

FILED: April 24, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of A. L., a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

v.

J. R. L.,
Appellant.

Clackamas County Circuit Court
101256J

Petition Number
101256J01

A152500

Eve L. Miller, Judge.

Argued and submitted on March 01, 2013.

Kimberlee Petrie Volm, Deputy Public Defender, argued the cause for appellant. With her on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Karla H. Ferrall, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

NAKAMOTO, J.

Reversed and remanded.

1 NAKAMOTO, J.

2 Mother appeals a permanency judgment, assigning error to the juvenile
3 court's denial of her motion to dismiss jurisdiction and wardship over her daughter, A,
4 and the change of the permanency plan from reunification to adoption. A was a ward of
5 the court based on mother's admissions relating to exposure of A to risks of sexual abuse
6 by A's father, a lack of suitable housing, and a failure to meet A's educational needs.
7 Mother contends that the wardship should have been dismissed because she had
8 adequately addressed those bases for jurisdiction and because the juvenile court
9 improperly relied on a different basis for continuing jurisdiction--mother's mental health--
10 -as to which mother had not received required notice. In part, mother challenges the
11 change of plan on the same basis, arguing that the Department of Human Services (DHS)
12 failed to establish the insufficiency of mother's progress toward ameliorating the bases
13 for jurisdiction that had been pleaded and proved. We conclude that the juvenile court
14 erred in relying on facts extrinsic to the jurisdictional judgment in denying mother's
15 motion to dismiss and in its determination of the permanency plan for A. Accordingly,
16 we do not reach mother's other arguments, and we reverse and remand.

17 The parties do not request that we exercise our discretion to review this
18 case *de novo*, ORS 19.415(3)(b), and we decline to do so. *See* ORAP 5.40(8)(c) (we
19 exercise *de novo* review "only in exceptional cases"). Accordingly, we are bound by the
20 juvenile court's findings of historical fact as long as there is "any evidence" to support
21 them. *State v. S. T. S.*, 236 Or App 646, 655, 238 P3d 53 (2010). We review the juvenile

1 court's conclusions for legal error. *Id.* When the juvenile court does not make findings
2 on disputed issues of fact, but evidence supports more than one factual conclusion, we
3 presume that the court decided those issues in a manner consistent with its ultimate
4 conclusion. *Id.* We state the following facts consistently with those standards.

5 In 2010, DHS removed A, who was almost seven years old, from mother's
6 custody and filed a petition for the juvenile court to assume jurisdiction over A. Father
7 was a convicted "predatory sex offender" and, as a condition of his parole, was ordered
8 not to have contact with any minors, including A. Although mother was aware of father's
9 condition of parole, she allowed him to have contact with A. At that time, mother and
10 father were married and had been homeless for nearly two-and-one-half months, living in
11 their van. While the family was homeless, A had not attended school.

12 At the juvenile dependency proceeding in March 2011, mother did not
13 contest the allegations in the petition as amended. Mother stipulated to the following
14 facts:

15 "2(a) The mother has allowed the father, a registered sex offender, to
16 live with her and her daughter which places the child at risk of harm.

17 "2(b) The mother is in need of education and counseling to
18 appreciate the risk of harm father presents to the child and learn how to
19 protect the daughter from the father.

20 "2(c) The mother lacks safe and stable housing in which to raise the
21 child.

22 "2(d) The mother failed to meet the educational needs of the child."

23 In March 2011, the juvenile court entered a combined jurisdictional and
24 dispositional judgment based on those admissions, making A a ward of the court. The

1 court's judgment stated that the case plan was reunification with mother and the
2 concurrent plan was adoption. The judgment stated that the "DHS service
3 agreement/letter of expectation is attached to and made a part of" the order finding A to
4 be within the court's jurisdiction, and the judgment also contained the court's order that
5 mother comply with the terms of that service agreement or letter of expectation.

6 The form that was attached to the jurisdictional judgment was entitled
7 "Services Requested"; it contained a column of various preprinted items and two columns
8 headed "MOTHER" and "FATHER." Some of the items under the column for mother
9 had been checked off, including the following services or activities: "[p]sychological * *
10 * [e]valuation," with a handwritten notation stating, "Follow all recommendations";
11 ensure that A have no contact with father; participate in individual counseling, again with
12 the addition, "Follow all recommendations"; seek and maintain steady employment or
13 reliable income adequate for self-support; "[s]afe and [s]table [h]ousing"; and continue
14 with counseling at Options Counseling Services (Options).

15 After A was placed in DHS's custody, mother cut off contact with father.
16 Additionally, pursuant to DHS's request, mother participated in the Family Sex Abuse
17 Treatment (FSAT) program, a program provided at Options that is geared towards
18 educating mother, a nonoffending parent, to appreciate the risk of harm that a sex
19 offender like father presented to A. Although mother's attendance was inconsistent at
20 times, she successfully completed the program.

21 Mother also completed parenting counseling through Options and a

1 separate parenting class with another agency. Mother participated in individual
2 counseling, albeit inconsistently, through Clackamas County Behavioral Health (CCBH).
3 Mother was unsuccessful in obtaining employment and, although she eventually secured
4 housing with friends, she did not have her own apartment or another housing situation,
5 such as a place in a family shelter, that could safely accommodate both her and A.

6 In June 2011, mother participated in a psychological evaluation. Dr. Gillis,
7 a licensed psychologist, evaluated mother and prepared a written report. Gillis
8 determined that mother met the criteria for "Major Depressive Disorder, Recurrent,
9 Moderate" and recommended that mother participate in individual therapy aimed at
10 decreasing symptoms of depressed moods and continue with medication management of
11 her mood symptoms. Gillis concluded that mother's "symptoms of depression are
12 currently interfering with her ability to meet daily responsibilities. And, the [test] results
13 * * * suggest that a high level of distress is increasing the risk of neglectful or abusive
14 parenting." In response to DHS's specific referral questions, Gillis determined that
15 mother's "prognosis for benefitting from mental health services is good; however, it is
16 difficult to determine with a sufficient degree of certainty whether she will actually
17 address the concerns that resulted in DHS involvement (i.e., keeping [A] safe from unsafe
18 adults)."

19 Several months later, in August 2011, DHS submitted a report to the court
20 summarizing mother's situation since the last court hearing. DHS stated that mother was
21 diagnosed with depression and suggested that her "lack of follow through in multiple

1 areas since the opening of this case * * * is likely a result of her untreated depression."
2 In subsequent reports to the court, DHS noted that mother continued to suffer from
3 depression and anxiety and that those mental health issues were related to her lack of
4 follow through in finding employment and housing.

5 In August 2012, a year after DHS first notified the juvenile court that
6 mother had been diagnosed with depression and 20 months after the court assumed
7 jurisdiction over A, DHS advised the court and mother that it sought to change the
8 permanency plan from reunification to adoption. The court held a permanency hearing
9 that same month.

10 At no time before the hearing did DHS recommend to the juvenile court
11 that mother be ordered to begin mental health counseling for depression to achieve any
12 expected outcome with respect to the bases for jurisdiction. DHS did not file an
13 additional or an amended petition for jurisdiction over A to encompass mother's mental
14 health issues. Nor did DHS seek to provide mother and the court with a revised list of
15 services that would have required mother to ameliorate her symptoms of depression and
16 anxiety to overcome any of the bases for jurisdiction in the judgment. At the time of the
17 permanency hearing, the jurisdictional judgment and the bases for jurisdiction over A
18 remained unchanged from March 2011.

19 Evidence presented at the permanency hearing, in part, concerned mother's
20 mental health and whether she had focused on improving her mental health. Gillis's
21 report was part of a marked exhibit, which the juvenile court considered. Lawrence, the

1 assigned DHS caseworker, testified that she was assigned to the case in March 2011 and
2 her understanding at that time was that mother needed to address her lack of housing,
3 lack of employment, lack of understanding related to allowing safe people around A, and
4 "[d]epression and anxiety as well." Lawrence stated that DHS had provided mother with
5 information for self-referral to CCBH for individual counseling, referred mother for a
6 psychological evaluation, and provided ongoing monthly bus passes to help mother get to
7 the visitation center and counseling. When asked what mother would need to do so that
8 A could be returned to her care, Lawrence replied, "We would like to see her actively
9 engaged in mental health counseling. * * * We also would like for her to have safe and
10 stable housing that would be appropriate for [A] to be returned to, and ideally a job so she
11 can continue to sustain safe and stable housing." Mother testified at the hearing, and
12 DHS's cross-examination focused on mother's mental health. Mother testified that she
13 was taking several antidepressants but had stopped going to mental health treatment and
14 CCBH because she wanted to focus on seeking employment.

15 With regard to the jurisdictional issue of stable housing, Lawrence testified
16 that DHS provided mother with shelter referral lists and phone numbers of various
17 housing opportunities. DHS also contacted Bridges to Housing, a family shelter, but
18 learned that it was not a housing option for mother because the waitlist was not then
19 open. Mother had, at times, been homeless or had temporary places to stay after A was
20 placed in DHS custody, but mother had been living in a house with friends since a prior
21 hearing in May 2012 and had not requested any housing assistance after that. Mother

1 admitted that her current housing was not safe for A but said that she would be willing to
2 live in a family shelter with A. Lawrence explained that DHS would not return A to
3 mother or offer mother a chance to go to a family shelter, which mother would
4 presumably be eligible to receive if A was in her care, because mother has not adequately
5 addressed her "depression and anxiety * * * that underlies the lack of housing and lack of
6 employment." Lawrence also agreed that, if A were with mother, they would be entitled
7 to receive "TANF" (Temporary Assistance for Needy Families) benefits and food stamps,
8 a stable source of income.

9 At the end of the permanency hearing, mother moved to have jurisdiction
10 and wardship over A dismissed because the conditions or circumstances alleged in the
11 jurisdictional judgment no longer existed. Regarding the condition that mother lacked
12 safe and stable housing, mother argued that, if DHS was willing to reunite A with mother,
13 mother and A would be able to live together at a family shelter. Mother further argued
14 that she had addressed the other conditions and circumstances in the jurisdictional
15 judgment adequately. Mother asserted that she had not allowed father to live with or visit
16 A and had completed the educational and counseling services provided by DHS to
17 appreciate the risk of harm father presented to A. Mother explained that, regarding A's
18 educational needs, she could meet those needs once she received housing through a
19 family shelter.

20 The juvenile court denied mother's motion to dismiss wardship of A and
21 changed the permanency plan to adoption. In support of its decision, the juvenile court

1 stated:

2 "Well, if I go through each and every review, perm[anency] hearing, every
3 single step of the way, *it's been the mental health piece*. And why that was
4 not an allegation is not totally clear to me because I kind of inherited the
5 case. But it is clear to me that *Mother understood and Mother has*
6 *essentially agreed along the way that she needed mental health treatment in*
7 *order to achieve safe and stable housing and to appreciate the risk of harm*
8 *that she put [A] in.*

9 " * * * *I took judicial notice of the * * * psychological evaluation*
10 *from Dr. Kathleen Gillis. * * ** And it's very apparent from Dr. Gillis'[s]
11 report, which may be, albeit, needs to be updated since Abilify and some
12 other things have been on board there. But Mother had some major issues
13 concerning stress. * * *

14 " * * * * *

15 "So here we are, 14 months from Dr. Gillis'[s] report, and *my*
16 *understanding is that [Mother] has made very sporadic attempts at mental*
17 *health treatment, that she has not followed through with the CCBH despite*
18 *the fact that she still confesses to having anxiety and other things that*
19 *impair her ability to manage her daily life functions.* And by that I mean,
20 there are some people that have major mental illnesses and they're just out
21 of touch with reality. It appears [Mother] is in touch with reality, knows
22 what her limitations are, and knows that she gets overwhelmed and then she
23 freezes up, as she puts it, and that keeps her from doing what normal people
24 do in order to be adequate parents. *So progress has been made, but it's*
25 *been made in such a small degree that it's still clear to this court that [A]*
26 *cannot safely be returned.* And it's not just a matter of putting [A] there
27 and saying okay, now you've got [A], get some TANF, get some food
28 stamps, whatever. It's the chicken and egg sort of thing. Do you risk [A]
29 getting back into a home that is not, at this point, appropriate for her? So I
30 don't know how that happens.

31 " * * * * *

32 "And furthermore, we're at the 20 month mark, and so there is a
33 rebuttable presumption, * * * it is rebuttable, that's it's been too long. And
34 the conversation in January was at the 12 month or some mark from
35 removal, and it really has been too long and that's why we have that
36 rebuttable presumption. I don't believe that presumption has been rebutted
37 given the fact that we're still not at a point -- you didn't get the job."

1 (Emphasis added.) The juvenile court emphasized that mother had not made progress in
2 addressing her mental health issues:

3 "So again, I keep coming back to the notion that this must be
4 something else. And if it isn't the mental health piece, I don't know what it
5 is. But that's the only opinion that I have from Dr. Gillis is that you needed
6 intensive constant treatment for six to nine months, if not longer, and that
7 she did not believe that you could safely parent [A] without that."

8 The court then stated its conclusion that the plan should change from reunification to
9 adoption.

10 In the permanency judgment, the juvenile court noted that "Mother is
11 involved in the case and has not made sufficient progress toward meeting the
12 expectations set forth in the service agreement, letter of expectation and/or case plan, and
13 the child cannot be safely returned to mother's care." (Emphasis omitted.) In additional
14 findings, the juvenile court stated, "Mother's depression and anxiety are significant and
15 require intensive [treatment] for several months or up to 1-2 [years]. Mother has not
16 consistently engaged in mental health [treatment]."

17 On appeal, mother contends that the juvenile court erred in denying her
18 motion to dismiss jurisdiction and wardship. Mother contends that she had ameliorated
19 all the conditions and circumstances that served as the bases for jurisdiction over A and
20 that the juvenile court failed to limit its assessment of mother's progress to the factual
21 bases for the court's jurisdiction identified in the jurisdictional judgment. Mother argues
22 that the juvenile court's reliance on her mental health issues was erroneous because she
23 was not given adequate notice that she needed to address those concerns. Citing *Dept. of*

1 *Human Services v. G. E.*, 243 Or App 471, 260 P3d 516, *adh'd to as modified on recons.*,
2 246 Or App 136, 265 P3d 53 (2011), *Dept. of Human Services v. N. M. S.*, 246 Or App
3 284, 266 P3d 107 (2011), and *Dept. of Human Services v. N. T.*, 247 Or App 706, 271
4 P3d 143 (2012), mother contends that she is entitled to a reversal. DHS responds that the
5 juvenile court did not base its rulings on a matter extrinsic to the jurisdictional bases,
6 because mother's mental health is "sufficiently connected to other jurisdictional facts to
7 be fairly incorporated in them." DHS also argues that mother failed to obtain safe and
8 stable housing suitable for both herself and A, and that her argument that she would be
9 able to obtain suitable housing in a family shelter if A were in her care is irrelevant given
10 our standard of review.

11 We begin our analysis with a brief discussion of the statutory provisions
12 governing jurisdiction and wardship to provide context, and then focus on *G. E.*, one of
13 the cases on which mother relies and the case that frames our analysis of whether the
14 juvenile court correctly relied on mother's lack of progress in mental health treatment or
15 counseling in denying her motion to dismiss wardship and in changing the permanency
16 plan for A. The juvenile court has jurisdiction over a child who is under 18 years old and
17 "[w]hose condition or circumstances are such as to endanger the welfare of the person or
18 of others[.]" ORS 419B.100(1)(c). In a petition alleging jurisdiction, DHS "must set
19 forth in ordinary and concise language * * * the facts that bring the child within the
20 jurisdiction of the court, *including sufficient information to put the parties on notice of*
21 *the issues in the proceeding.*" ORS 419B.809(4)(b) (emphasis added). The court

1 determines whether the facts alleged in the petition, if proved, are sufficient to establish
2 jurisdiction. ORS 419B.100. The court, on its own motion or a motion by an interested
3 party, may amend the petition; however, "[i]f the amendment results in a substantial
4 departure from the facts originally alleged, the court shall grant such continuance as the
5 interests of justice may require." ORS 419B.809(6).

6 In *G. E.*, we addressed whether a parent was given adequate notice of the
7 factual bases on which the court continued jurisdiction and wardship. In that case, the
8 mother argued that she had ameliorated all the circumstances in the jurisdictional
9 judgment, namely, that the mother "needed to find safe housing where dangerous people
10 did not live or visit and that was not below community standards of sanitation, and she
11 needed to participate in recommended substance abuse treatment." 243 Or App at 482.
12 Noting that "[i]t is axiomatic" that "a juvenile court may not continue a wardship based
13 on facts that have never been alleged in a jurisdictional petition," *id.* at 479 (citing ORS
14 419B.809(4)(b)), we concluded that the mother lacked adequate notice that her failure to
15 address newly specified safety concerns (related to her inattention when with the child)
16 would allow the court to continue jurisdiction and wardship. *Id.* at 483.

17 Juvenile courts are authorized to disregard errors or defects in petitions or
18 other documents or proceedings only when the error or defect "does not affect the
19 substantial rights of the adverse party." ORS 419B.857(2). Under the test articulated in
20 *G. E.*, to avoid affecting the substantial rights of a parent, a juvenile court cannot base its
21 jurisdictional decision on facts that depart from the petition or jurisdictional judgment

1 when neither the petition nor the jurisdictional judgment would put a reasonable parent
2 on notice of what the parent must do to prevent the state from asserting or continuing
3 jurisdiction over the child. *Id.* at 481. In *N. M. S.*, 246 Or App at 300, we applied the
4 reasoning in *G. E.* in the context of a change to a permanency plan and concluded that, if
5 a juvenile court relies on a parental condition or characteristic that is not "one that fairly
6 can be implied from the facts found in the jurisdictional judgment, then it is outside the
7 scope of the court's jurisdiction, and that deficit cannot be remedied by claims of 'actual
8 notice' through case plans, or as the state suggests in this case, letters of expectation."
9 *See also N. T.*, 247 Or App at 717-18 (reversing judgments changing permanency plans
10 that were based, in part, on facts related to the father's conduct not explicitly stated in or
11 fairly implied by the jurisdictional judgment). Thus, we examine the bases for the
12 juvenile court's decisions and the jurisdictional judgment and determine whether the
13 judgment would put a reasonable parent on notice that those bases would be used to
14 continue jurisdiction over the child and to change the permanency plan for a child.

15 In this case, DHS implicitly acknowledged in its brief that, at least in part,
16 the juvenile court based its decision to change the permanency plan and to deny mother's
17 motion to dismiss jurisdiction because of mother's failure to make adequate progress
18 toward ameliorating her depression and anxiety. At oral argument, DHS suggested that
19 the court had relied on express jurisdictional bases and not on mother's mental health as a
20 basis for its decisions. But, that view is contradicted by the court's explanation of its
21 decision and by the findings in the judgment itself. The juvenile court repeatedly referred

1 to mother's lack of progress in addressing "the mental health piece," noting that mother
2 had failed to follow through with individual counseling even though she was aware of her
3 depression and anxiety issues. In the judgment, the court found that "[m]other's
4 depression and anxiety are significant and require intensive [treatment] for several
5 months or up to 1-2 [years]. Mother has not consistently engaged in mental health
6 [treatment]." Accordingly, we agree with mother that the juvenile court based its
7 decisions in significant part on mother's mental health and failure to consistently engage
8 in mental health treatment.

9 The jurisdictional judgment stated four conditions and circumstances
10 sufficient for jurisdiction as to mother: (1) mother allowed father, a registered sex
11 offender to live with her and A, which places A at risk of harm; (2) mother is in need of
12 education and counseling to appreciate the risk of harm father presents to A and to learn
13 how to protect A from father; (3) mother lacks safe and stable housing; and (4) mother
14 failed to meet the educational needs of A. None of them identifies mother's depression,
15 anxiety, or mental health generally as a condition that endangered A. As to that
16 condition, our determination therefore reduces to whether the jurisdictional judgment
17 fairly implies that mother's mental health was a condition or circumstance that would
18 justify continued jurisdiction.

19 Mother argues that the adjudicated grounds for jurisdiction in the judgment
20 did not put her and would not have put a reasonable parent on notice that her depression
21 and anxiety would warrant the court's continuation of jurisdiction and wardship over A.

1 In response, DHS contends that mother was aware that her mental health issues related to
2 her inability to obtain safe and stable housing and that mother's depression and anxiety
3 are the reasons that she had not been able to find safe and stable housing and employment
4 during the 20 months after the court assumed jurisdiction over A.¹ DHS points to its
5 August 2011 report to the court, a year before the permanency hearing, in which DHS
6 identified the need for mother to obtain mental health treatment. Based on that report,
7 and other reports to the court, DHS argues that mother was on notice that she had to
8 address her mental health problems for A to be returned to her care.

9 We agree with mother that she was not given adequate notice that her
10 progress toward obtaining safe and stable housing could be measured by her progress in
11 addressing her mental health issues. Initially, we reject DHS's argument that mother,
12 regardless of the jurisdictional judgment, had actual notice and that is sufficient. *N. M.*
13 *S.*, 246 Or App at 300.

14 Relying on *Dept. of Human Services v. M. M. B.*, 253 Or App 431, 440, 290
15 P3d 891 (2012), *rev den*, 253 Or 280 (2013), DHS also asserts that subsequent reports to
16 the court indicated that mother needed to address her depression and anxiety issues,
17 because those issues "play[ed] into [her] lack of follow through in both the areas of
18 employment and housing," and constituted sufficient notice to mother. However, those
19 reports are insufficient to provide a parent with adequate notice. As we held in *G. E.*,

¹ That contention is similar to the juvenile court's conclusion that mother needed "mental health treatment in order to achieve safe and stable housing" and that mother had actual notice of that fact.

1 only "the petition or the jurisdictional judgment" can provide a parent with adequate
2 notice. 243 Or App at 481. DHS cannot rely on reports to the court to overcome the
3 limits of what is contained in the jurisdictional judgment, *N. M. S.*, 246 Or App at 300,
4 and DHS's reliance on *M. M. B.* to support that contention is misplaced.

5 In *M. M. B.*, we held that, when the juvenile court ordered DHS and the
6 parent to enter into and to abide by a written action agreement and the court attached that
7 document to the jurisdictional judgment, the parent was on notice that her progress could
8 be measured based on the action agreement. 253 Or App at 440. The action agreement
9 listed safety threats to the child and changes in cognitive, behavioral, or emotional
10 protective capacities the parent had to make and demonstrate to increase her ability to
11 keep the child safe in relation to those threats. *Id.* at 434. Although the parent argued
12 that she was not on notice that her progress could be measured by whether her son
13 observed a change in her behavior, the action agreement specifically stated otherwise.
14 The parent had agreed that she understood that the changes she had to make in her
15 behavior "must be noticed over time by significant others, *including [her] child(ren),*
16 *[her] caseworker, and other professionals."* *Id.* at 435 (emphasis added). The action
17 agreement was specific and put the parent on notice of exactly how the court would
18 determine her progress toward addressing the bases for jurisdiction in the judgment.

19 This case is distinguishable from *M. M. B.* First, DHS relies on periodic
20 reports to the court, not on any documents attached to the jurisdictional judgment, to
21 support its argument that mother was given adequate notice that she needed to address

1 her depression and anxiety issues. Second, even if DHS had relied on the Services
2 Requested form that was in fact attached to the jurisdictional judgment, we would
3 conclude that it did not adequately direct mother to ameliorate her symptoms of
4 depression and anxiety. The form alerted mother to participate in a psychological
5 evaluation, which she completed, and to attend individual counseling, which she did.
6 With regard to both of those services, the form included a handwritten notation stating,
7 "Follow all recommendations," but unlike the action agreement in *M. M. B.*, which stated
8 the specific problems that the parent needed to address, such as her violent or impulsive
9 behavior and her negative perceptions of her child, the services for those problems, and
10 how the mother's progress in addressing her problems would be evaluated, in this case,
11 the Services Requested form is not specific. It is unclear from the Services Requested
12 form why mother needed to attend individual counseling. Based on the jurisdictional
13 judgment and Gillis's understanding of why mother was required to undergo a
14 psychological evaluation (her problem "keeping [A] safe from unsafe adults"), it may
15 well be that mother was directed to attend counseling specifically *to appreciate the risk of*
16 *harm father presented to A* and not to address depression and anxiety. There is no
17 dispute that she has addressed that significant problem as identified in the jurisdictional
18 judgment. DHS neither recommended to the court that mother be ordered to begin
19 mental health treatment for depression and anxiety, nor revised its Services Requested
20 form to include individual counseling for mother's depression and anxiety issues and
21 obtained its incorporation in a judgment. Mother was not given adequate notice from the

1 jurisdictional judgment, or from the Services Requested document incorporated in the
2 judgment, that her failure to address her mental health issues could be a basis for the
3 court to continue jurisdiction over A.

4 At the time of the combined hearing, mother had addressed concerns that
5 she would not protect A from father, a sex offender. In addition, A was in school, and
6 mother pointed out that, if A were returned to her, A would attend an appropriate school.
7 Therefore, the parties focus on the lack of "safe and stable housing" as an alternative
8 potential basis for continuing jurisdiction and for the change in the permanency plan. In
9 DHS's view, that was a separate and proper ground for the juvenile court to continue
10 jurisdiction over A. Mother argues that she should not be penalized for her lack of
11 housing, because DHS improperly opposed A's return to mother based on mental health
12 grounds, and mother would be able to obtain safe family shelter housing, but only if A is
13 permitted to return to her. The juvenile court recognized that the availability of housing
14 in a family shelter was a "chicken and egg" problem, *i.e.*, because A was not returned to
15 mother, mother could not obtain housing in a family shelter.

16 Because the court based its decision to continue jurisdiction, in large part,
17 on mother's mental health, a fact extrinsic to the jurisdictional judgment, and because it is
18 unclear whether the court would have reached the same conclusion--that mother failed to
19 find safe and stable housing--without considering mother's mental health issues, we
20 cannot conclude that the court's error was harmless. *See N. T.*, 247 Or App at 718
21 (concluding that, "because the court did not indicate that mother's and father's lack of

1 progress in addressing their substance abuse, mental health, and housing issues * * * was
2 independently sufficient to warrant changing the plans for the children to adoption," the
3 error was not harmless). For that reason, we reverse the court's denial of mother's motion
4 to dismiss and remand for the court to reconsider mother's motion without reliance on
5 those extrinsic facts.

6 In addition, the court's decision to change the permanency plan from
7 reunification to adoption was similarly based, in large part, on mother's mental health
8 issues. In the permanency judgment, the court determined that mother had not made
9 sufficient progress in meeting the expectations in the "services agreement" letter and that
10 her "depression and anxiety are significant." Again, on this record, we are unable to
11 determine whether the court would have reached the same conclusion as to mother's
12 progress based solely on the permissible jurisdictional bases and without considering
13 mother's mental health issues. *See N. M. S.*, 246 Or App at 297 (noting that, "if the facts
14 have been determined to be insufficient to support continued jurisdiction, the court lacks
15 authority to act, let alone decide that adoption is an appropriate plan for a child").
16 Accordingly, we reverse and remand the court's permanency judgment.

17 Reversed and remanded.