikely to change to allow the children to be integrated into her home within a reasonable time.” Id. at 21.

Finally, the court held that it was in the children’s best interest to terminate parental rights, based on the fact that they were “exhibiting developmental delays and attachment issues” and that “both parents have an extended history of recovery and relapse that is likely to repeat itself.” Id.

Dept. of Human Services v. M.U.L., 270 Or App 343, 347 P3d 364 (2015) (Marion County). Mother had a history of mental illness. In this termination of parental rights proceeding, a guardian-ad-litem (GAL) was appointed following a determination in mother’s criminal cases that she was unable to aid and assist. At the termination trial, several witnesses testified that mother’s condition had stabilized, and three days earlier, she had been released from the Oregon State Hospital. Despite that evidence, neither mother nor her attorney requested removal of the GAL. The trial court terminated mother’s parental rights, and she appealed. On appeal, she did not challenge the merits of the TPR. Instead, she contended that (1) the trial court committed plain error in failing to remove the GAL after she was “determined to be competent to proceed” in her criminal cases; and (2) that her trial counsel was inadequate for failing to object to the continuation of the GAL appointment.

Held: Affirmed. The court held that ORS 419B.237(2) “simply does not support mother’s contention that, in the absence of any ‘request’ by mother or her attorney, the juvenile court had a sua sponte obligation to determine whether the GAL appointment should be terminated. For that reason, the juvenile court did not commit plain error.” With regard to mother’s inadequate-assistance claim, the court held that consideration of that claim on direct review was “foreclose[d]” by the decision in Dept. of Human Services v. T.L., 269 Or App 454 (2015).
**Dept. of Human Services v. J.A.M.**, 270 Or App 464, 348 P3d 1157 (2015) (Washington County). The trial court terminated father’s parental rights to his five-year-old daughter on the basis of his substance abuse. On appeal, father argued that “DHS failed to prove that his addiction to heroin continued, because, at the time of trial, he was no longer using heroin and because his use of other drugs [including benzodiazepines and prescribed methadone] in the months before trial did not constitute substance abuse.” Id. at 466. He also contended that his drug use was not seriously detrimental to his child, and that the “evidence did not support a conclusion that future relapse was likely.” Id.

**Held:** Affirmed. First, the court concluded that father’s use of “nonprescription benzodiazepine and prescription opiates in the months preceding trial,” his use of “doctor shopping” to obtain opiates, his failure to disclose his methadone use to prescribing doctors, and his “minimization of the dangers of [the child’s] living conditions before removal” all demonstrated that father was not “successfully treating his opiate addiction or substance abuse problem.” Id. at 475-76. Thus, the court held that “father is unfit because he has not successfully treated his substance abuse problem, a problem that created circumstances dangerous” to the child. Id. at 477. The court then held that “for many of the same reasons, we also conclude it is improbable that [the child] can return to father’s care within a reasonable time. His reluctance to address the underlying causes for his addiction and to establish support for achieving sobriety, and his refusal to even admit that he has an addiction, make it unlikely that his conduct or condition will improve within a time suitable for [the child], given her immediate need for permanency.” Id. Finally, the court concluded that it was in the child’s best interest to terminate father’s parental rights, based on the fact that father had never been the child’s primary caregiver, and that “changing her circumstances would jeopardize the attachment she has formed with her aunt and uncle and, given evidence of her anxiety disorder, would only add to those serious problems.” Id.

**Dept. of Human Services v. A. S.-M.,** 270 Or App 728, 350 P3d 207, rev den, 357 Or 640 (2015) (Washington County). Mother and father appealed the judgments terminating their parental rights. Four months before the TPR trial, the juvenile court appointed a GAL for mother, based on its determination that she was “unable to give direction and assistance” to her attorney. On appeal, mother argued that the evidence was insufficient to support the appointment of a GAL, that the appointment violated her right to a fundamentally fair trial, and that her trial attorney was constitutionally inadequate for initiating the process of obtaining a GAL (although DHS filed the motion for the appointment). Father challenged the judgment on the merits.

**Held:** Affirmed as to father, reversed as to mother. On de novo review, the court held that father’s parental rights should be terminated, and the case would likely have been affirmed without an opinion if not for the GAL issue involving mother (the court acknowledged that “considerable evidence in the record supports the juvenile court’s ultimate conclusion regarding mother’s fitness”). However, the court determined that “the evidence was insufficient to support a finding that mother lacked ‘substantial capacity’ to give ‘direction and assistance’ to her attorney.” Therefore, the appointment of the GAL “against mother’s wishes was erroneous.” And that error required reversal,
because mother was deprived of the opportunity to defend against the termination petition, and the trial was thus fundamentally unfair.

Dept. of Human Services v. R.K. Sr., 271 Or App 83, 351 P3d 68, rev den, 357 Or 640 (2015) (Marion County). These consolidated cases involve two children, X and R. The children have the same mother and different fathers. X’s father, XZF, has been incarcerated since 2010 following a conviction for first-degree robbery. He is scheduled to be released from prison in November 2017. After XZF was incarcerated, mother and R’s father, RK, parented both children. The children were removed from mother and RK in January 2013, based on allegations of domestic violence and drug abuse. The juvenile court terminated all three parents’ rights, and all three appealed.

Held: Affirmed as to mother and RK, reversed as to XZF. On appeal, the court affirmed the terminations as to mother and R. The court held that mother was “currently unfit because of her mental health issues, her abuse of drugs and alcohol, and her exposure of the children to domestic violence and drug abuse, and that her unfitness is detrimental to the children.” Id. at 89. Mother did not dispute her present unfitness, but she contended that if she were offered residential treatment, she could be a parenting resource in six months, which was a reasonable time for the children to wait. The court disagreed, in large part because it was skeptical of mother’s “prediction” that she would be able to care for the children in six months. Id. at 90.

RK had been incarcerated since February 2014, and he was released a couple of days before the termination trial. He testified at trial that he had been enrolled in an intensive substance abuse program and that he was committed to changing his lifestyle. He remained married to mother, and was ambivalent about whether he would separate from her. The court held that despite father’s “recent progress and his testimony concerning his commitment to changing his conduct and lifestyle, as of the date of trial, [father] remained unfit, and the conditions causing his unfitness are seriously detrimental to [the child].” Id. at 93. The court also found that it was improbable that the child could be returned to father in a reasonable time, because he “has just been released from custody and begun treatment, and he has not addressed the other issues that led to the jurisdictional judgment.” Id.

With regard to XZF, the court reached a different result. The court noted that “there is no evidence of unfitness based on XZF’s conduct as a parent,” and further, “the type of detriment X experienced after his removal from mother’s and R’s home is not the type of serious detriment that provides a basis for terminating parental rights. Additionally, generalized testimony that a lack of permanency could result in emotional distress does not persuade us that X is experiencing serious detriment as a result of continuing in foster care.” Id. at 99-100. Because the court concluded that the evidence of XZF’s unfitness was insufficient, it did not reach the issue of whether “integration of X into XZF’s home within a reasonable time was improbable.” Id. at 100.

Dept. of Human Services v. J.C.H., 272 Or App 413, 358 P3d 294, adhered to as modified on recons., 274 Or App 186, 361 P3d 610 (2015) (Lane County). Father
appealed from the judgment terminating his parental rights to his three children pursuant to ORS 419B.504. On appeal, father contended that (1) on de novo review, evidence in the record did not support termination; and (2) “his parental rights cannot be terminated on conditions or circumstances extrinsic to the grounds that DHS proved at the jurisdictional hearing,” because to do so would deprive him of constitutionally adequate notice.

**Held:** Affirmed. The court rejected father’s first argument without discussion. With regard to the second argument, the court concluded it “need not address” it because five of the proven allegations in the TPR petition were “materially indistinguishable from the grounds on which the court asserted jurisdiction over the children. Consequently, father was on notice of those conditions and circumstances since the entry of the jurisdictional judgment.” Id. at 423.

**Dept. of Human Services v. M. P.-P.,** 272 Or App 502, 356 P3d 1135 (2015) (Washington County). Mother appealed from the judgment terminating her parental rights to her 10-year-old son pursuant to ORS 419B.504 and ORS 419B.506 (DHS conceded on appeal that there was insufficient evidence to support termination under 419B.506). Mother argued on appeal that “the record does not establish a factual basis for termination or that termination is in the best interest of the child.” Id. at 503.

**Held:** Reversed. The court concluded, without discussion, that the evidence “establishes by clear and convincing evidence the grounds for termination under ORS 419B.504.” Id. at 504. However, the court reversed the termination judgment, holding that “the evidence is not clear and convincing that [the child’s] interests are best served by terminating mother’s parental rights to make way for an adoption at this time. Indeed, given the overwhelming evidence regarding [the child’s] strong attachment to mother, it seems clear that an arrangement that accommodates a continuing relationship with mother would serve [the child’s] best interest.” Id. at 504.

**Dept. of Human Services v. E.N.,** 273 Or App 134, 359 P3d 381, rev den, 358 Or 374 (2015) (Jackson County). DHS petitioned to terminate mother’s parental rights under ORS 419B.504, based primarily on allegations relating to mother’s substance abuse, mental health, and an unstable living situation. The child, who was born in September 2008, has been in foster care since she was two years old. The juvenile court found that mother was unfit, but that her conduct and conditions were not seriously detrimental to the child because “the record is lacking with respect to any specific cognizable mental or physical harm, or threat thereof,” to the child. Id. at 148. Therefore, the court dismissed the petition. DHS and child appealed.

**Held:** Reversed. The court held that the child’s “well-being in foster care does not preclude our determination that mother’s conduct or conditions are seriously detrimental” to the child. Id. at 151. The court then went on to conclude that “based on mother’s history and current condition, mother would not be able to safely parent [the child], because [the child] requires a stable, calm, child-focused primary caregiver to remain the healthy child she has become in foster care.” Id. at 152. The court also noted that the
child would need mental health counseling to “get through her next transition in care,” and that mother would not be able to provide the child with “the care she needs to get through another transition without lasting harm.” Id.

The trial court did not reach the issues of reintegration within a reasonable time and best interest, but on de novo review, the court decided to do so. It held that “given the complex interrelation of mother’s conditions and that mother has only taken the first small step to effectively address them, we conclude that it would be improbable that [the child] can be integrated into mother’s care within a reasonable time.” Id. at 153. The court also found that termination was in the child’s best interest.

**Post-judgment motions**

**Dept. of Human Services v. K.M.J.,** 272 Or App 506, 356 P3d 1132, rev den, 358 Or 145 (2015) (Grant County). Mother appealed from an order denying her motion to set aside the judgment terminating her parental rights. Mother failed to appear for the termination trial, and her motion alleged that her failure to appear was due to excusable neglect. On appeal, she made two arguments: (1) she was denied adequate assistance of counsel at the termination trial; and (2) she established excusable neglect sufficient to set aside the termination judgment.

**Held:** Affirmed. With regard to mother’s inadequate-assistance claim, the court “agree[d] with the state that mother did not preserve her contention in the juvenile court as part of her motion to set aside the termination judgment, and we will not address the issue as a separate ground for setting aside the judgment.” Id. at 509. The court then concluded that mother had failed to establish excusable neglect, because (1) she “cut off contact with her attorney months before the termination hearing”; (2) she did not “suggest in any of her correspondence [with the court and counsel] that she wanted the termination hearing rescheduled or that doing so would make it possible for her to attend”; and (3) “had mother continued her relationship with her attorney leading up to the hearing, she could well have learned that she could appear by telephone at the hearing.” Id. at 511.

**Dept. of Human Services v. K.W.,** 273 Or App 611, 359 P3d 539 (2015) (Lane County). Mother’s parental rights to her daughter, S, were terminated in December 2012. At that time, S lived with her great-grandparents, who intended to adopt her. An adoption was not finalized, and 16 months after entry of the TPR judgment, mother moved to set the judgment aside under ORS 419B.923. She did not “raise any concerns” about the form of the TPR judgment or the “fairness” of the underlying termination proceeding. Instead, she contended that the judgment should be set aside because circumstances had changed and adoption was no longer in the child’s best interest. The trial court denied the motion, and mother appealed. On appeal, the issue before the court was whether ORS 419B.923(1), which authorizes the juvenile court to modify or set aside a judgment for reasons including but not limited to certain enumerated examples, extended to the circumstances alleged by mother in this case. DHS argued that it did not, because “the legislature intended to limit the court’s authority under ORS 419B.923(1) to
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situations where the order or judgment is defective in form or the result of an unfair proceeding.” Id. at 617-18. Mother argued that it did, because the juvenile court must be afforded the discretion to “respond to the changing needs and best interests of children in its care.” Id. at 619.

**Held:** Affirmed. Applying the principle of ejusdem generis, the court concluded that “the specific examples provided in ORS 419B.923(1), although nonexclusive, serve to limit the court’s authority to act under the statute.” Id. at 622. First, the court observed that “the legislature could not have intended to grant the juvenile court the authority to modify and set aside an order or judgment for literally any reason.” Id. at 623. Second, the court noted that if the legislature had intended to retain “the broad authority that existed in former ORS 419B.420 (1999)” it could have said so. Id. at 622-23. And finally, the court noted that if the legislature had intended to authorize the juvenile court to set aside a TPR judgment based on a post-judgment change in circumstances, it “would have done so more explicitly, as it has done with respect to permanent guardianships established under ORS 419B.365.” Id. at 624. Ultimately, the court held that “a change in circumstance like that alleged by mother since entry of the TPR judgment is not a ‘reason’ that would allow a court to act under ORS 419B.923(1) to set aside a TPR judgment.” Id. at 625-26.

**Dept. of Human Services v. A.W.,** 274 Or App 493 (2015) (Douglas County). Mother appealed from a judgment terminating her parental rights in her absence. Mother appeared for the first day of the termination trial. On the second day of trial, mother’s attorney appeared and requested a continuance “at least for the day” so that mother could seek medical attention for injuries she had suffered in an assault by her husband and his girlfriend. Later that afternoon, counsel informed the court that mother was at the hospital waiting to be evaluated, and the parties scheduled a status hearing 11 days later (December 29). The DHS caseworker told mother about the hearing, but mother failed to appear. DHS moved for “an order of default” against mother, and the court scheduled a prima facie hearing for two days later (December 31), stating that if mother “shows up at that hearing I guess we will figure out what happens at that point in time.” Id. at 496. Mother again failed to appear. The court excused mother’s counsel, and proceeded to terminate her parental rights.

On appeal, mother argued that the juvenile court erred in finding her in default “because she was not required to attend the December 29 status conference.” Id. at 496. She also argued that the juvenile court’s decision to proceed in her counsel’s absence on December 31 deprived her of a fundamentally fair trial.

**Held:** Reversed and remanded. On appeal, DHS conceded that the juvenile court was not entitled to proceed in mother’s absence on December 29, because she had not been ordered to appear “in the manner provided in ORS 419B.820.” Id. at 498. Instead, DHS argued that mother was required to appear on December 31, because her attorney had knowledge of that hearing date and “her knowledge is imputed to mother.” The court rejected that argument, holding that “because there was no basis for finding mother in default on either date, it follows that the juvenile court lacked authority to terminate
mother’s parental rights in her absence on December 31.” Id. at 499. And even though mother’s arguments were unpreserved, the court elected to review them as plain error, because the question of “whether ORS 419B.819(7) authorized the juvenile court to terminate mother’s parental rights in her absence, at a hearing of which she had no notice, presents a pure question of law that is not reasonably in dispute.” Id. at 500. Moreover, the court elected to exercise its discretion to correct the error, “given the magnitude of mother’s interest in a fundamentally fair termination proceeding.” Id.