

FILED: September 25, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of N. S.,
aka N. D. S.-T.,
a Child.

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Respondent,

and

S. D.-V.,
Respondent,

v.

A. R. S.;
and N. S.,
aka N. D. S.-T.,
Appellants.

Washington County Circuit Court
J070280

Petition Number
02J070280

A153447

James Lee Fun, Jr., Judge.

Argued and submitted on June 04, 2013.

Shannon Storey, Senior Deputy Public Defender, argued the cause for appellant A. R. S. With her on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Megan L. Jacquot argued the cause and filed the brief for appellant N. S.

Cecil A. Reniche-Smith, Senior Assistant Attorney General, argued the cause for respondent Department of Human Services. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Erin Galli argued the cause and filed the brief for respondent S. D.-V.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

Reversed and remanded.

1 ORTEGA, P. J.

2 This is the third time that we have considered an appeal in this juvenile
3 dependency case. In the first appeal, we reversed and remanded a permanency judgment
4 because the juvenile court had analyzed mother's progress to allow child to return to her
5 care under an incorrect legal standard--that is, the court incorrectly determined that a
6 parent's ability to parent independently is a legal requirement for parental fitness. *Dept.*
7 *of Human Services v. A. R. S.*, 249 Or App 603, 605-06, 278 P3d 91 (2012) (*ARS I*). In
8 the second appeal, we reversed and remanded another permanency judgment because the
9 court had relied on a circumstance that was not alleged or established as a basis for
10 jurisdiction in assessing mother's progress toward reunification--*i.e.*, mother's purported
11 personality disorder. *Dept. of Human Services v. A. R. S.*, 256 Or App 653, 664, 303 P3d
12 963 (2013) (*ARS II*). While that appeal was pending, the court held a review hearing at
13 which it addressed motions by mother and child to dismiss the wardship. The court
14 declined to dismiss the wardship and entered a review hearing judgment that continued
15 the permanency plan of reunification. Mother and child (collectively, appellants)
16 separately appeal that ruling.

17 Appellants challenge the court's refusal to dismiss the wardship and certain
18 determinations in the court's review hearing judgment. In their first assignment of error,
19 appellants assert that the juvenile court should have dismissed the wardship because the
20 facts that gave rise to jurisdiction have been ameliorated. In their second assignment of
21 error, appellants claim that the court, in its review judgment, erroneously determined that

1 mother had not made sufficient progress to allow child to return to her care within a
2 reasonable time. In their third assignment of error, appellants contend that the court erred
3 in overruling the child's objection, based on the Fourteenth Amendment to the United
4 States Constitution, to being "removed" from the United States to live with his father in
5 Mexico. Child also raises additional assignments of error. Those are that the juvenile
6 court erred when it determined that the Department of Human Services (DHS) had made
7 reasonable efforts to reunify the family and that the court erred when it determined that it
8 was in child's best interests to continue the wardship. DHS and father respond that the
9 juvenile court properly denied appellants' motions to dismiss jurisdiction and that several
10 of appellants' other assignments of error should not be considered in this appeal. Because
11 we conclude that the court erred by denying appellants' motions to dismiss the wardship,
12 we address only appellants' first assignment of error. Therefore, we reverse and remand
13 with instructions to dismiss the wardship.

14 As an initial matter, we decline child's request for *de novo* review. Child
15 does not provide any reason why this case merits *de novo* review, and we do not perceive
16 any reason for it. *See* ORAP 5.45(8)(c) (stating that we exercise *de novo* review only in
17 "exceptional" cases). Accordingly, we view the evidence, as supplemented and
18 buttressed by permissible derivative inferences, in the light most favorable to the trial
19 court's disposition and assess whether, when so viewed, the record was legally sufficient
20 to permit that outcome. *Dept. of Human Services v. N. P.*, 257 Or App 633, 639, ___ P3d
21 ___ (2013). We describe the facts in accordance with that standard.

1 Although the history of this case is extensive, we provide only the
2 background necessary to address the issues before us. At the time of the review hearing,
3 child, age five, continued to live in the foster home of his maternal grandmother with his
4 two half-siblings, both of whom were adopted by grandmother when mother's parental
5 rights to them were terminated several years ago. Father, after a visit to his home by
6 immigration officials, left the United States to return to Mexico in late 2010 and remains
7 there.

8 DHS first became involved in the family's life in 2007. As we explained in
9 *ARS II*:

10 "DHS first filed a dependency petition with respect to child on July
11 24, 2007, four days after his birth. In a shelter/preliminary hearing order,
12 the juvenile court granted DHS temporary custody of child and approved
13 placement of child with mother in child's maternal grandmother's (foster
14 mother) home. Jurisdiction was established in September 2007; as to
15 mother, it was based on mother's substance abuse problem, exposure of
16 child to controlled substances while pregnant, and relinquishment of
17 parental rights to her two older children. Jurisdiction as to father was based
18 on his substance abuse, his status as legal father, and because his parenting
19 capacity was 'unknown.' Child remained placed with mother in foster
20 mother's home. In October 2008, the juvenile court ruled that mother had
21 made sufficient progress to ensure child's safe return to her and terminated
22 its wardship of child. A year later, however, after mother left child with
23 foster mother for five days without telling her when she would return,
24 foster mother called DHS, and DHS again took protective custody of child.
25 In October 2009, DHS filed a new dependency petition. The juvenile court
26 entered new jurisdictional judgments over child in November 2009
27 (relating to father) and February 2010 (relating to mother). Child has lived
28 with foster mother ever since.

29 "As it relates to mother, the court established dependency
30 jurisdiction over child based on the following facts:

31 "A. The mother has had residential instability since July of 2009,
32 which impairs her ability to provide for said child.

1 "B. The mother has a history of substance abuse, which if left
2 untreated impairs her ability to care for said child. She provided a
3 UA on October 8, 2009 that failed to register on the temperature test
4 strip and tested positive for amphetamines/methamphetamines on a
5 subsequent UA on the same date.

6 "C. The mother has a history of leaving said child in the care of her
7 mother without making appropriate plans for said child's ongoing
8 care and supervision. This occurred frequently during September of
9 2009 and from October 2nd to October 7th, 2009. The mother knew
10 that said child was safe with her mother.

11 "D. Said child had a head injury in approximately September of
12 2009 which required stapling. The mother did not return said child
13 to the doctor to have the staples removed. The late removal did not
14 permanently adversely effect said child.

15 "E. The mother had chosen violent and/or unsafe partners, which
16 places said child at risk of harm. The mother's current husband is
17 incarcerated until February of 2011 for Methamphetamine related
18 crimes.

19 "F. The mother voluntarily relinquished her parental right to two (2)
20 other children."

21 256 Or App at 656-59 (footnotes omitted).¹

22 After a permanency hearing in June 2011, the court determined that mother
23 had not made sufficient progress toward reunification to enable child to be returned to
24 her, *see* ORS 419B.476(2), but that father had made sufficient progress and, therefore,
25 that the permanency plan would remain reunification and child would be returned to

¹ The juvenile court took jurisdiction of child as to father in November 2009 based on father's admission that he needed DHS's assistance to establish a relationship with child. Apparently, he had not had contact with child between child's birth and the juvenile proceedings that began in 2009.

1 father's care by September 2011 if father completed certain conditions.² On appeal of the
2 resulting permanency judgment, we reversed and remanded, concluding that

3 "the juvenile court was * * * operating under a misapprehension that
4 mother must be able to parent child independently--that is, without the
5 assistance of child's maternal grandmother, who was child's foster
6 placement and with whom mother (with grandmother's approval and
7 encouragement) wanted to live--in order to demonstrate sufficient progress
8 under the statute."

9 *ARS I*, 249 Or App at 605. Because a parent's ability to parent independently is not a
10 legal requirement for parental fitness, we concluded that the juvenile court committed
11 legal error. Accordingly, we reversed and remanded the case for the juvenile court to
12 reconsider in light of the correct legal principles. *Id.* at 605-06.

13 Another permanency hearing occurred in the late spring and early summer
14 of 2012. At the conclusion of that hearing, the court denied motions by appellants to
15 dismiss jurisdiction, determined that mother had not made sufficient progress toward
16 reunification with child, but that father had, and again ordered placement of child with
17 father.³ Appellants appealed that permanency judgment, and we again reversed and
18 remanded, concluding that the court had erroneously relied on mother's purported
19 personality disorder--a circumstance that was not alleged or established as a basis for
20 jurisdiction--in assessing mother's progress toward reunification and denying her motion
21 to dismiss jurisdiction. *ARS II*, 256 Or App at 661. Noting that a juvenile court cannot

² Mother's motion for a stay of the July 2011 permanency judgment pending appeal was granted by the Appellate Commissioner.

³ We granted mother's stay request pending appeal; thus, the permanency judgment was stayed, and ultimately reversed in *ARS II*.

1 continue wardship over a child based on circumstances that were not explicitly stated or
2 fairly implied by the jurisdictional judgment, we reversed the permanency judgment and
3 remanded for the court to reconsider. *Id.*

4 On December 14, 2012, during the pendency of the appeal in *ARS II*, the
5 court held a review hearing, *see* ORS 419B.449 (providing the court with authority to
6 hold a hearing to review the child's condition and circumstances and to determine if
7 jurisdiction should be continued). At that hearing, child moved to dismiss jurisdiction
8 and objected to "removing" him from the United States. Mother also moved to dismiss
9 jurisdiction and terminate the wardship, arguing that the conditions that had given rise to
10 jurisdiction no longer posed a current threat of serious loss or injury to child. In her
11 motion, she explained that she had completed inpatient and outpatient substance abuse
12 treatment and had not used alcohol or controlled substances in 33 months. She explained
13 that she was attending community college and living off of grants and financial aid. As
14 for her living arrangements, she noted that she was living in a home with a roommate;
15 however, she maintained that she would like to live in the "family home" but for the
16 court's order prohibiting her from living with grandmother and child. Further, she noted
17 that the court had no authority to continue jurisdiction based on mother's purported
18 personality disorder or any other fact extrinsic to the jurisdictional judgment. In addition
19 to requesting dismissal of the wardship, mother also asked for alternative relief,
20 specifically, that the court lift the order disallowing mother from residing in the family
21 home, sustain child's objection to being "removed" from the United States, and rule that

1 DHS's reunification efforts had not been reasonable.

2 At the review hearing, DHS acknowledged some positive changes in
3 mother's dealings with the agency, but cautioned that mother had not alleviated at least
4 two bases for jurisdiction--her residential instability and her choice of unsafe partners.

5 Up until a month before the review hearing, mother had lived with a
6 boyfriend, Antonio, in Vancouver, Washington. While living with Antonio, mother had
7 asked that DHS approve overnight visits with child, which required a home study
8 pursuant to the Interstate Compact for the Placement of Children (ICPC). A basic
9 criminal background check on Antonio did not return any concerning information. In
10 early October, mother reaffirmed her request for an ICPC home study, but before that
11 could happen, mother informed her caseworker that she had moved out because of
12 Antonio's concerning behavior. After leaving Antonio's home, mother's living
13 arrangements were unstable for a few weeks until she rented a room in a friend's home in
14 Lake Oswego. At the time of the hearing, she was living there, but she indicated to DHS
15 that she was planning to find a different place to live in January 2013 that was closer to
16 where child was living. When DHS visited mother's residence in Lake Oswego, mother
17 showed the caseworker a room that had nothing in it except boxes that the previous
18 roommate had left. The caseworker indicated that the home was "safe and appropriate"
19 and approved unsupervised daytime visits, but DHS declined to approve overnight visits
20 until mother had made suitable sleeping arrangements for both her and child because her
21 room lacked a bed for child. Mother indicated that grandmother would help her transfer a

1 bed for child.

2 As for Antonio's concerning behavior, mother informed DHS via e-mail
3 that he had threatened to harm himself if mother left him and that, as a result, she had
4 moved out and ended the relationship. In addition, mother was concerned about
5 Antonio's parenting style (as to his own child) and "his inability to put his child's needs
6 before his wants." In that e-mail, mother indicated that she did not wish to expose child
7 to an unstable person and that she would no longer allow Antonio around herself and her
8 family. Mother indicated that she had "realize[d] that being in any type of relationship is
9 not in my best interest" and that she had "housing for the meantime and will be renting a
10 room soon."

11 The CASA report indicated that mother was attending community college
12 classes, financed through grants and loans, to become a drug and alcohol counselor.
13 Further, mother had begun court-ordered counseling every other week and spent much of
14 her free time at grandmother's house, studying, preparing meals, and watching the
15 children when grandmother was at work. The CASA ultimately recommended that child
16 remain a ward of the court, but that mother could eventually be a permanent resource for
17 child.

18 DHS, at the review hearing, also asserted that it had been difficult to assess
19 mother's compliance with recommendations and court-ordered services because mother
20 had failed to provide documentation that she was attending narcotics anonymous
21 meetings and, further, that mother had only attended one counseling session in the six

1 months since the last hearing and had only recently signed a release allowing DHS access
2 to counseling records.

3 At the hearing, grandmother testified that her relationship with mother was
4 no longer as tumultuous as it had been in the past, stating:

5 "I think * * * with any mother-child relationship, there's not going to
6 be a hundred percent agreement across the board on anything. But, I'll take
7 the 75 to 80 percent that I'm getting now, because it's a heck of a lot better
8 than it was, like I say, even two years ago."

9 She also noted that child was doing extremely well and has an incredible relationship
10 with his half-siblings.

11 At the conclusion of the hearing, the court announced:

12 "Mom is making insufficient progress towards reunification, and I
13 find that the reasons for jurisdiction originally persist through today. There
14 is no confirmation, really, of Mom's participation in counseling, and--and
15 while I would conclude, I suppose, that even if Mom were participating in
16 that counseling, that that counseling has begun really in the last 30 days,
17 meaningfully.

18 "Mom signed a Release just today to have DHS have access to those
19 records, even though those requirements have been pending for the past six
20 months. Mom continues to express residential instability, independence
21 financially--and, by the comment of her partner, there is evidence that
22 suggests that she's unable to assess safety risk, which was the original
23 reason for DHS for involvement.

24 "Now, having said that, do I conclude that that comment alone
25 justifies, by itself, continuing DHS involvement and continuing wardship?
26 No. But I will say the constellation of those factors that I just described in
27 total, given the circumstances of this case, cause the Court to conclude that
28 continuing DHS involvement and wardship of that placement is necessary.

29 "Stated more--more simply, I suppose, if you take the fact that
30 [child] has been in care for 38 consecutive months, and the reasons that the
31 Court originally became involved persist in some fashion today, that alone
32 would be enough for the Court to continue jurisdiction.

1 "I acknowledge that the safety threats currently are not as extreme as
2 those that caused the Court originally to be involved. But, after the passage
3 of 38 consecutive months, one would expect that there would be some
4 progress made towards addressing those safety issues. And there has not at
5 least been sufficient progress to convince the Court that it's no longer
6 necessary to be involved."

7 Thus, the court denied the motions to dismiss wardship, concluding that at least some of
8 the jurisdictional bases had not been ameliorated and those that persisted continued to
9 pose a risk of harm to child. The court entered a review judgment that continued the
10 wardship, concluded that father had made sufficient progress, and continued the plan of
11 reunification. The court also determined that mother had not made sufficient progress
12 towards meeting the expectations set forth "in the service agreement, letter of
13 expectation, and/or case plan" and that child could not be safely returned to her at that
14 time.

15 ORS 419B.100(1)(c) grants a juvenile court jurisdiction over a child
16 "[w]hose condition or circumstances are such as to endanger the welfare of the person or
17 of others[.]" Whether the "conditions or circumstances" warrant jurisdiction requires us
18 to consider if, under the totality of the circumstances, there is a reasonable likelihood of
19 harm to the welfare of the child. *State v. A. L. M.*, 232 Or App 13, 15, 220 P3d 449
20 (2009). For the court to maintain jurisdiction, the jurisdictional bases--*i.e.*, the conditions
21 or circumstances--must continue to pose a current threat of serious loss or injury, and
22 there must be a reasonable likelihood that the threat will be realized. *Dept. of Human*
23 *Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011). Put another way, the
24 conditions or circumstances must present a threat of danger--*i.e.*, serious loss or injury--

1 that is current and not speculative. *Id.*

2 Where, as here, the court's continued jurisdiction is at issue in a review
3 hearing, ORS 419B.449(1) states that the court may "review the child or ward's condition
4 and circumstances and * * * determine if the court should continue jurisdiction and
5 wardship or order modifications in the care, placement and supervision of the child or
6 ward." Accordingly, at such a review hearing the juvenile court examines whether the
7 conditions or circumstances of the child require the court to retain jurisdiction. *Dept. of*
8 *Human Services v. D. M.*, 248 Or App 683, 685, 275 P3d 971 (2012). "A wardship
9 cannot continue if the jurisdictional facts on which it is based have ceased to exist.
10 However, that determination [at a review hearing] does not include a retrial of the
11 original allegations. The evidence is limited to whether the conditions that were
12 originally found to endanger a child persist." *Id.* (quoting *State ex rel Juv. Dept. v.*
13 *Gates*, 96 Or App 365, 372, 774 P2d 484, *rev den*, 308 Or 315 (1989)).

14 The standards that govern our review of the juvenile court's resolution of
15 that question are the same as the standards that govern our review of a juvenile court's
16 original jurisdictional determination. Thus,

17 "we view the evidence, as supplemented and buttressed by permissible
18 derivative inferences, in the light most favorable to the trial court's
19 disposition and assess whether, when so viewed, the record was legally
20 sufficient to permit that outcome. Specifically, with respect to a juvenile
21 court's determination under ORS 419B.100(1)(c), we: (1) assume the
22 correctness of the juvenile court's explicit findings of historical fact if these
23 findings are supported by any evidence in the record; (2) further assume
24 that, if the juvenile court did not explicitly resolve a disputed issue of
25 material fact and it could have reached the disposition that it reached only if
26 it resolved that issue in one way, the court implicitly resolved the issue

1 consistently with that disposition; and (3) assess whether the combination
2 of (1) and (2), along with nonspeculative inferences, was legally sufficient
3 to permit the trial court to determine that ORS 419B.100(1)(c) was
4 satisfied."

5 *N. P.*, 257 Or App at 639.

6 Before we review the court's determination in this case under that standard,
7 we address the parties' disagreement over which party bore the "burden" in this case.
8 Mother maintains that the proponent of continuing jurisdiction--in this case, DHS--had
9 the burden to prove, by a preponderance of the evidence, that the factual bases for
10 jurisdiction persisted. DHS disagrees, arguing that mother, as the moving party, bore the
11 burden of demonstrating that the jurisdictional facts upon which the wardship was based
12 had "ceased to exist."

13 We agree with mother. In the context presented by this case, DHS had the
14 burden to prove, by a preponderance of the evidence, that the factual bases for
15 jurisdiction persisted to a degree that they posed a current threat of serious loss or injury
16 that is reasonably likely to be realized. In *D. M.*, when addressing a motion to dismiss
17 jurisdiction at a review hearing, we adopted the mother's statement that a "wardship must
18 be dismissed unless DHS proves that the alleged jurisdictional bases continue to pose a
19 current threat of serious loss or injury" and concluded that DHS had failed to meet that
20 standard in that case. 248 Or App at 686; *see also A. L. M.*, 232 Or App at 15 (dismissing
21 the wardship because no evidence was presented at a review hearing that the conditions
22 or circumstances that existed at the time of the hearing presented a reasonable likelihood
23 of harm to the child).

1 Moreover, the statutory scheme supports placing the burden on DHS. As
2 we have explained, ORS 419B.449(1) can put at issue the court's continuing jurisdiction.
3 The statute also provides that "[t]he court shall conduct a hearing provided in subsection
4 (1) of this section in the manner provided in ORS 419B.310, except that the court may
5 receive testimony and reports as provided in ORS 419B.325." ORS 419B.449(2). ORS
6 419B.310(3), in turn, provides that "[t]he facts alleged in the petition showing the child to
7 be within the jurisdiction of the court as provided in ORS 419B.100(1), unless admitted,
8 must be established by a preponderance of competent evidence." Viewing those statutes
9 together, ORS 419B.449 places the court's continuing jurisdiction at issue; ORS
10 419B.100(1)(c) provides the legal standard for the court's continuing jurisdiction; and
11 ORS 419B.310(3) requires the proponent of jurisdiction to prove, by a preponderance of
12 the evidence, the facts that demonstrate that continuing jurisdiction is necessary.

13 Nevertheless, as we recently noted in *D. M.*, a motion to dismiss wardship
14 that is considered at a review hearing does not require a "retrial of the original
15 allegations. The evidence is limited to whether the conditions that were originally found
16 to endanger a child persist." 248 Or App at 685. Accordingly, in this procedural context,
17 DHS must prove by a preponderance of the evidence that those conditions persist and
18 pose a reasonable likelihood of harm to child. *See* ORS 419B.449(3)(A) (requiring the
19 court to state why continued substitute care is necessary when the court decides to
20 continue the child or ward in substitute care).

21 The parties do not dispute that, of the original jurisdictional bases, the only

1 two that remained at issue at the time of the review hearing were residential instability
2 and mother's choice of unsafe partners. DHS does not dispute that mother's substance
3 abuse has been ameliorated--there is no evidence that mother has used controlled
4 substances in the 33 months preceding the review hearing.

5 Viewing the evidence of mother's residential instability and her choice of
6 partners in the light most favorable to the court's disposition and giving credit to any
7 permissible inferences, we conclude that the record contains insufficient evidence from
8 which a reasonable factfinder could conclude, by a preponderance of the evidence, that
9 those circumstances individually, or in combination, exposed child to a current risk of
10 serious loss or injury that was reasonably likely to occur.

11 First, residential instability is not a sufficient basis for jurisdiction without a
12 showing that it creates a risk of harm to the child. *See, e.g., Dept. of Human Services v.*
13 *M. H.*, 256 Or App 306, 331, 300 P3d 1262, *rev den*, ___ Or ___ (2013) (evidence that
14 the parents had multiple residences, including camping for extended periods of time, was
15 insufficient to prove a risk of harm to the child). That is ultimately where the evidence
16 fails in this case. Although there is evidence that mother lived in multiple residences in
17 the year preceding the review hearing and that she was considering a move from her
18 housing at the time of the hearing to be closer to child, or if allowed by the court, into
19 grandmother's home, there is not sufficient evidence that those circumstances posed a
20 current risk of harm to child that was not speculative. Mother was living in a room that
21 was deemed safe and appropriate by DHS. There was no evidence that any condition or

1 circumstance involving that home posed a risk of harm to child, and DHS offered no
2 explanation as to why that home was a safety risk. Furthermore, there was no evidence
3 that mother's purported plan to move closer to child would pose a safety risk. Any
4 conclusion to the contrary is only speculation. Accordingly, the evidence of residential
5 instability is insufficient to support a determination that it created a risk of harm to child.

6 Mother's relationship with Antonio suffers from the same flaw--that is,
7 there is insufficient evidence for a reasonable factfinder to conclude that child was at a
8 current risk of serious loss or injury that was reasonably likely to occur. We
9 acknowledge the concern that mother became involved with a man who later threatened
10 violence to himself--perhaps as a way to control mother. But the evidence here is that
11 mother reacted appropriately to the threat, *i.e.*, she immediately left the home and ended
12 the relationship, and contacted DHS. Given that there was no evidence that Antonio had
13 a history of violence or that mother should, for some other reason, have foreseen that he
14 otherwise presented a safety risk, and further that mother ended the relationship and
15 immediately left the home, any conclusion that child was at risk because of mother's
16 choice of Antonio is speculative. It may be that, in some cases, where there is evidence
17 that a parent has a pattern of choosing violent partners, it would be fair to infer that the
18 parent's choice of yet another violent partner created a risk of harm to child. However,
19 the record here does not establish that mother had such a pattern (although she has
20 historically chosen drug users as partners); thus, the record does not support the
21 determination that mother's relationship with Antonio created a risk of harm to child.

1 In sum, although there is evidence of residential instability and that mother
2 resided with one unsafe partner, there is insufficient evidence in the record from which a
3 reasonable factfinder could conclude, by a preponderance of the evidence, that the totality
4 of those circumstances exposed child to a current risk of serious loss or injury that was
5 reasonably likely to occur. Any risk of harm on this record was speculative.
6 Accordingly, the juvenile court erred in denying appellants' motions to dismiss the
7 wardship.

8 Reversed and remanded.