

FILED: May 15, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

DANIEL E. STEWART,
Petitioner-Respondent,

and

MELANIE L. STEWART,
Respondent-Appellant.

Washington County Circuit Court
C110801DRA

A150549

Andrew Erwin, Judge.

Submitted on March 06, 2013.

Katrina R. Saint Marie filed the brief for appellant.

No appearance for respondent.

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

PER CURIAM

Reversed and remanded.

1 PER CURIAM

2 In this dissolution case, wife appeals, asserting that the trial court erred in
3 denying wife all parenting time without making the finding that parenting time would
4 endanger the health and safety of the parties' two minor children, as required by ORS
5 107.105(1)(b).¹ At the time of the dissolution hearing, wife was serving a prison
6 sentence that was expected to continue for 14 years. In the form general judgment, the
7 trial court made the following finding:

8 "Wife shall not have parenting time because ~~this would endanger the~~
9 ~~health and safety of the children~~ wife is currently serving a Measure 11
10 prison sentence. She will be incarcerated for the next 14 years. Her crimes
11 include Robbery I & Assault I."

12 (Strikethrough in original.)

13 The trial court did not make the required finding that visitation "would
14 endanger the health and safety" of the parties' two minor children. Rather, it crossed out
15 that language and inserted its own handwritten explanation that, because wife was
16 serving a prison sentence, she was denied all parenting time. The trial court erred in
17 failing to engage in the necessary inquiry as to whether parenting time with wife would
18 endanger the health and safety of the children.

19 To the extent that the general judgment suggests that wife's incarceration
20 necessarily endangers the health and safety of the children, our case law is to the

¹ ORS 107.105(1)(b) provides that "the court may deny parenting time to the noncustodial parent under this subsection *only* if the court finds that parenting time would endanger the health or safety of the child." (Emphasis added.)

1 contrary. We have held that "a parent's incarceration does not invariably require that
2 visitation be denied." *Harris v. Burns*, 137 Or App 355, 359, 904 P2d 648 (1995), *rev*
3 *den*, 322 Or 644 (1996). "Each case must be decided on its own merits and not on the
4 basis of a policy not to allow children to visit their parents at the penitentiary." *State ex*
5 *rel Juv v. Clampitt/Hale*, 18 Or App 12, 16, 523 P2d 594 (1974).

6 Further, we note that the trial judge, in his concluding remarks, indicated
7 that he was going to "take [himself] out of it" and let husband "make the decision for
8 what's going to be in his best interest." It is the court's task, not husband's, to develop a
9 parenting plan, including appropriate quality parenting time, in the best interests of the
10 children. *See* ORS 107.105(1)(b); *see also Hickam and Hickam*, 223 Or App 302, 196
11 P3d 63 (2008) (holding that it was plain error for the trial court to establish a schedule of
12 parenting time without making findings as required by ORS 107.105(1)(b) and instead
13 leaving the matter to a parenting coordinator, and exercising discretion to correct the
14 error).

15 Reversed and remanded.