IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of D. J. B.,
a Child.
S. H.,
*Appellant.*

Deschutes County Circuit Court
BENDES09;
Petition Number 14JV0194;
A164811 (Control)

In the Matter of B. G.,
a Child.
S. H.,
*Appellant.*

Deschutes County Circuit Court
GEEBLA13;
Petition Number 14JV0194;
A164812

In the Matter of S. H.,
a Child.
S. M. H.,
*Appellant.*

Deschutes County Circuit Court
HENSAY15;
Petition Number 15JV0084;
A164813

Stephen P. Forte, Judge.

Argued and submitted September 26, 2017.

Shannon Storey, Chief Defender, Juvenile Appellate Section, argued the cause for appellant. With her on the brief was Holly Telerant, Deputy Public Defender, Offices of Public Defense Services.

Before Egan, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

EGAN, P. J.

Reversed and remanded.

**EGAN, P. J.**

In this consolidated juvenile dependency case, mother appeals orders of the juvenile court denying her motions to set aside guardianship over her three children. She asserts on appeal that, in light of our decision in *Dept. of Human Services v. S. M. H.*, 283 Or App 295, 388 P3d 1204 (2017), in which we reversed the underlying permanency judgments changing the plan for her children from reunification to adoption, the court was required to grant her motions. As explained below, we agree with mother and reverse and remand.

This case relates to mother's three children, D, B, and S. As stated in our earlier opinion, "D and B have different legal fathers; S has no legal father." *Id*. at 298. At the time of the permanency hearing in March 2016, all three parents were incarcerated. And, at that time, the children had been living with their maternal aunt and uncle for approximately one year. As a result of that hearing, the court entered permanency judgments, over the parents' objections, changing the plan for the children from reunification to guardianship. The parents appealed the permanency judgments, assigning "error to the juvenile court's determination that the Department of Human Services (DHS) made reasonable efforts to make reunification possible as required by ORS 419B.476(2)(a)." *Id.* at 297.

While the appeal was pending, DHS filed petitions for the juvenile court to establish a guardianship and appoint aunt and uncle as the children's legal guardians. Mother filed motions to stay, asserting that she was likely to prevail on appeal because DHS had failed to "provide reasonable efforts to support reunification." She further contended that "all parties and participants would be ill-served by the establishment of a guardianship that might then be swiftly overturned upon reversal." The court denied the motions to stay and, in September 2016, proceeded to hold a hearing on DHS's motions to establish guardianship. At the hearing, mother stipulated to orders appointing aunt and uncle as guardians with the understanding that she was "still appealing the permanency hearing change of plan," but that, "if a guardianship is allowed to stand, certainly

this relative foster placement is [an] appropriate party to act in that capacity." The court heard testimony from aunt and observed that, although there was "an appeal pending about the permanen[cy] plan," the parties did not object to the "orders and judgments that have been presented." The court further informed the parties that it would "be signing the order[s] and judgments" establishing guardianship and, thereafter, it did so.

In January 2017, we reversed the underlying permanency judgments, concluding that the record lacked "sufficient evidence to support the trial court's conclusion that DHS made reasonable efforts within the meaning of" ORS 419B.476(2)(a).[1] *S. M. H.*, 283 Or App at 297. Specifically, we held that there was insufficient evidence to support the juvenile court's determination that DHS made reasonable efforts with respect to mother and, accordingly, the court incorrectly changed the plan away from reunification. Based on that conclusion, we reversed the permanency judgments for all three children and remanded the case to the juvenile court. *Id*. at 311-12.

In February 2017, based on our reversal of the underlying permanency judgments, mother moved under ORS 419B.923 to set aside the guardianship orders and judgments in this case.[2] She also requested a new permanency hearing. Counsel for the state and both fathers supported the relief mother requested, and the children's attorney took no position. The juvenile court, despite our decision reversing the permanency judgments for lack of reasonable efforts, denied mother's motions, stating that "[m]other's remedy is as provided in ORS 419B.368."[3]

---

[1] Under ORS 419B.476(2)(a), if the case plan at the time of the permanency hearing is to reunify the family, at the hearing, the court must determine whether DHS has made reasonable efforts to make it possible for the child to safely return home and whether the parent has made sufficient progress to make reunification possible. Only if there have been reasonable efforts and a lack of sufficient progress may the plan be changed away from reunification.

[2] Under ORS 419B.923(1), the juvenile court "may modify or set aside any order or judgment made by it."

[3] Pursuant to ORS 419B.368(3),

"[t]he court may vacate a guardianship order, return the ward to the custody of a parent and make any other order the court is authorized to make under this chapter if the court determines that:

As noted, mother challenges that decision on appeal. Specifically, mother contends that the juvenile court had no discretion to deny her request to set aside the guardianship judgments because our reversal of the underlying permanency judgments "returned the parties to the status quo ante." (Boldface omitted.) According to mother, under ORS 419B.366, a valid permanency judgment is a legal prerequisite to establishing guardianship.

"We review the denial of a motion to set aside a judgment under ORS 419B.923 for an abuse of discretion." *Dept. of Human Services v. A. D. G.*, 260 Or App 525, 534, 317 P3d 950 (2014) (internal quotation marks omitted). If the court's exercise of discretion is within the range of legally correct choices and produced a legally correct outcome, then the court did not abuse its discretion. *Id.* "We review the underlying legal questions for legal error." *Id.*; *see Dept. of Human Services v. M. H.*, 266 Or App 361, 364, 337 P3d 976 (2014) (we "review the legal questions presented by the parties, underlying the trial court's ruling" on a motion to set "aside a judgment pursuant to ORS 419B.923 for legal error"). In this case, we agree with mother that the juvenile court had no discretion to deny mother's motions to set aside the guardianship judgments.

We begin with mother's contention that the court was required to grant her motions because a valid permanency judgment is a legal prerequisite to establishing a guardianship under ORS 419B.366. In support of her contention, mother relies on both the relevant statutes and our decision in *M. H.*, 266 Or App 361. In *M. H.*, the juvenile court terminated the parents' parental rights while their appeals from an earlier permanency judgment were pending. Based on our later reversal of the underlying permanency judgment, the parents moved to set aside the judgment terminating their parental rights, and the court granted those motions. On appeal, we were presented with the question

"(a) It is in the ward's best interest to vacate the guardianship;

"(b) The conditions and circumstances giving rise to the establishment of the guardianship have been ameliorated; and

"(c) The parent is presently able and willing to adequately care for the ward."

whether it was appropriate to set aside a termination judgment based on the reversal of an underlying permanency judgment. Based on the relevant statutes, we explained that the juvenile court's approval of a permanency plan of adoption is a precondition to the filing of a termination petition. *Id.* at 370-71; *see* ORS 419B.498(3); *see also* *Dept. of Human Services v. W. H. F.*, 254 Or App 298, 306 n 6, 295 P3d 78 (2012), *rev den*, 353 Or 428 (2013) (explaining that the reversal of underlying permanency judgment "would invalidate the subsequent termination judgment").

As in *M. H.*, here, under the relevant statutes, the underlying permanency judgment containing the permanency plan is a prerequisite to the later judgment implementing that plan. That is, as mother correctly points out, a valid plan of guardianship after a permanency hearing is required before a guardianship may be established under ORS 419B.366.

As we have explained, "[o]nce the juvenile court has taken jurisdiction over [a] child, it must conduct permanency hearings at regular intervals based on the child's circumstances[.]" *M. H.*, 266 Or App at 365. "When the permanency plan at the time of a permanency hearing is reunification, the juvenile court is authorized to change the plan away from reunification only if DHS proves that (1) it made reasonable efforts to make it possible for the child to be reunified with his or her parent and (2) notwithstanding those efforts, the parent's progress was insufficient to make reunification possible." *S. M. H.*, 283 Or App at 305; *see* ORS 419B.476(2)(a). The court must enter an order within 20 days of the hearing that includes the "court's determination of the permanency plan for the ward that includes whether" and, in the case of a plan of guardianship, when "[t]he ward will be referred for establishment of legal guardianship." ORS 419B.476(5)(b)(C). Furthermore, if the court determines that the permanency plan should be guardianship, the court's order must include "the court's determination of why neither placement with parents nor adoption is appropriate." ORS 419B.476(5)(e).

ORS 419B.366, in turn, addresses the establishment of a guardianship. Specifically, it provides for the filing

of a "motion to establish a guardianship." ORS 419B.366(1). ORS 419B.366(5) further provides:

> "*If the court has approved a plan of guardianship* under ORS 419B.476, *the court may grant the motion for guardianship* if the court determines, after a hearing, that:
>
> "(a) The ward cannot safely return to a parent within a reasonable time;
>
> "(b) Adoption is not an appropriate plan for the ward;
>
> "(c) The proposed guardian is suitable to meet the needs of the ward and is willing to accept the duties and authority of a guardian; and
>
> "(d) Guardianship is in the ward's best interests. In determining whether guardianship is in the ward's best interests, the court shall consider the ward's wishes."

(Emphasis added.) Thus, once the court has made all the determinations required pursuant to ORS 419B.476 to change the plan from reunification to guardianship, at a hearing concerning the establishment of a guardianship, the court is called upon to make additional determinations before granting the motion for guardianship. In any event, however, ORS 419B.366(5) makes clear that the court may *only* grant a motion for guardianship *if* the court has "approved a plan of guardianship under ORS 419B.476." In other words, a permanency plan of guardianship is a prerequisite to the establishment of a guardianship under ORS 419B.366.

Here, as discussed, the underlying permanency judgment was reversed on appeal because there was "insufficient evidence to support the juvenile court's determination that DHS made reasonable efforts with respect to mother." *S. M. H.*, 283 Or App at 311. In the absence of such reasonable efforts, the juvenile court could not properly change the permanency plan from reunification to guardianship. And, in light of our reversal on those grounds, there was no validly "approved plan of guardianship" to support the orders and judgments establishing the guardianship. ORS 419B.366(5). Under those circumstances, the court had no discretion to deny mother's motions to set aside the guardianship judgments. *See M. H.*, 266 Or App at 373 (our holding

invalidating underlying permanency judgments required the juvenile court to grant motion under ORS 419B.923 to set aside termination judgments). Accordingly, the court erred.[4]

Reversed and remanded.

[4] Mother also contends that the trial court was required to "change the permanency plans for" her children "from guardianship back to reunification." However, we need not separately address that contention. As discussed, our decision in *S. M. H.*, reversed the judgment changing the permanency plan to guardianship based on the lack of reasonable efforts. That is, there was no valid change of plan away from reunification. Furthermore, on remand, the juvenile court will need to hold a permanency hearing to determine the appropriate plan for the children in light of current circumstances. *See M. H.*, 266 Or App at 371-72 ("ORS 419B.470—requiring multiple permanency hearings—and ORS 419B.476(5)—requiring statutory determinations to be based on current circumstances—when read in conjunction, require the juvenile court to make the statutory determinations after *each* permanency hearing, thus ensuring that the most recent permanency plan reflects existing circumstances at the time of the most recent hearing." (Emphasis in original.)).