

**FILED: October 8, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of S. F.-H., a Child.

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

H. H. and R. F.,  
Appellants.

Multnomah County Circuit Court  
2012811991

Petition Number  
109587M

---

In the Matter of H. F.-H., a Child.

DEPARTMENT OF HUMAN SERVICES,  
Petitioner-Respondent,

v.

H. H. and R. F.,  
Appellants.

Multnomah County Circuit Court  
2012811992

Petition Number  
109587M

A156147

Katherine E. Tennyson, Judge.

Argued and submitted on August 21, 2014.

Laura S. Anderson argued the cause and filed the brief for appellant H. H.

George W. Kelly argued the cause and filed the brief for appellant R. F.

Michael Casper, Senior Assistant Attorney General, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Karla H. Ferrall, Assistant Attorney General.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Lagesen, Judge.

LAGESEN, J.

Affirmed.

---

**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

- No costs allowed.
  - Costs allowed, payable by
  - Costs allowed, to abide the outcome on remand, payable by
-

1                   LAGESEN, J.

2                   Mother and father (collectively, parents) each appeal a juvenile court  
3 judgment taking jurisdiction over their sons, S and H, under ORS 419B.100(1)(c). The  
4 court took jurisdiction of the children based on its determination that their condition and  
5 circumstances endangered their welfare because (1) father had caused a nonaccidental  
6 injury to H that amounted to child abuse and resulted in "significant adverse  
7 consequences" for H; and (2) mother refused to acknowledge father's role in injuring H  
8 and, for that reason, was not capable of protecting the children from father. On appeal,  
9 mother and father each assign error to the juvenile court's finding that H's injury was  
10 nonaccidental; mother also contends that, even if the injury was nonaccidental,  
11 the juvenile court erred in finding that the children's circumstances endangered them.  
12 Both parents also assert that they have made a sufficient showing of inadequate  
13 assistance of counsel before the juvenile court so as to warrant a remand under *State ex*  
14 *rel Juv. Dept. v. Geist*, 310 Or 176, 796 P2d 1193 (1990), for an evidentiary hearing on  
15 the adequacy of their lawyers' performances. We affirm the judgment of the juvenile  
16 court and decline to exercise our discretion to remand the case for an evidentiary hearing  
17 on parents' claim of inadequate assistance of counsel.<sup>1</sup>

---

<sup>1</sup> Following oral argument and the submission of these appeals, the Department of Human Services (DHS) filed a "Notice of Potential Mootness" to alert us that the juvenile court had entered a judgment terminating jurisdiction. Mother and father separately responded, arguing that the judgment terminating jurisdiction does not moot this appeal because, if this court dismisses parents' appeals without deciding the case on the merits, the persistence of the initial jurisdictional determination will (1) limit father's access to, and contact with, his children; (2) have collateral effects on mother's particular employment prospects as a licensed school psychologist, school counselor, and mental-

1 I. BACKGROUND

2 Mother and father have been in a relationship since approximately 2008.  
3 Their two sons, S and H, were born in 2010 and 2012, respectively. Father is a  
4 commercial fisherman who regularly is away from home for periods of approximately  
5 two months. Mother has advanced degrees in counseling and psychology and, before  
6 having children, worked as a mental-health counselor, a school counselor, and a school  
7 psychologist. She stopped working outside the home at some point after her children  
8 were born.

9 When H was approximately three weeks old, he suffered his first injury  
10 while in father's care: a broken femur. According to father, the injury occurred while  
11 father was holding H in one arm and reaching up for a bottle for H with the other arm. H  
12 squirmed out of father's grasp, and father caught H by the leg as he fell, causing the  
13 child's leg to break. Father took H to the emergency room, where doctors treated the  
14 break with a Pavlik harness. Although long-bone injuries are generally concerning for  
15 child abuse in nonambulatory children under the age of 14 months, the emergency room  
16 doctors thought that father's report of how the injury occurred seemed consistent with the  
17 injury and did not suspect child abuse at the time.

---

health counselor; (3) affect any future investigation of the children's circumstances; and (4) result in continued and profound social stigma. Consistent with the decisions in *Dept. of Human Services v. G. D. W.*, 353 Or 25, 32, 292 P3d 548 (2012), and *State ex rel Juv. Dept. v. L. B.*, 233 Or App 360, 363-65, 226 P3d 66 (2010), we agree with parents that this appeal is not moot. In particular, we note that the judgment terminating jurisdiction incorporates restrictions on father's access to children and parenting time. At a minimum, were we to rule in favor of parents on this appeal, that ruling could provide a basis for removing those restrictions.

1           A little over three and one-half months later--six days after father had  
2 returned home after being away for work for almost three months--H suffered his second  
3 injury while in father's care. H had received vaccinations several days earlier and had  
4 been vomiting periodically since their administration. After one episode of vomiting,  
5 father took H upstairs to clean and change him. H stopped breathing while father was in  
6 the process of changing him. Father called to mother, who was in a different room at the  
7 time, for assistance. Mother contacted 9-1-1; father began administering CPR to H.

8           H was taken to the emergency room and later admitted into intensive care.  
9 Brain imaging tests revealed that H was suffering from bilateral subdural hematomas. An  
10 ophthalmological exam revealed that H also was suffering from significant bilateral  
11 retinal hemorrhages. H experienced seizures in the days after he was admitted to the  
12 hospital.

13           Because H's presentation at the hospital was indicative of nonaccidental  
14 trauma, the hospital alerted its CARES team of the need to assess whether H's injuries  
15 resulted from abuse. Dr. Copeland, a child-abuse pediatrician for CARES Northwest,  
16 was assigned to evaluate H's case. After reviewing H's records, and consulting with the  
17 doctors involved in H's treatment, she determined that that H was suffering from an acute  
18 subdural hemorrhage, brain injuries, and retinal hemorrhages. The particular pattern of  
19 H's retinal hemorrhages was consistent with severe trauma. Combined with the evidence  
20 of the subdural hematomas, the evidence of the retinal hemorrhages was "indicative of a  
21 severe inflicted injury," particularly in "a young, nonmobile infant with no other available

1 history to explain those findings." The fact that H's status had deteriorated suddenly  
2 further indicated to Copeland that H's condition was the result of an inflicted injury.

3           Concerned that H had been abused and by parents' failure to acknowledge  
4 that abuse, the Department of Human Services (DHS) petitioned for jurisdiction over S  
5 and H on the ground that their condition and circumstances endangered them. The  
6 children were placed in the temporary custody of DHS, and mother's parents moved in  
7 with parents to serve as safety service providers for the children pending the outcome of  
8 the jurisdictional trial.

9           At the jurisdictional trial, mother and father both denied that father had  
10 injured H. Mother testified that, even though father had assaulted her in the past, she did  
11 not believe that father had the capacity to injure a child and did not believe that father  
12 injured H, and that nothing except an admission by father would cause her to change her  
13 mind about the source of H's injuries. She further testified that, if, at the close of trial, the  
14 court determined that DHS had not established that jurisdiction was warranted, she  
15 anticipated that the family's life would be the same, except that her parents would not be  
16 living with them.

17           The trial consisted in large part of competing testimony from doctors  
18 regarding the source of H's injuries. Among other witnesses, DHS called Dr. Shelak,  
19 who was working in the pediatric intensive care unit at the time that H was admitted with  
20 the brain injury; Dr. Elia, the family's primary pediatrician until a few months before  
21 trial; Copeland; and Dr. Achterman, the orthopedic surgeon who had treated H in

1 connection with the femur fracture. Shelak testified that, in her opinion, H's injury  
2 resulted from "an acute event in some period of hours before his presentation."

3 Elia testified that, based upon his review of the records of H's  
4 hospitalization, and on his own training and experience, he "agree[d] with the diagnosis  
5 of abusive head trauma." Elia also testified that, after his injury, H "had multiple  
6 regressions in developmental skills." Specifically, H lost the ability to eat; lost his head  
7 and neck strength, which had been good before the injury; and, although he continued to  
8 react to neurological stimulation, H stopped seeking out such interactions. Before his  
9 injury, H was developmentally on track in all respects; afterwards, he was not.

10 Copeland testified that she had concluded to a reasonable degree of medical  
11 certainty that H's injuries resulted from "a significant inflicted injury." Apparently in  
12 anticipation of parents' defense theory, Copeland also testified as to why other possible  
13 explanations for H's injury, including a chronic subdural hematoma and the blood  
14 disorder known as Von Willebrand's Disease, could not account for H's condition, given  
15 H's particular medical history.

16 Achterman testified that, at the time that he had treated H's femur fracture,  
17 he had thought that father's explanation of the injury was "viable." Achterman testified  
18 that his opinion had changed, however, as a result of H's subsequent injuries. He  
19 explained that, "in my experience of 30 plus years, when you have two events like that,  
20 the likelihood that it is not nonaccidental trauma is minuscule," particularly where both  
21 injuries occurred only months apart while H was in father's care.

1 Mother and father<sup>2</sup> called Dr. Recht, a pediatric hematologist; Dr. Karr, a  
2 pediatric ophthalmologist; and Dr. Green, a doctor who specializes in children's  
3 disorders, each of whom evaluated or treated H following his brain injury. In addition,  
4 mother and father presented expert testimony regarding the cause of H's brain injury from  
5 Dr. Jollo.

6 Recht testified that H had a blood disease known as Von Willebrand's  
7 Disease, which causes him to bleed longer than other people when he is injured. Recht  
8 opined that that disease would need to be taken into account in assessing whether H's  
9 injuries resulted from abusive head trauma. On cross-examination, however, Recht  
10 acknowledged that it would be "vanishingly rare" for Von Willebrand's Disease to  
11 explain H's condition, given his belief that H suffered from a "less severe" form of the  
12 disease. Karr similarly testified that blood disorders, including leukemia, can cause  
13 retinal hemorrhages. However, on cross-examination, Karr conceded that, given the  
14 particular pattern of H's retinal hemorrhages, and assuming that H did not, in fact, have  
15 leukemia, it was "probably greater than 90 percent likely" that the cause of H's  
16 hemorrhages was abusive head trauma.

17 Green testified that H was a medically vulnerable or fragile child, and that,  
18 in his opinion, it was possible that H's injuries resulted from H's vulnerabilities rather

---

<sup>2</sup> The transcript identifies mother as the person who called Recht, Karr, Green, and Jollo. However, parents were unified in their presentation of their theory of defense below--that father was not the source of H's injuries--and it appears that Recht, Karr, Green, and Jollo were all called to support that theory. Thus, we refer to them as parents' witnesses, not just as mother's witnesses.



1 than from abuse. In particular, Green opined that, given H's vulnerabilities, H's  
2 hematomas and retinal hemorrhages possibly resulted from insignificant or accidental  
3 trauma. According to Green, H's injuries could have resulted from CPR or even from the  
4 vomiting that H experienced in the days before his injury.

5           Finally, Jollo testified that he had reviewed H's medical records, as well as  
6 mother's prenatal records related to her pregnancy with H. Jollo testified that there is  
7 skepticism in the medical community as to whether the presence of acute subdural  
8 hematomas and retinal hemorrhages are indicative of abusive head trauma. He also  
9 testified that, based on his review of the medical records associated with H, he had  
10 concluded that H suffered from chronic subdural hematomas and hygromas that had been  
11 present at least since birth, and that an acute cardiovascular event possibly had led to the  
12 acute subdural hematomas and retinal hemorrhages identified when H was hospitalized.  
13 Jollo testified that he could not be certain what caused the acute bleeding, but that it was  
14 also possible that the vaccinations triggered it. Although Jollo could not exclude the  
15 possibility that H's injuries resulted from a traumatic event, including abuse, he thought  
16 that it was more likely than not that H's injuries were the result of H's chronic subdural  
17 hematomas.

18           At the close of trial, the juvenile court found that jurisdiction was  
19 warranted. The court noted that, although mother should be commended for the lengths  
20 to which she had gone to remedy the harm to H as a result of his injury, "we need to all  
21 remember that none of those [lengths] would have been necessary if he hadn't been hurt

1 in the first place." It then found that the evidence established that the children's condition  
2 and circumstances endangered them:

3 "And I think the overwhelming weight of the evidence in this case,  
4 the persuasive evidence in this case by experienced--experienced and  
5 qualified witnesses is that this was a non-accidental injury that occurred  
6 while in the care of parents, more particularly the father, which constitutes  
7 child abuse of [H] and has caused him significant consequences, and that  
8 the children are both at risk because the mother is unable or unwilling to  
9 believe that the children are at risk when with the father."

10 Both parents timely appealed.

## 11 II. STANDARD OF REVIEW

12 Mother and father each request that we review *de novo*. We decline that  
13 request. Although the key factual finding that parents challenge on appeal was central to  
14 the juvenile court's jurisdictional determination, this is not the type of "exceptional" case  
15 in which we should exercise our discretion to displace the juvenile trial court as factfinder  
16 and determine the facts ourselves from a paper record, without the opportunity to observe  
17 the witnesses and their demeanors on the stand. *See Dept. of Human Services v. J. G.*,  
18 260 Or App 500, 502-03, 317 P3d 936 (2014). Accordingly, we review the juvenile  
19 court's factual findings to determine whether those findings are supported by any  
20 evidence in the record and review its legal conclusions for legal error. *Id.* at 504.

## 21 III. ANALYSIS

22 Mother and father first contend that the juvenile court erred by taking  
23 jurisdiction because, in their view, the evidence does not support the juvenile court's  
24 finding that H's brain injury resulted from abuse by father. We disagree. As noted, a

1 number of medical professionals testified that H's injuries resulted from nonaccidental  
2 trauma. Even Karr, the pediatric ophthalmologist called by parents, testified that it was  
3 more than "90 percent likely" that the particular pattern of retinal hemorrhages suffered  
4 by H was caused by abuse. Moreover, the evidence of the circumstances of H's injuries  
5 also supports the finding that H's injuries were caused by father's abuse. In particular, the  
6 facts that (1) H broke his femur shortly after birth while in father's care; (2) father left  
7 shortly thereafter for nearly three months, during which time H did not suffer injuries;  
8 and (3) within a week of father's return, H suffered a traumatic head injury while in  
9 father's care permit the reasonable inference that father caused H's injuries through abuse.

10           Mother next asserts that, even if the juvenile court correctly found that H's  
11 injury resulted from father's abuse, it nonetheless erred in concluding that the children's  
12 circumstances endangered them so as to warrant jurisdiction. She argues that the  
13 evidence shows that she is a skilled, caring, and engaged parent, and that, as a result, S  
14 and H are not in dangerous circumstances. She argues further that the fact that she does  
15 not believe father caused H's injuries is insufficient to permit the conclusion that S and H  
16 are endangered, in the light of the evidence of mother's parenting skills. Again, we  
17 disagree.

18           Whether a child is endangered so as to warrant the exercise of jurisdiction  
19 turns on whether, "under the totality of the circumstances, there is a reasonable likelihood  
20 of harm to the welfare of the child." *Dept. of Human Services v. C. Z.*, 236 Or App 436,  
21 440, 236 P3d 791 (2010) (internal quotation marks omitted). We conclude that that

1 standard is met here. Although the record demonstrates that mother is an engaged and  
2 caring parent, father caused a severe brain injury to H, notwithstanding mother's parental  
3 abilities. Mother nonetheless continues to reside with father, is adamant that father did  
4 not injure H, and is unwilling to accept the medical evidence regarding the source of the  
5 injuries to H. Mother testified that, if DHS were no longer involved in the family's life,  
6 she would continue to believe that father did not harm H, she would be relieved to have  
7 DHS out of the family's life, and the family would "probably function relatively the same  
8 except for my parents wouldn't be there." Those circumstances create a reasonable  
9 likelihood of harm to S and H. As the juvenile court found, because mother does not  
10 believe that father played a role in harming H, she does not perceive the need to take  
11 steps to protect her children from father. That, in turn, creates a reasonable likelihood  
12 that mother will leave S and H unsupervised in father's care, because that is what mother  
13 did before DHS became involved with the family, and that father will again inflict a  
14 significant injury on one of the children--particularly given that, as of the time of trial,  
15 father, like mother, had not acknowledged his own role in H's injuries.

16           Finally, in the alternative to their arguments challenging the merits of the  
17 juvenile court's decision, parents also assert that their lawyers below rendered inadequate  
18 assistance of counsel by not calling a particular expert witness--Dr. Barnes--to testify at  
19 the jurisdictional trial. Parents request that we remand the case to the juvenile court to  
20 permit them to further develop that claim. *See Geist*, 310 Or at 192 n 16. In support of  
21 that claim, parents have submitted extra-record material consisting of declarations from

1 each parent averring that they wanted Barnes to testify at their trial; a declaration from a  
2 lawyer who has expertise handling cases involving infants with injuries that resemble  
3 those suffered by H stating that, in her opinion, Barnes's testimony would be helpful; and  
4 a letter to father's lawyer from Barnes summarizing Barnes's recommendations--  
5 following a review of "available" records associated with H--regarding possible avenues  
6 of investigation as to the causes of H's injuries. DHS opposes parents' request for a  
7 remand, contending that (1) statutory amendments have supplanted any authority that we  
8 had under *Geist* to remand a case for development of a claim of inadequate assistance of  
9 counsel; (2) the statutory right to adequate counsel established by *Geist* does not apply  
10 where, as here, parents have retained their own lawyers; (3) the procedure contemplated  
11 by *Geist* applies only if parental rights are terminated and does not apply at the  
12 jurisdictional stage of a juvenile case; and (4) parents have not shown that their lawyers  
13 performed inadequately by not calling Barnes.

14           We assume without deciding that the statutory amendments identified by  
15 the state have not foreclosed our discretion to remand a case for evidentiary development  
16 of a claim of inadequate assistance of counsel in the manner contemplated by *Geist*. We  
17 also assume without deciding that the right to the adequate assistance of counsel applies  
18 even where a parent's lawyer is retained and that it applies at all stages of a juvenile case,  
19 including the jurisdictional stage. We nonetheless decline to exercise our discretion to  
20 remand the case here.

21           In *Geist*, the Supreme Court cautioned that a court should authorize an

1 evidentiary hearing on a claim that counsel was inadequate for failing to call a particular  
2 witness in a juvenile case "if ever, only when a parent raises a *substantial* question"  
3 concerning the issue. *Id.* (emphasis in original). The court further explained what a  
4 parent would have to show to raise a "substantial" question that would warrant an  
5 evidentiary hearing:

6 "Before authorizing an evidentiary hearing, a court doubtless would require  
7 a threshold showing of specific allegations, including the names of  
8 witnesses to be called, the expected substance of their testimony, and an  
9 explanation of how that testimony would show that trial counsel was  
10 inadequate."

11 *Id.*

12 Here, parents' extra-record submissions to us do not reveal what the  
13 expected substance of Barnes's testimony at trial would have been; those submissions  
14 show only that Barnes had conducted a preliminary evaluation of the case, that Barnes  
15 concluded that the images that he reviewed were not specific to nonaccidental trauma and  
16 that there were other potential causes of H's injuries, and that Barnes recommended that  
17 those other potential causes be further evaluated by clinical experts. Absent a clearer  
18 picture of what, exactly, Barnes's testimony would have contributed to the trial--including  
19 a clearer picture of what Barnes would have said if asked to opine on the likelihood that  
20 H's injuries resulted from abuse--we are not persuaded that there is a "substantial  
21 question" as to whether parents' lawyers performed inadequately by not calling Barnes.  
22 Accordingly, we deny parents' request to remand the case for an evidentiary hearing on  
23 their claim of inadequate assistance of counsel. Our denial of parents' request is without

1 prejudice to parents' ability to renew the request in the juvenile court.<sup>3</sup>

2 Affirmed.

---

<sup>3</sup> DHS argues in its brief, and conceded at oral argument, that parents would be entitled to raise their claim of inadequate assistance of counsel through a motion under ORS 419B.923(1).