



# 2011 Annual Training Conference



## Appellate Decisions that Impact Permanency





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## Michael Livingston, Oregon Judicial Department Juvenile Law Staff Counsel

Michael C. Livingston, began his work for the Oregon Department of Justice in 1984 in the General Counsel Division, moved to the Appellate Division in 1987, and returned to the General Counsel Division in December 2007. He retired from the Department of Justice in June 2008. For a number of years, he administered the Appellate Division's termination-of-parental-rights case load, and from 1999 to 2005, he served as a member of the Oregon Law Commission's Juvenile Code Revision Workgroup. He is the author of the chapter on Appeals in *Juvenile Law* (Oregon CLE 2007). In 2006 and 2007, he worked with Chief Judge David Brewer of the Court of Appeals and Judy Henry of the Appellate Settlement Conference Program and others to implement the termination-of-parental-rights appellate court mediation pilot project. From September 2008 to January 2011, he served as a Circuit Court Judge Pro Tem and referee in the Marion County Juvenile Court. He is now Juvenile Law Staff Counsel for the Juvenile Court Programs office of the Oregon Judicial Department.

## Inge Wells, Senior Assistant Attorney General

Inge Wells graduated from Portland State in 1981, and the University of Washington School of Law in 1987. She was in private practice until 2007, handling primarily domestic relations cases and civil appeals. Most of her appellate practice involved representing parents in juvenile dependency cases. She joined the Appellate Division at DOJ in 2007, and is one of two lead attorneys for the juvenile dependency caseload.

## Stephanie Slayton, CRB Field Staff

Stephanie Slayton was admitted to the Oregon Bar in 1989. She has been with the Citizen Review Board since 1992. Prior to that she was in private practice as an attorney and mediator, with a special interest in children and the law. She was a foster parent, an adoptive parent and now is a grandparent.

## Walt Gullett, CRB Field Staff

Walt was born in San Diego, but for some unknown reason left the uncertain weather of Pacific Beach and La Jolla for places like Healy, Alaska, Jordan Valley, Oregon and Silverton, Oregon. Walt has degrees from Sand Diego State, Southern Oregon University, University of Oregon, and Willamette Law School. He has enjoyed working as a teacher, coach, curriculum coordinator, principal, superintendent of schools, attorney, and CRB Field Manager. Walt and his wife, Jane, have two grown sons, well grown is a relative term. Walt is very proud of his sons and his work with the wonderful CRB Volunteer Board Members.

## APPELLATE DECISIONS THAT AFFECT PERMANENCY

Michael C. Livingston  
Juvenile Law Staff Counsel  
Oregon Judicial Dept.

Inge D. Wells  
Senior Assistant Attorney General  
Oregon Department of Justice

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## What is the CRB's responsibility?

ORS 419A.116(1):

- Review each case and make findings and recommendations.
- Were reasonable efforts made prior to placement in substitute care to prevent or eliminate the need for removal of the child from the home?
- If the case plan is to reunify the family, *were reasonable [or active in ICWA cases] efforts made to make it possible for the child to safely return home?*
- *Has the parent made sufficient progress* to make it possible for the child to safely return home?
- If the case plan is something other than to reunify the family, have reasonable efforts been made to place the child in a timely manner in accordance with the plan?
- The child's health and safety are the paramount concerns.

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## What are reasonable efforts?

*State ex rel SOSCF v. Frazier*, 152 Or App 568, 955 P2d 272 (1998)

*State ex rel DHS v. R.O.W.*, 215 Or App 83, 168 P3d 322 (2007)

The type and sufficiency of efforts that the state is required to make and whether the types of actions it requires parents to make are reasonable depends on the particular circumstances of each case.

*Dept. of Human Services v. K.C.J.*, 228 Or App 70, 207 P3d 423 (2009)

"Active efforts" "impose[s] on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently," instead, the agency must assist the client through the steps of a reunification.

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### What services can be ordered?

*State ex rel Juv. Dept. v. G.L.*, 220 Or App 216, 185 P3d 483 (2008)

Court-ordered services must bear a "rational relationship to the jurisdictional findings."

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- A parent is incarcerated
- Paternity has not been established
- A parent is unable to afford the cost of treatment
- Adequacy of services/progress

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### Reasonable Efforts: Incarcerated Parent

*State ex rel Juv. Dept. v. Williams*, 204 Or App 496, 130 P3d 801 (2006)

Incarceration of a parent, without more, does not excuse DHS from making reasonable efforts.

*State ex rel DHS v. H.S.C.*, 218 Or App 415, 180 P3d 39 (2008)

"Mere detention of the parent does not excuse the state from making reasonable efforts by inquiry and arranging the services that might be available under the circumstances."

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### Reasonable efforts when paternity has not been established

*State ex rel Juv. Dept. v. C.D.J.*, 229 Or App 160, 211 P3d 289 (2009)

"DHS has no obligation to offer services to a putative legal father who has not attempted to assume any of the responsibilities of parenthood."

The agency's efforts to establish paternity may constitute reasonable efforts to make possible a child's safe return home, because paternity is a "necessary predicate" to providing services.

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### Responsibility for cost of treatment

*State ex rel SOSCF v. Burke*, 164 Or App 178, 990 P2d 922 (1999)

A "realistic reunification plan must provide an opportunity for the parent to complete the required treatment successfully"

ORS 419B.389

A parent who believes or claims that financial, health or other problems will prevent or delay the parent's compliance with an order of the court must inform the court of the relevant circumstances as soon as reasonably possible.

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### Adequacy of services

*State ex rel DHS v. Shugars*, 208 Or App 694, 145 P3d 354 (2006)

Offering services for only four months prior to the permanency hearing insufficient to enable parents to "apply and perfect newly learned parenting skills."

*State ex rel DHS v. E.K.*, 230 Or App 63, 214 P3d 58 (2009)

The period of time during which DHS provided services was "sufficient in length to afford a good opportunity to assess parental progress."

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## Sufficient Progress

*State ex rel DHS v. S.L.*, 211 Or App 362, 155 P3d 73 (2007)

"Mere participation in services, however, is not sufficient to establish adequate progress toward reunification."

*State ex rel DHS v. T.F.*, 217 Or App 116, 175 P3d 976 (2007)

The parents' "notable progress was not of sufficient duration."

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**APPELLATE LAW  
“TERMINATED:  
COURT DECISIONS THAT  
IMPACT PERMANENCY”**

*Legal Principles from Appellate Decisions that  
Impact CRB Case Review*

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AGENDA

- Appellate Court Cases
- Application to CRB Reviews
- Summary and Next Steps



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**LEGAL PRINCIPLES FROM  
APPELLATE DECISIONS THAT AFFECT  
CRB CASE REVIEW**

Michael Livingston and Inge Wells



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APPLICATION TO CRB  
FINDINGS AND RECOMMENDATIONS

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TERMINATION

The rights of a parent may be terminated if the court finds that the parent's conduct or condition is seriously detrimental to the child and integration of the child into the home of the parent is improbable be within a reasonable time.

ORS 419B.504

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CONSIDERATIONS IN TERMINATION

- Reasonable Efforts by DHS  
*(finding #4)*
- Fitness of the Parent **and**  
*(finding #6 and #9)*
- Best Interest of the Child  
*(finding #9)*

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CASE EXERCISE

**Small Group Work**

- Read the scenario
- Discuss the case
- Make findings #4 and #9
- Make two recommendations

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FINDING #4

*"DHS Made Reasonable Efforts to Provide Services to Make it Possible for the Child to Safely Return Home"*

- Efforts must bear a rational relationship to the basis of jurisdiction

ORS 419B.343(1)(a)

- Efforts must be appropriate and timely

OAR 413-040.0010(1)(g)(B)

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**#4 REASONABLE EFFORTS**

What is reasonable is case specific:

- Timely services
- Payment of services
- Incarcerated parent
- Psychological evaluations

Recommendations:

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FINDING #9

***“The Permanency Plan is the Most Appropriate Plan for the Child”***

Consider the ability of the parent

***and***

the best interests of the child

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FINDING #9

**PARENT:**

- o Present ability
- o Reasonable likelihood of change
- o Substantial and sustained efforts to change
- o Totality of circumstances

**CHILD:**

- o Need for Permanence
- o Structure and stability
- o Attachment and bonding
- o Developmental level/mental health

**Recommendations:**

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**“TERMINATED: COURT DECISIONS THAT IMPACT PERMANENCY”**

- DHS must make reasonable efforts
- Parent must be able to adequately parent within a reasonable time
- Adoption must be in the best interest of the child

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LEGAL PRINCIPLES ARE SIGNIFICANT FOR CHILDREN AND/OR FAMILIES INVOLVED IN FOSTER CARE

- o Defines *reasonable efforts* and services
- o Defines *ability to parent* and progress
- o Further defines the role of DHS and best practice
- o Provides focus to CRB findings and recommendations




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IMPORTANT QUESTIONS TO ASK/CONSIDER IN REVIEWS:

- Is DHS making *reasonable efforts* to address this particular parent's needs?
- Is the parent *presently able to parent*?
- Will the parent be able to parent within a *reasonable time* for the child?
- What is in the *best interests* of the child?




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RECOMMENDATIONS BOARDS SHOULD CONSIDER

- o 1. "DHS immediately *put services in place to address the parent's particular circumstances.*"
- o 2. "DHS immediately seek court endorsement of a plan of adoption as the parent will not be able to parent within a reasonable time and adoption is in the child's best interests."




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**STRATEGIES FOR IMPLEMENTATION**

- 1. SHARE THESE LEGAL PRINCIPLES with BOARD MEMBERS and DHS
- 2. APPLY LEGAL PRINCIPLES IN REVIEWS

*Increase Parties' Awareness in Reviews*

↓  
*Improve DHS Practice*

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*Improve Outcomes for Children*

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“IF ALL BOARDS

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THEN CHILDREN AND FAMILIES IN  
THE FOSTER CARE SYSTEM WILL  
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## **APPELLATE LAW CASE EXERCISE**

Basis of Jurisdiction: The mother's substance abuse interferes with her ability to adequately parent; Crystal's father has a history of domestic violence which impairs his ability to safely parent; Bobby's father is incarcerated and unavailable to parent.

History: At the time of the first CRB, six months ago, the mother had completed a drug and alcohol assessment, started treatment and then relapsed. She was just about to start treatment services again. She was not visiting consistently and was homeless. Crystal's legal father had only recently been located. Bobby's legal father remained incarcerated. He had had some written contact with Bobby. The letters are screened by the caseworker. The plan was return to parent and the board made a "No" finding regarding each parent's progress.

### **TODAY'S CRB (4/09/11)**

At today's review, DHS reported that Crystal, age 9, and Bobby, age 5, have made a lot of progress though they continue to display some anxiety. The caseworker attributes this primarily to the consistency in the foster home. They continue in counseling. The children are reported to be bonded to the foster parent and the foster parent is available as a long term placement. A relative search is ongoing and no relative resources have been identified to date.

DHS referred the mother for a drug and alcohol assessment and individual counseling. DHS asked the mother to submit to random UA's. DHS referred Crystal's father for domestic violence treatment. DHS implemented Action Agreements with the mother and Crystal's father. DHS also offered them bus passes, and referred them to low income housing programs. DHS has asked the mother to participate in a psychological evaluation and a referral was made. DHS has had no contact with Bobby's father. Reports state that his release date is now 2012.

DHS reported the mother entered residential treatment as recommended. She stayed there about one month and then left. Her whereabouts were unknown for months. She then resurfaced and has been in outpatient treatment for the last two months. Her UA's have been clean. She has weekly visits. DHS would like the mother to participate in a psychological evaluation. Her attorney objects and notes that mental health issues are not a basis of jurisdiction. The mother's attorney also noted that treatment reports are positive and that the mother is visiting consistently with no parenting problems. DHS noted the mother's long history of completing treatment programs and then relapsing is of concern.

DHS reported that Crystal's father, Mr. Smith, is out of compliance because he is not in domestic violence treatment. Mr. Smith's attorney reported that Mr. Smith started domestic violence treatment but did not have the money to continue and DHS has refused to pay for his treatment. He has also missed visits. Mr. Smith's attorney reported that the father was consistent in visiting until he recently obtained a part-time job which conflicts with the scheduled visit time. The attorney noted that what little money the father is making has gone to housing and back child support. The attorney noted that

DHS expects the father to have appropriate housing, participate in services and treatment and also work. The father stated that if he misses work he will be fired. He asks that services and visits be scheduled around his work hours.

Bobby's father, Mr. Taylor, continues to write to Bobby in care of the caseworker. His letters have been appropriate and all have been shared with Bobby. Mr. Taylor's attorney noted that his client is participating in some services available to him while incarcerated. His release date may change due to good behavior. DHS has no information regarding Mr. Taylor's treatment and has not had direct contact with him.

The children have been in care for a total of 12 months out of the past 22 months. The children's attorney reported that Crystal wants to go home. DHS questions how realistic the plan of return to parent is and will soon staff the case to consider implementation of the concurrent plan of adoption.

**Findings:**

4. DHS **made/has not made** reasonable efforts to provide services to make it possible for the children to safely return home.

9. The permanency plan **is/is not** the most appropriate plan for the child.

**RECOMMENDATIONS:**

# **APPELLATE CASE LAW SUMMARIES**

**Significant Appellate Court Decisions in  
Juvenile Court Dependency Cases  
2007 and 2011**

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# Appeals from Judgments Finding or Denying Jurisdiction

1. *Dept. of Human Services v. C.Z.*, 236 Or App 436, 236 P3d 791 (2010) (state failed to prove that mother’s use of marijuana on one occasion, out of the home and out of the presence of the children, was sufficient to support juvenile court jurisdiction under ORS 419B.100(1)(c)).....1
2. *Dept. of Human Services v. K.L.R.*, 235 Or App 1, 230 P3d 49 (2010) (holding that: (1) requiring an admission of abuse as a condition of reunification violates a parent’s Fifth Amendment rights; (2) terminating parental rights based on parent’s failure to comply with a juvenile court order to engage in meaningful therapy, perhaps in part because the parent’s failure to acknowledge abuse prohibits meaningful therapy, does *not* violate the parent’s Fifth Amendment rights; and (3) granting “use” immunity from criminal prosecution is a necessary condition to compelling potentially incriminating statements as an inducement for full cooperation and disclosure in juvenile court dependency proceedings).....1
3. *State v. J.G.*, 233 Or App 616, 227 P3d 1181 (2010) (accepting state’s concession that, under ORS 419B.100(1)(c), an allegation that father had history of assaultive behavior, without more, is insufficient to establish a basis for jurisdiction).....2
4. *State ex rel Juv. Dept. v. N.W.*, 232 Or App 101, 221 P3d 174 (2009), *rev den*, 348 Or 291 (2010) (taken together, allegations that mother used controlled substances and repeatedly allowed her children to come into contact with untreated sex offenders, if proven, are sufficient to establish dependency jurisdiction).....3
5. *State ex rel Dept. of Human Services v. D.T.C.*, 231 Or App 544, 219 P3d 610 (2009) (state failed to prove that father’s use of alcohol and his failure to follow through with recommended treatment endangered his children’s welfare).....3
6. *State v. S.M.P.*, 230 Or App 750, 217 P3d 260 (2009) (where the state proved by a preponderance of the evidence that child had been physically abused, juvenile court erred in dismissing the dependency petition, notwithstanding that the state did not prove causation or that mother was responsible for the abuse).....5

7. *State ex rel Juv. Dept. v. S.A., 230 Or App 346, 214 P3d 851 (2009)* (allegation that the father “has a history of substance abuse, which if active, would endanger the welfare of the child” does not state a ground for dependency jurisdiction under ORS 419B.100).....5
8. *G.A.C. v. State ex rel Juv. Dept., 219 Or App 1, 182 P3d 223 (2008)* (reversing dismissal of petitions alleging physical abuse).....6

## **Appeals from Permanency Judgments**

9. *Dept. of Human Services v. H.R., --- Or App ---, --- P3d --- (March 9, 2011)* (adoption and placement with a fit and willing relative are separate and distinct permanent plans).....7
10. *Dept. of Human Services v. S.T., 240 Or App 193, --- P3d --- (2010)* (is “open adoption” a permanency plan?).....8
11. *State of Oregon v. L. C., 234 Or App 347, 228 P3d 594, rev allowed, 349 Or 172 (2010), rev dismissed --- Or --- (February 3, 2011)* (reversing permanency judgment changing permanent plan from APPLA to adoption because the record showed that it was improbable that a suitable adoptive placement would be found).....10
12. *State ex rel Department of Human Services v. E. K., 230 Or App 63, 214 P3d 58, rev den 347 Or 348 (2009)* (affirming permanency judgments changing case plans for four of the mother’s six children where, notwithstanding reasonable efforts by DHS and the mother’s access to community resources, the mother’s deficiencies continue to prevent her from being able to adequately supervise her children or meet their psychological and emotional needs).....11
13. *State ex rel Department of Human Services v. N. S., 229 Or App 151, 211 P3d 293 (2009)* (reversing permanency judgment changing plan to guardianship).....12

14. **State ex rel Juv. Dept. v. K. L., 223 Or App 35, 194 P3d 845 (2008)** (the juvenile court erred in denying DHS’s request for a 90-day continuance of return-to-parent case plan, even though granting the request would continue the child’s out-of-home placement beyond the 15-out-of-22-months time line under ORS 419B.498(1)(a)).....13

15. **State ex rel Juv. Dept. v. L. V., 219 Or App 207, 182 P3d 866 (2008)** (reversing permanency hearing judgment because, on *de novo* review, the record was not sufficient to show that the father was not able to care for the child at the time of the hearing).....14

16. **State ex rel Dept. of Human Services v. T. F., 217 Or App 116, 175 P3d 976 (2007)** (affirming permanency judgment changing plan from reunification to adoption and observing that record did not support termination of the parents’ rights).....16

## **APPEALS FROM TERMINATION-OF-PARENTAL-RIGHTS JUDGMENTS**

17. **Dept. of Human Services v. T.C.A., 240 Or App 769, --- P3d --- (2011)** (reversing judgments terminating mother’s rights to two children where state failed to prove by clear and convincing evidence that it was improbable that the children could be integrated into mother’s home within a reasonable time).....17

18. **Dept. of Human Services v. D.M.T., 239 Or App 127, 243 P3d 836 (2010), rev den 349 Or 654 (2011)** (affirming judgment terminating parental rights of a father convicted of encouraging child sexual abuse who was prohibited by the conditions of his post-prison supervision from providing a home for the child).....19

19. **State ex rel Dept. of Human Services v. L.S., 232 Or App 1, 220 P3d 457 (2009)** (although mother’s health issues and history with DHS are of some concern, given the significant improvements in mother’s health, DHS failed to prove by clear and convincing evidence that, at the time of trial, she was unfit for purposes of ORS 419B.504).....22
20. **State ex rel Juv. Dept. v. S.W., 231 Or App 311, 218 P3d 558, rev den, 347 Or 446 (2009)** (juvenile court did not err in terminating mother’s parental rights, because the state proved that mother’s mental health problems rendered her presently unfit, she would require at least another year of DBT therapy, that therapy would not resolve all of her problems, DHS’s efforts were reasonable, and termination was in the child’s best interests).....23
21. **State ex rel Dept. of Human Services v. A.L.S., 228 Or App 700, 209 P3d 817 (2009)** (termination of parental rights warranted where, among other things, the mother remains addicted to alcohol, the child has multiple special needs and requires a stable placement immediately, and a disruption of the child’s bond with the foster family would result in a regression in her development).....24
22. **State ex rel Dept. of Human Services v. R.T., 228 Or App 645, 209 P3d 390 (2009)** (reversing judgment terminating parental rights) .....25
23. **State ex rel Dept. of Human Services v. K.C.J., 228 Or App 70, 207 P3d 423 (2009)** (holding that, in an ICWA case, each finding required to support termination of a parent’s rights must be proved beyond a reasonable doubt, and construing “active efforts”).....25
24. **State ex rel DHS v. A.T., 223 Or App 574, 196 P3d 73 (2008), rev den 345 Or 690 (2009)** (reversing judgment denying petition to terminate father’s rights; discussing proof of present unfitness and serious detriment to child) .....27
25. **State ex rel Juv. Dept. v. J. L. M., 220 Or App 93, 182 P3d 1203 (2008)** (father’s conduct and conditions, considered in combination, rendered him “presently unfit” because he could not provide the steady, patient care needed to sustain the child’s improved, but still fragile, mental health).....29

**26. State ex rel Dept. of Human Services v. J. S., 219 Or App 231, 182 P3d 278 (2008) (the serious detriment requirement of ORS 419B.504 does not mean that the detriment to the child must already have occurred as a prerequisite to termination).....31**

**27. State ex rel Juv. Dept. v. F.W., 218 Or App 436, 180 P3d 69 (2008) (although father's drug dependency was in remission at the time of trial, the combination of father's drug dependency and mental disorders and the children's special needs made the father unable to adequately appreciate and meet the children's needs and rendered him presently unfit).....32**

# Appeals from Judgments Finding or Denying Jurisdiction

**1. Dept. of Human Services v. C.Z., 236 Or App 436, 236 P3d 791 (2010) (state failed to prove that mother's use of marijuana on one occasion, out of the home and out of the presence of the children, was sufficient to support juvenile court jurisdiction under ORS 419B.100(1)(c))**

## THE COURT OF APPEALS' SUMMARY:

Mother appeals a juvenile court judgment taking jurisdiction over her children on the basis that her use of marijuana presented a reasonable likelihood of harm to the children. Mother contends that the state did not prove that her use of marijuana on one occasion, out of the home and out of the presence of the children, directly or indirectly created a reasonable likelihood of harm to the children. *Held:* The state did not meet its burden to prove that mother's use of marijuana created a reasonable likelihood of harm to her children under ORS 419B.100(1)(c).

**2. Dept. of Human Services v. K.L.R., 235 Or App 1, 230 P3d 49 (2010) (holding that: (1) requiring an admission of abuse as a condition of reunification violates a parent's Fifth Amendment rights; (2) terminating parental rights based on parent's failure to comply with a juvenile court order to engage in meaningful therapy, perhaps in part because the parent's failure to acknowledge abuse prohibits meaningful therapy, does *not* violate the parent's Fifth Amendment rights; and (3) granting "use" immunity from criminal prosecution is a necessary condition to compelling potentially incriminating statements as an inducement for full cooperation and disclosure in juvenile court dependency proceedings)**

## THE COURT OF APPEALS' SUMMARY:

Mother appeals from a dispositional order in this juvenile case that requires that she complete a polygraph test. Parents stipulated to dependency jurisdiction over their child, a three-month-old who suffered multiple unexplained injuries. As part of the dispositional order, the trial court included a provision that each parent complete a polygraph test. The court explained that, if the parents were asked by the polygraph

examiner how the injuries occurred "and they remain silent, then I guess the inference is whatever it is that the court can draw or the polygraph examiner can draw." Mother objected to the provision on the ground that it violated her right not to incriminate herself pursuant to the Fifth Amendment to the United States Constitution. *Held:* Requiring an admission of abuse as a condition of family reunification violates a parent's Fifth Amendment rights; terminating or limiting parental rights based on a parent's failure to comply with an order to obtain therapy or rehabilitation, however, may not violate the Fifth Amendment; providing use immunity from criminal prosecution is a necessary condition to compelling potentially incriminating statements as an inducement for full cooperation and disclosure during dependency proceedings. In this case, although the parties and the court discussed the possibility of immunity from prosecution, the court did not make any provision for such immunity. Second, the polygraph requirement was not ordered as part of treatment, but was imposed to determine the source of the child's injuries. Thus, assuming the court had statutory authority to order a polygraph, that requirement in these circumstances ran afoul of mother's Fifth Amendment right to avoid self-incrimination.

**3. State v. J.G., 233 Or App 616, 227 P3d 1181 (2010)  
(accepting state's concession that, under ORS 419B.100(1)(c), an allegation that father had history of assaultive behavior, without more, is insufficient to establish a basis for jurisdiction)**

THE COURT OF APPEALS' PER CURIAM OPINION:

In this dependency case, father appeals the juvenile court's judgment committing his child to the legal custody of the Department of Human Services. The judgment states that child is within the jurisdiction of the court, based, in part, on an allegation in the dependency petition that father has a history of assaultive behavior. On appeal, father asserts that that allegation was insufficient as a basis for the court's jurisdiction. The state concedes that the allegation that father had a history of assaultive behavior "was insufficient on its face to state a basis for juvenile jurisdiction and further, that the state failed to prove facts that might have cured the defect." We agree and accept the state's concession.

The parties agree that father earlier stipulated to the court's jurisdiction on a separate and independent basis--that father did not have sole custody of child and was, therefore, unable to protect child from mother--and that the case should be remanded for entry of judgment on the basis of that stipulation. *See State ex rel Juv. Dept. v. S.A., 230 Or App 346, 214 P3d 851 (2009).*

**4. State ex rel Juv. Dept. v. N.W., 232 Or App 101, 221 P3d 174 (2009), rev den, 348 Or 291 (2010) (taken together, allegations that mother used controlled substances and repeatedly allowed her children to come into contact with untreated sex offenders, if proven, are sufficient to establish dependency jurisdiction)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals a juvenile court judgment taking dependency jurisdiction over her two children. She argues, first, that the juvenile court erred in denying her motion to dismiss the dependency petition because the allegations that it contained, even if proved, are insufficient to establish jurisdiction; and, second, that, even if those allegations are sufficient, the state failed to prove them by a preponderance of the evidence. *Held:* The allegations in the dependency petition that the mother used controlled substances and repeatedly allowed her children to come into contact with untreated sex offenders, taken together, were sufficient to establish jurisdiction; and the fact that mother brought her child to an apartment that she knew to be frequented by drug users and remained there with the child despite the fact that drug use was occurring, and, while there, allowed an untreated sex offender to come into contact with the child, establishes that mother is unable or unwilling to protect the children from exposure to dangerous situations, thus endangering their welfare.

**5. State ex rel Dept. of Human Services v. D.T.C., 231 Or App 544, 219 P3d 610 (2009) (state failed to prove that father's use of alcohol and his failure to follow through with recommended treatment endangered his children's welfare)**

THE COURT OF APPEALS' SUMMARY:

Father appeals a judgment of the juvenile court taking jurisdiction over his three children. He argues that the state failed to prove by a preponderance of the evidence that any of the children's "condition or circumstances are such as to endanger [their] welfare," ORS 419B.100(1)(c). He contends that the court's reliance on his refusal to complete the recommended substance abuse treatment program was erroneous because it shifted the inquiry from the children's circumstances to his own condition; he also maintains that the court's decision stemmed from considerations of fairness to other litigants who had followed the court's recommendations, and that such considerations were not lawful. *Held:* On *de novo* review, the Court of Appeals agreed with father that the trial court erred in extending jurisdiction because the state has shown neither that father was using alcohol at the time of the dependency hearing, nor

that he was then at risk of relapsing, nor that a relapse was likely to endanger the children's welfare.

EXCERPT FROM OPINION:

Although we find this to be a close case, we conclude that the court erred. Father's refusal to participate in treatment is a serious concern, as is his refusal to provide UAs, and we do not mean to downplay the importance or the wisdom of the court's recommendations. Further, we recognize that drinking to excess can be harmful or dangerous to children and that father's continued sobriety is not guaranteed. We are nonetheless persuaded that the state did not produce sufficient evidence in this case. It bears repeating that "[t]he key inquiry \* \* \* is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child." *T. S.*, 214 Or App at 191. ***Here, we perceive little if any evidence that father's condition was harmful to the children in the past. From the record, we learn that he "act[ed] out" when he drank, that his conduct when drinking frightened the children, and that drinking made him mean and "controlling." Obviously, that is not ideal parenting. However, without more, it is not inherently or necessarily more harmful or dangerous than other varieties of parenting that would, by no stretch of the imagination, justify state intervention into the parent-child relationship. Passing out is a different matter; had father been the only caregiver in the home when that occurred, we would readily conclude that doing so endangered the welfare of the children. However, at all relevant times, father was living with Tabitha, a nondrinker, and there is no evidence that she was not in the home when father drank himself unconscious.***

***More importantly, however, even if we were convinced that father's condition did endanger the welfare of the children before October 2007, we are not persuaded that, at the time of the hearing, a preponderance of the evidence supported the conclusion that the children were still at risk.*** \* \* \* The state's second allegation, "despite prior services offered \* \* \* through DHS and other agencies, \* \* \* father has been unable and/or unwilling to overcome the impediments to his ability to provide safe, adequate care to" the children, fares no better. The only evidence presented by the state regarding father's risk of relapse was an OnTrack evaluation, then one and one-half years old, in which Cooper stated that father's risk of relapse at that time had been "severe" due to his denial that he had an alcohol problem and resulting unwillingness to change. But the state has failed to show that any such risk existed when the hearing took place; rather, the undisputed evidence is that father last used alcohol 10 months earlier and had since made the decision not to drink "for [him]self, for [his] children, [and] to better [his] life." Moreover, to the extent that father's parenting when sober was an issue, we find that his successful completion of the parenting program alleviates that concern.

We thus conclude that, under the totality of the circumstances, the state has failed to show a reasonable likelihood of harm to the welfare of the children. As noted above, our focus in determining whether the court's exercise of jurisdiction was proper is on "the *child[ren]'s* condition or circumstances," *T. S.*, 214 Or App at 191 (internal quotation marks omitted; emphasis in original), not on how "fair" the court's decision is to "other people" or on father's obstinacy and failure to comply with specific DHS directives. Because the state has not shown that father was using alcohol at the time of the dependency hearing, nor that he was then at risk of relapsing, nor that a relapse was likely to endanger the children's welfare, it has failed to meet its burden. ORS 419B.100(1)(c).

231 Or App at 553-55 (emphasis in bold italics added) (footnote omitted).

**6. State v. S.M.P., 230 Or App 750, 217 P3d 260 (2009) (where the state proved by a preponderance of the evidence that child had been physically abused, juvenile court erred in dismissing the dependency petition, notwithstanding that the state did not prove causation or that mother was responsible for the abuse)**

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (DHS) appeals juvenile judgments dismissing its petition for dependency jurisdiction over child and vacating an order for temporary custody and shelter care. DHS argues that it presented sufficient evidence of physical abuse to prove that the welfare of the child was endangered by his circumstances. *Held:* Where the state has proved by a preponderance of the evidence that a child suffered physical abuse, it need not prove causation or culpability by mother in order to establish that child needs the protection of the juvenile court.

**7. State ex rel Juv. Dept. v. S.A., 230 Or App 346, 214 P3d 851 (2009) (allegation that the father "has a history of substance abuse, which if active, would endanger the welfare of the child" does not state a ground for dependency jurisdiction under ORS 419B.100)**

THE COURT OF APPEALS' PER CURIAM OPINION:

Father appeals a judgment that made his nine-month-old child a ward of the court. The judgment states that child is within the jurisdiction of the court based on three allegations in the dependency petition, one of which the Department of Human Services (DHS) proved and two of which father admitted. On appeal, father challenges the judgment only with respect to the allegation that DHS proved--i.e., that "father has a history of substance abuse, which if active, would endanger the welfare of the child." In father's view, that allegation is on its face an insufficient basis for establishing dependency jurisdiction, because it does not allege that child is *currently* endangered. The state concedes that the allegation is insufficient and that the judgment must be reversed with respect to that allegation. We agree and accept the state's concession. *See State ex rel Juv. Dept. v. Randall*, 96 Or App 673, 675-76, 773 P2d 1348 (1989) ("Although we agree with the state that a parent's use of controlled substances is a proper consideration in determining whether a child should be made a ward of the state, that allegation is insufficient by itself to establish that the child's welfare is endangered. The petition must also include some factual allegation showing how the

parent's drug usage endangers the welfare of the child over whom the court is asserting jurisdiction.").

**8. G.A.C. v. State ex rel Juv. Dept., 219 Or App 1, 182 P3d 223 (2008) (reversing dismissal of petitions alleging physical abuse)**

THE COURT OF APPEALS' SUMMARY:

Three children appeal from separate judgments dismissing the state's petitions for establishment of juvenile dependency jurisdiction over them on the ground that the state and the children failed to prove that mother subjected the children to physical abuse or inappropriate discipline, thereby placing the children at risk of harm. *Held:* Striking child with wooden spoon and leaving raised welts that were still visible four hours later is physical abuse and conduct that endangered the child's welfare, and circumstances leading to the abuse are likely to recur. Under the totality of the circumstances, mother's physical abuse of one child endangered the welfare of all three children; therefore, all three children are within the jurisdiction of the juvenile court under ORS 419B.100(1)(c).

EXCERPTS FROM OPINION:

ORS 419B.100(1)(c) calls for a fact-specific inquiry whether the court should take jurisdiction over children. *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652, 853 P2d 282 (1993). In *Smith*, the court rejected the proposition that any specific condition or circumstance *per se* does or does not suffice to establish dependency jurisdiction under that provision. *Id.* Rather, the court must consider the totality of circumstances before it. *Id.* at 652-53. If, after, considering those circumstances, the court finds a "reasonable likelihood" of harm to the child's welfare, jurisdiction exists. *Id.* The pertinent conditions or circumstances need not involve the child directly but may be found harmful because they create a harmful environment for the child. *Id.* In deciding whether the juvenile court has jurisdiction, the court must determine whether the child needs the court's protection, not the nature or extent of the necessary protection. *See State ex rel Juv. Dept. v. Brammer*, 133 Or App 544, 549 n 5, 892 P2d 720, *rev den*, 321 Or 268 (1995) ("Our decision merely places the children under the protection of the juvenile court. Whether or not they remain in the home will be determined in a subsequent proceeding.").

\* \* \* \* \*

***In this case, although it was mother's conduct toward one child that precipitated state intervention, the evidence supports establishment of jurisdiction for all three children.*** In light of the ordinary nature of V's conduct on March 30--losing something and inadequate housekeeping--it is reasonable to infer that the circumstances leading to the abuse that day are likely to recur. Mother gave little indication in her testimony that she would handle things differently in the future. Unlike in *Shugars I*, the evidence here did not differentiate the risk of harm to V from risks to the other children. *See Imus*, 179 Or App at 35 (evidence supported jurisdiction of the juvenile court over two children based on the allegation that younger child was subjected to physical abuse by way of severe facial bruising caused by a

nonaccidental physical blow). Although V was the victim of mother's conduct on March 30, all three children have been similarly struck at different times. Both A and G testified that mother has hit them with her hands and with objects when they are "in trouble." Although mother may have stopped hitting G, that change was recent and was a consequence, not of a change of approach on mother's part, but of the grim reality that mother can no longer physically intimidate G. Even though that change may reduce the risk of physical harm to G while he is in the home, G testified that he has run away in the past as a result of mother's mistreatment, which places him at risk of harm. Moreover, the evidence established that mother hits A and is likely to continue doing so.

***ORS 419B.100 authorizes the state to intervene not only when children have suffered actual harm, but to protect children from a substantial risk of harm. State ex rel Juv. Dept. v. Gates, 96 Or App 365, 774 P2d 484, rev den, 308 Or 315 (1989); see also ORS 419B.005(1)(a)(G). Under the totality of the circumstances, mother's conduct has endangered the welfare of all three children, and the children are within the jurisdiction of the juvenile court under ORS 419B.100(1)(c).***

219 Or App at 9, 14-15 (emphasis in bold italics added).

## **Appeals from Permanency Judgments**

### **9. Dept. of Human Services v. H.R., --- Or App ---, --- P3d --- (March 9, 2011) (adoption and placement with a fit and willing relative are separate and distinct permanent plans)**

#### THE COURT OF APPEALS' SUMMARY:

Mother appeals from a permanency judgment changing the permanency plan for her son from reunification to adoption. She contends, first, that the juvenile court's findings did not include, as required by ORS 419B.476(5)(a), a brief description of reasonable efforts by the Department of Human Services (DHS) to reunify the family and, second, that the court erred under ORS 419B.498(2)(a) in determining that there was no reason to defer the filing of a petition to terminate parental rights. Held: The permanency judgment, in which the juvenile court adopted a specific DHS court report as its findings on reasonable efforts, complied with the requirements of ORS 419B.476(5)(a). Under ORS 419B.498(2)(a), a placement for adoption by a relative does not prevent the filing of a petition for termination of parental rights.

#### EXCERPTS FROM OPINION:

\* \* \* [M]other contends that the juvenile court erred in its determination that there was no reason, under ORS 419B.498(2), to defer filing a petition to terminate her parental rights.

See ORS 419B.476(5)(d) (requiring, when the court determines that the permanency plan should be adoption, that the court determine "whether one of the circumstances in ORS 419B.498(2) is applicable"). In mother's view, this case falls within the circumstances described in ORS 419B.498(2)(a), which provides an exception to the requirement to file a petition when "[t]he child or ward is being cared for by a relative and that placement is intended to be permanent." Mother contends that, because R was placed with his maternal grandmother, whom DHS had identified as the adoptive resource, R was being cared for by a relative in a placement that is intended to be permanent. DHS responds that ORS 419B.498(2)(a) refers to a permanent placement with a relative other than an adoption. We conclude that DHS is correct.

The Juvenile Code treats "adoption" and "placement with a fit and willing relative" as two distinct permanency plans. \* \* \*.

\* \* \* \* \*

ORS 419B.476(5) thus identifies as different permanency plans, requiring different findings, (1) return to a parent, (2) adoption, (3) a legal guardianship or "placement with a fit and willing relative," and (4) a planned permanent living arrangement. See also ORS 419A.004(18) ("Planned permanent living arrangement" means an out-of-home placement other than by adoption, placement with a relative or placement with a legal guardian that is consistent with the case plan and in the best interest of the ward."). For permanency plan purposes, then, adoption is different from placement with a relative; indeed, if the permanency plan is placement with a relative, the court must explain why adoption is not appropriate. Accordingly, the reference in ORS 419B.498(2)(a) to when "[t]he child or ward is being cared for by a relative and that placement is intended to be permanent" refers to placement with a relative other than an adoption.

That construction of ORS 419B.498(2)(a) is internally consistent and consistent with ORS 419B.476(5). Mother's construction, by contrast, creates an internal inconsistency: The placement with a relative here--which mother contends triggers the application of ORS 419B.498(2)(a)--is a prospective adoption and therefore is certainly "intended to be permanent"--yet the termination of parental rights and subsequent adoption cannot occur, under mother's reading, because the child is placed with a relative in a placement that is intended to be permanent. Planning for adoption by a relative would preclude achieving adoption by a relative, in mother's construction. Although apparently plausible at first glance, mother's construction of ORS 419B.498(2)(a) is not plausible when the statute is considered in context.

--- Or App at ---.

**10. Dept. of Human Services v. S.T., 240 Or App 193, --- P3d --- (2010) (is "open adoption" a permanency plan?)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals a permanency judgment in which the juvenile court approved a plan of adoption. Held: The juvenile court did not err by approving a permanency plan of adoption, finding that an open adoption was in child's best interests, and deciding that, if an open adoption became impossible, it would hold another permanency hearing.

## EXCERPTS FROM OPINION:

\* \* \* [Mother] contends that the juvenile court erred in two respects: (1) by approving a plan of adoption that was contingent on the adoption being "open" and (2) by changing the plan to adoption when a guardianship would better protect child's health and safety needs. Under ORS 419B.476, mother argues, "open adoption" is not an available permanency plan. Mother also contends that, because an open adoption is contingent on approval by a third party--namely, the as-yet-undetermined adoptive parents--a plan of adoption cannot ensure that child will have continuing contact with his birth parents, and thus the court cannot ensure that the plan is in child's best interests. Mother further argues that, because a permanency plan of adoption cannot ensure continuing contact with her, a permanent guardianship, pursuant to ORS 419B.365, would better meet child's needs.

\* \* \* \* \*

***We conclude, first, that the juvenile court did not order a plan of open adoption, which it explicitly stated it "cannot mandate"; rather, it ordered a plan of adoption.*** Accordingly, mother's argument that the court approved a plan not contemplated by the permanency statute is not well taken. No one disputes that "adoption" is among the permanency plans identified in ORS 419B.476(5)(b). The Juvenile Code also provides for court review of DHS's development of placement plans, including adoption. At a permanency hearing, the court may review DHS's efforts to develop a concurrent plan, including, if adoption is the concurrent plan, "identification and selection of a suitable adoptive placement for the ward," ORS 419B.476(4)(e); may order DHS to develop or expand the case plan or concurrent permanent plan, ORS 419B.476(4)(f); and may order DHS "to modify the care, placement and supervision of the ward," ORS 419B.476(4)(g). *See also* ORS 419B.449(5) (the court shall consider efforts to develop a concurrent plan, including "identification of appropriate permanent placement options for the child or ward both inside and outside this state and, if adoption is the concurrent case plan, identification and selection of a suitable adoptive placement for the child or ward").

Although the juvenile court determined that the permanency plan should be "adoption," we reject DHS's contention that the juvenile court did no more than recommend an open adoption. Rather, ***the court found that an open adoption would best meet child's needs and decided that, if circumstances changed and an open adoption became impossible, a reexamination of the permanency plan would be required. Doing so was within the court's authority.*** Unless there is good cause not to hold a permanency hearing, a court's decision to conduct a permanency hearing, including a hearing on the court's own motion, is consistent with ORS 419B.470(5). At a permanency hearing, a court makes findings based on a preponderance of the evidence before it; those findings may include a determination of the likelihood of an open adoption and whether an open adoption is in the child's best interests. ***The court also has authority to order another permanency hearing on its own motion; unless there is good cause not to hold a hearing, it may choose to do so where circumstances relating to the child's likely placement change.***

We turn to mother's argument that the court should not have approved a plan of adoption, because the plan does not "ensure" or "guarantee[ ]" ongoing contact between child and mother and, therefore, another plan would better meet child's needs. Evidence in the record supports the juvenile court's finding that an open adoption would best meet child's needs for permanency and continuing contact with his birth family. In addition, evidence supports the court's finding that it was very likely that child's current foster parents would adopt child and would agree to continuing contact. Any time a court approves a permanency plan, it necessarily

makes predictions, based on a preponderance of the evidence before it, about the availability and capacity of potential caregivers--a birth parent, adoptive parent, guardian, or foster parent--to meet the child's needs. Finding that an open adoption is likely and will best meet a child's needs, as the court did here, is a predictive finding of a similar type. Based on its findings, the juvenile court did not err in changing the permanency plan to adoption.

(240 Or App at 197-99) (emphasis in bold italics added; footnotes omitted).

**11. *State of Oregon v. L. C., 234 Or App 347, 228 P3d 594, rev allowed, 349 Or 172 (2010), rev dismissed --- Or --- (February 3, 2011) (reversing permanency judgment changing permanent plan from APPLA to adoption because the record showed that it was improbable that a suitable adoptive placement would be found)***

THE COURT OF APPEALS' SUMMARY:

The state appeals from permanency judgments concerning two children. It contends that the juvenile court erred by ordering a change in the permanency plan from another planned permanent living arrangement (APPLA) to adoption and by ordering the Department of Human Services to file a petition to terminate parental rights. *Held:* Because the record at permanency hearing shows that it is unlikely that a suitable adoptive placement will be found, the juvenile court erred by changing the permanency plan to adoption and ordering the filing of a petition to terminate parental rights.

EXCERPTS FROM OPINION:

After removing the children, DHS attempted to recruit an adoptive family and detailed those recruitment efforts for the court, but it was not confident that it would find a suitable family. ***DHS took the position that "[t]he age of these children, combined with their history, high needs and the unsuccessful recruitment to date leaves DHS unable to conclude that it can successfully place and maintain the children in any adoptive placement."*** At a review hearing shortly before the permanency hearing, no one questioned DHS's representation that it was "using all the recruitment resources possible, including things we don't typically use this early in recruitment for kids." \* \* \*.

***\* \* \* [S]hortly before the permanency hearing, the juvenile court itself expressed skepticism regarding the likelihood of an adoptive placement. The court's primary concern was its sense that "the parents cannot be expected \* \* \* to be able to perform as parents for these children. That is a basis for termination of parental rights." After the permanency hearing, the court changed the permanency plan from APPLA to adoption and ordered DHS to file a petition to terminate parental rights.***

\* \* \* \* \*

\* \* \* [T]he statutory scheme suggests that the legislature intended the termination of parental rights to result in the creation of a new parent-child relationship through adoption. \* \* \*

\* \* \* \* \*

\* \* \* ***It is difficult to see how a permanency plan of adoption would be better suited than other permanency plans, such as APPLA, to meet the ward's needs if an actual adoption is unlikely.***

***A permanency plan of adoption implicitly requires some likelihood that adoption will be achieved. We cannot conceive of a reason that the legislature would require, as a precondition to the filing of a termination petition, the approval of a plan that was unlikely to be achieved.*** \* \* \*

\* \* \* \* \*

We appreciate the juvenile court's sympathy for father and mother, given the court's apparent view that the family broke down because of trauma suffered by the children before being adopted. The juvenile code, however, does not provide for a permanency plan of adoption--or, accordingly, for the filing of a termination petition--under those circumstances. ***On this record, it appears that a suitable adoptive placement for the children is unlikely to be found. Accordingly, the juvenile court erred by changing the permanency plan to adoption.*** Because approval of a permanency plan of adoption is a precondition to the filing of a termination petition, ORS 419B.498(3), the court also erred by ordering DHS to file a petition to terminate father's and mother's parental rights.

235 Or App at 351-54, 357 (emphasis in bold italics added) (footnotes omitted).

**12. *State ex rel Department of Human Services v. E. K., 230 Or App 63, 214 P3d 58, rev den 347 Or 348 (2009)* (affirming permanency judgments changing case plans for four of the mother's six children where, notwithstanding reasonable efforts by DHS and the mother's access to community resources, the mother's deficiencies continue to prevent her from being able to adequately supervise her children or meet their psychological and emotional needs)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from four judgments of the juvenile court, which changed the permanency plan for three of her children to adoption and for one of them to a planned permanent living arrangement. She asserts that Department of Human Services (DHS) failed to make reasonable efforts to reunify the family and that she made sufficient progress to allow the safe return of her children in a reasonable time. *Held:* DHS expended extensive efforts, including evaluations, parent training, help enrolling in

public schools, education assistance, counseling, in-home services, and visitations. DHS's efforts to prevent the removal of the children from mother's home, and then to reunite the family after the removal, were reasonable. Moreover, even with responsibility for only two of the six children, mother had difficulty applying the parenting training that DHS had provided, and the evidence demonstrates that she had even greater difficulty adequately parenting all six children. Given expert recommendations that the children need permanency soon, it is unlikely that mother will make sufficient progress to allow the children to be returned in a reasonable period. The preponderance of the evidence demonstrates that the juvenile court did not err in changing the permanency plan for four of the children.

**13. *State ex rel Department of Human Services v. N. S.*, 229 Or App 151, 211 P3d 293 (2009) (reversing permanency judgment changing plan to guardianship)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals an order establishing a guardianship under ORS 419B.366 for her three-year old child. The Department of Human Services (DHS) first took custody of child because of concerns about mother's inability to protect child from father. Those concerns have since been alleviated. DHS later learned that mother's brother had been convicted of third-degree sodomy, an offense that, by statute, involves "deviate sexual intercourse" with a person less than 16 years of age. Despite DHS's suspicions that mother shares a home with her brother, mother denies living with her brother and, despite "numerous" home visits, DHS has found no evidence that mother lives with her brother. Mother's brother currently resides half a mile away from mother's home, and mother occasionally receives mail addressed to him. Although mother planned to maintain a relationship with her brother, she testified that her brother would not be allowed to have any contact with child. Shortly before the hearing in this case, an unidentified male answered the telephone at mother's home and identified himself as mother's roommate. *Held:* The evidence presented to the juvenile court established neither that mother's brother would have contact with child nor a nexus between the nature of his prior offense and this particular child.

**14. State ex rel Juv. Dept. v. K. L., 223 Or App 35, 194 P3d 845 (2008) (the juvenile court erred in denying DHS's request for a 90-day continuance of return-to-parent case plan, even though granting the request would continue the child's out-of-home placement beyond the 15-out-of-22-months time line under ORS 419B.498(1)(a))**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from an order that the trial court issued after a permanency hearing under ORS 419B.476 that determined that the Department of Human Services / Community Human Services--Child Welfare (DHS) should implement its concurrent plan of adoption for mother's children rather than continuing to plan for their integration to her home. Held: On de novo review of the record, the trial court erred when it denied DHS's request for a 90-day continuance of the hearing.

EXCERPTS FROM OPINION:

The trial court apparently believed that it did not have the authority to grant the continuance that DHS requested. ORS 419B.476(1) provides that a trial court shall conduct a permanency hearing in accordance with, among other statutes, ORS 419B.310(1). That statute, in turn, provides that the court may continue the hearing from time to time. The trial court, however, was concerned about the requirement in ORS 419B.498(1)(a) that DHS initiate termination proceedings after the children had been in substitute care for 15 of the previous 22 months, a period that \* \* \* would have elapsed before the end of the requested 90 days. However, ORS 419B.498(2)(b) authorizes DHS to defer filing a termination petition if there is a compelling reason, which DHS has documented in its case plan, for determining that filing a petition would not be in the children's best interests. The statute includes a nonexclusive list of several possible compelling reasons, including that the "parent is successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time \* \* \*." ORS 419B.498(2)(b)(A).

***In the circumstances of this case, there was a compelling reason not to file a termination petition immediately after the children spent 15 months in substitute care.*** After much effort, [which included moving "to the other end of the state" to "break free" from an abusive relationship,] mother had placed herself in a position in which it was possible for her to participate fully in the services that DHS had available, and she was doing so successfully. The purpose of the proposed 90-day continuance was to determine whether the changes that she was making would make it possible for the children to safely return home within a reasonable time, thus satisfying the statutory preference that children live in their own homes with their own families. ORS 419B.090(5). The children are currently living with relatives and have frequent contact with mother, so the relatively small delay in filing a termination petition--assuming it becomes necessary to do so--was unlikely to be damaging. The trial court,

thus, had the lawful authority to grant the requested continuance, and there was no discernable reason for it not to have done so.

223 Or App at 43-44 (emphasis in bold italics added).

**15. State ex rel Juv. Dept. v. L. V., 219 Or App 207, 182 P3d 866 (2008) (reversing permanency hearing judgment because, on de novo review, the record was not sufficient to show that the father was not able to care for the child at the time of the hearing)**

THE COURT OF APPEALS' SUMMARY:

Father appeals a judgment entered after a permanency hearing after which the juvenile court found that he had not yet made sufficient progress to make it possible for him to care for his two-year-old child, A. Although father requested it, the court declined to order placement with father or to order a family-decision meeting to implement transition of A to father's care. Father appealed, assigning error to the court's failure to order placement or a family-decision meeting and to the court's designation of a concurrent permanent plan of guardianship. *Held:* Although a review hearing was held after father appealed from the permanency judgment, his appeal was not moot because the permanency judgment continues to have a practical effect on whether and under what circumstances father can parent A. The juvenile court's denial of father's requests that A be placed in his care and that the court order a family-decision meeting to create a plan to transition A to his care adversely affected father, and the judgment is therefore appealable. The Court of Appeals declined to review the juvenile court's designation of a concurrent permanency plan, however, because the issue was not sufficiently developed. Regarding the permanency plan, a *de novo* review of the record on appeal revealed no basis to conclude that father cannot currently parent A. Father had remedied the conduct and conditions that formed the basis for juvenile jurisdiction by completing the required services and developing a parental relationship with A. Accordingly, the juvenile court erred by concluding that father is not currently able to parent A on his own, and the Court of Appeals reversed the portion of the judgment that orders father to continue his involvement with services and indicates that the anticipated date of A's placement with father is "unclear." Instead, the anticipated date of return and transition should be the earliest reasonable date determined by a family-decision meeting to be held at the first available opportunity. Reversed in part; remanded with instructions to enter a permanency judgment consistent with this opinion; otherwise affirmed.

EXCERPTS FROM OPINION:

\* \* \* The juvenile court found that the Department of Human Services (DHS) had made reasonable efforts to make it possible for father to care for his two-year-old daughter, A, but it

concluded that father had not yet made sufficient progress and declined to order placement with father or to order a family-decision meeting to implement transition of A to father's care. Father assigns error to the court's failure to so order and to its designation of a concurrent plan of guardianship. We review the record *de novo*, ORS 419A.200(6)(b), and we reverse the judgment of the juvenile court in part and remand the case for further proceedings.

\* \* \* \* \*

\* \* \* We begin by reviewing the relevant portions of the statutes governing permanency hearings. At a permanency hearing, the court must determine "whether and, if applicable, when \* \* \* [t]he ward will be returned to the parent," ORS 419B.476(5)(b)(A), whether DHS has made reasonable efforts to reunite the family, ORS 419B.476(2)(a), and whether "the parent has made sufficient progress" for the ward to be safely placed in the parent's care, ORS 419B.476(2)(a). When the court determines that the permanency plan should be to return the ward to his or her parent, the court must also identify in its disposition "the services in which the parents are required to participate, the progress the parents are required to make and the period of time within which the specified progress must be made." ORS 419B.476(5)(c).

Father contends that the court erred by finding that he has failed to make sufficient progress to parent A. In explaining why it so found, the juvenile court agreed with the intervenor:

"Maybe you're right, maybe this is a function of immaturity and age, and if that's the case, then people outgrow it over time. I have--I do not believe, in spite of his cooperation, which I appreciate and think is wonderful, and the work that [he has] done in services, I do not believe that [father] is currently capable of parenting this child on his own. I simply don't believe that that's the case, and it may be that there hasn't been enough practice before, it may be that father is young, it may be that you have to start at a later date in her development because you weren't involved in the beginning of her life. It may be that seventeen and eighteen-year-old kids have things they'd rather be doing than be parents, but the fact of the matter is until all of this blew up, that what [mother] was doing, and we're kind of talking as if she, you know, doesn't have a role in the future of this child's life, and that concerns me tremendously."

The record before us does not support the juvenile court's finding that father is unable to parent A now. The juvenile court's emphasis on father's youth, without evidence that his age poses some risk of harm to A, does not support a finding that he is not currently capable of parenting. Although the record contains some evidence that father "antagonized" mother, the record also contains evidence that father ceased such conduct at the direction of the court and DHS. Particularly where the parenting class trainer and DHS believe that he has acquired minimally adequate skills, we are unable to discern, from the record before us, why the juvenile court concluded that father was not able to parent A. The record contains only unsupported assertions to that effect.

In addition to gaining parenting skills, father's previous lack of involvement in A's life has been remedied, and he has developed a parental relationship with the child. A putative father's lack of involvement with a child prior to establishing his paternity cannot serve as a basis for a finding that he is unable to parent. *See State ex rel Dept. of Human Services v. Rardin*, 340 Or 436, 446, 134 P3d 940 (2006). Moreover, the evidence does not reveal a basis for the court's concern that father would not be A's primary caregiver. Father's mother testified that, although she and other family members would support his efforts to parent A, father would be primarily responsible for A's care, and father agreed that that was his plan.

On *de novo* review, we conclude that the record does not support the finding that father is not "currently able to parent on his own." The DHS caseworker's report that father can parent on his own and that he "has done everything in the jurisdictional order that has been asked of him," including building a parental relationship with A, supports the opposite finding. We therefore find that father currently is capable of parenting A and that he has completed the required services. Accordingly, we reverse the portion of the trial court's judgment that orders father to continue his involvement in services and indicates that the "anticipated date of return and transition plan [is] unclear." Instead, the anticipated date of return and transition should be the earliest reasonable date determined by a family-decision meeting to be held at the first available opportunity. \* \* \*.

219 Or App at 209, 218-19.

**16. *State ex rel Dept. of Human Services v. T. F.*, 217 Or App 116, 175 P3d 976 (2007) (affirming permanency judgment changing plan from reunification to adoption and observing that record did not support termination of the parents' rights)**

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal from a judgment following a permanency hearing in which the juvenile court authorized the Department of Human Services (DHS) to change its plan for two children, T. K. and J. K., from reunification with their parents to adoption. ORS 419B.476(2)(a). *Held*: A preponderance of the evidence supported the trial court's conclusion that parents' notable progress was not of sufficient duration to allow for children's safe return in light of the serious nature of parents' conduct leading to their removal. Given children's need for permanence, the court correctly authorized DHS to proceed with a plan to achieve adoption. However, before DHS proceeds to subsequent steps toward termination of parental rights, parents would be entitled to request (and absent good cause, the court must grant) another permanency hearing to gauge whether parents' progress has continued to the point where safe reintegration of children into their home may be achieved. Affirmed.

EXCERPT FROM OPINION:

\* \* \* [T]o warrant a change in the permanency plan from reunification to adoption under the circumstances described in ORS 419B.476(2)(a), the court must find that, despite DHS's reasonable efforts to make it possible for the child to return home safely, the parents have not made sufficient progress to allow that to occur. *S. L.*, 211 Or App at 372; *State ex rel Dept. of Human Services v. Shugars*, 208 Or App 694, 711, 145 P3d 354 (2006).

***We agree that, at the time of the second permanency hearing, a preponderance of the evidence supported the trial court's conclusion that parents had not made sufficient progress to allow for the safe return of children.*** In light of the serious nature of parents' conduct leading to the removal of children, parents' notable progress was not of sufficient duration to justify the conclusion that children could safely return to their home. Children had been under the jurisdiction of the court for 17 months; given their need for

permanence, the court correctly authorized DHS to proceed with a plan to achieve adoption. Such contingency planning is in children's interest.

We also agree with the court regarding parents' progress. ***We presume that if parents have continued that progress and completed necessary services, they would have the opportunity to present evidence to that effect at a future hearing, and, as the juvenile court pointed out, they "certainly would not be the first \* \* \* in a long list of parents who have continued to work and have changed the direction of the case for their children \* \* \*."*** We also note that, as the state recognized at oral argument, the record at this point would not support termination of parents' parental rights.

217 Or App at 122-23 (emphasis in bold italics added; footnote omitted).

## **APPEALS FROM TERMINATION-OF-PARENTAL-RIGHTS JUDGMENTS**

**17. Dept. of Human Services v. T.C.A. , 240 Or App 769, --- P3d --- (2011) (reversing judgments terminating mother's rights to two children where state failed to prove by clear and convincing evidence that it was improbable that the children could be integrated into mother's home within a reasonable time)**

### EXCERPTS FROM OPINION:

In appealing the judgments, mother contends, among other things, that DHS failed to prove that the children's integration into her home is improbable within a reasonable time due to conduct or conditions not likely to change. In her view, she could be ready to parent in three to 18 months, and that delay is reasonable, given the children's lack of special needs. DHS responds that integration is improbable within a reasonable time, given that mother's drug problem escalated from marijuana to heroin during almost two years in treatment. In DHS's view, AA is ready for permanency with his grandmother now, and AF has spent nearly two out of his three years of life in foster care.

We begin with the framework for termination of parental rights. ORS 419B.504 provides, in part:

"The rights of the parent or parents may be terminated as provided in ORS 419B.500 if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward and integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change. In determining such conduct and conditions, the court shall consider but is not limited to the following:

"\* \* \* \* \*

"(3) Addictive or habitual use of intoxicating liquors or controlled substances to the extent that parental ability has been substantially impaired."

Under that statute, we must determine not only whether the parent is unfit, but also whether integration of the child into the parent's home is improbable within a reasonable time due to conduct or conditions not likely to change. *State ex rel SOSCF v. Stillman*, 333 Or 135, 145-46, 36 P3d 490 (2001). A reasonable time is "a period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments." ORS 419A.004(20). The inquiry into a reasonable time "is child-specific. It calls for testimony in psychological and developmental terms regarding the particular child's requirements." *Stillman*, 333 Or at 146. Facts supporting termination of parental rights, unless admitted, must be proved by clear and convincing evidence. ORS 419B.521(1).

Here, we need not decide whether mother is unfit, because we conclude that, in any event, DHS failed to prove that the children's integration into mother's home is improbable within a reasonable time due to conduct or conditions not likely to change. Mother has the skills to be a good parent if she remains sober, and, relapses notwithstanding, she has made some progress in treatment. Although the expert witnesses acknowledged the difficulties of predicting when mother will be far enough into her recovery to be able to parent, they testified that she may well be able to resume caring for the children in a period ranging from six to 18 months. ***DHS did not show that mother would be unlikely to achieve sobriety or otherwise meet its burden to prove that it was improbable that mother would be able to provide a safe home for the children in that timeframe. Ultimately, the problem here is that the record is devoid of evidence regarding how such a delay in achieving permanency would affect the children's emotional and developmental needs or their ability to form and maintain lasting attachments.***

***There was no evidence about AF's needs other than evidence that he has overcome some educational delays and now is doing well. As to AA, his therapist testified that he has emotionally distanced himself from mother and feels "a little bit of anxiety" because of uncertainty about his permanent placement, but is doing well overall. There was no evidence about the effect of that emotional distancing on the prospects for successful reunification of the family and no evidence about how waiting six to 18 months to achieve permanency would affect AA.*** In short, the record does not contain clear and convincing evidence that a six-to-18-month wait to return to mother's home is unreasonable in light of the children's needs. Although the delay that the children have experienced is troubling, we cannot conclude, on this record, that it is improbable that the children can be integrated into mother's home within a reasonable time. Accordingly, we must reverse the termination of mother's parental rights

(240 Or App at 779-81) (emphasis in bold italics added).

**18. Dept. of Human Services v. D.M.T., 239 Or App 127, 243 P3d 836 (2010), rev den 349 Or 654 (2011) (affirming judgment terminating parental rights of a father convicted of encouraging child sexual abuse who was prohibited by the conditions of his post-prison supervision from providing a home for the child)**

EXCERPTS FROM OPINION

\* \* \* Among other grounds for termination, the juvenile court found that father was unfit under ORS 419B.504 because of criminal conduct, emphasizing that, under the conditions of father's post-prison supervision (PPS), "[f]ather is not authorized to have contact with his child."  
\* \* \* **We affirm because (1) father is characterized by a condition--having been convicted of first-degree encouraging child sexual abuse, ORS 163.684, and therefore being subject to a PPS condition that restricts any contact with minors--that is seriously detrimental to child; (2) as a result of his PPS condition, father was unlikely to be allowed to integrate child into his home for about two years, a period that is not a reasonable time for child to wait; and (3) termination is in child's best interests.** Because we affirm on that basis, we do not consider whether the juvenile court erred by also terminating father's parental rights because of extreme conduct under ORS 419B.502.

\* \* \* \* \*

Father was incarcerated from August 2007 to September 2008. Other components of his sentence continue to affect his ability to have contact with child. On seven counts, father was sentenced to 60 months of supervised probation, including a special condition that he "[h]ave no contact with minors except as authorized by DHS"; on the remaining count, he was sentenced to 18 months of imprisonment and 36 months of PPS. According to his parole officer, Michael, father will be on PPS until August 2012. **Among his PPS conditions are requirements that he complete sex offender treatment, submit to polygraphs, and have no contact with minors. Thus, at the time of the termination hearing, father was not allowed to have any contact with child. Michael explained that contact "includes telephones, letters, going through a third party, anything of that nature."**

As required by his PPS conditions, father began sex offender treatment promptly after being released from prison. At the time of the termination hearing, in January and February 2009, he was four months into a 22- to 26-month cognitive behavioral program involving systematic lifestyle restructuring. The cognitive behavioral treatment offers tools needed to develop a relapse prevention plan. According to Caywood, father's therapist for that program, father was consistently attending the weekly group sessions and was "in the beginning stages of treatment and working to understand \* \* \* the cognitive distortions and so forth that many offenders struggle with because of their own shame and fear." \* \* \*.

\* \* \* \* \*

**Although Caywood and Michael testified that father might be able to have contact with child at an earlier time, they agreed that father is unlikely to be able to integrate child into his home for about two years.** \* \* \*.

\* \* \* \* \*

Meanwhile, child, at age six, had not seen father at all since the summer of 2007, a year and a half before the termination hearing. Shortly before the termination hearing, child's therapist, Monahan, noted that child asked where father was but had no obvious emotional reaction to talk of father. Monahan testified that, when she told him that he would not have visits with father immediately, child "seemed a little sad, but nothing really extreme and he went back to the Play-Doh."

Child has significant developmental and emotional needs. As a result of premature birth, child is about one and one-half years delayed developmentally. He also suffers from severe headaches and possibly from seizures. He has been diagnosed with borderline cognitive function and adjustment disorder and is at risk for developmental behavioral and emotional issues. Because of child's cognitive delays, transitions are extremely difficult for him. In addition, child has traits of post-traumatic stress disorder (PTSD) and reactive attachment disorder (RAD), although he does not have the full-blown disorders.

Transitions are likely to continue to be difficult for child and to cause him to regress, according to Stoltzfus, a psychologist who evaluated child. PTSD, adjustment disorder, and RAD are treatable but will "re-emerge quickly if he's put back into a neglectful or abusive environment." Even without neglect or abuse, change is very hard for child, "[a]nd every change he endures will set him back. And it doesn't mean he can't pop back eventually, but it just takes longer." Stoltzfus explained that each transition increases the risk that child will develop RAD, although child probably could manage a transition into another "very stable home."

\* \* \* \* \*

**\* \* \* [F]ather contends that his criminal conduct does not present a risk of harm to child and that, given DHS's lack of reasonable efforts to provide sex offender treatment for father before his incarceration and to provide visits between father and child, DHS failed to prove that integration into father's home is improbable within a reasonable time due to conduct or conditions not likely to change. Father further contends that termination of his parental rights is not in child's best interests.** DHS responds that father is unfit because of sexually abusive criminal conduct, that the portions of ORS 419B.504 applicable to father do not require a showing of reasonable efforts, that child cannot be integrated into father's home within a reasonable time, and that termination is in child's best interests. We agree that each of the statutory requirements for termination under ORS 419B.504 was proved.

**First, father is unfit because, at the time of the termination hearing, he was subject to a PPS condition that he have no contact with minors, and father's condition is seriously detrimental to child. That condition is not enumerated in ORS 419B.504, but it nevertheless may be considered in the unfitness analysis.** See *Stillman*, 333 Or at 149 (concluding that the father's incarceration and residence in halfway house, which precluded him from personally caring for children or otherwise maintaining custodial parental role, could be considered a "condition" under ORS 419B.504); *State ex rel Dept. of Human Services v. Keeton*, 205 Or App 570, 582, 135 P3d 378 (2006) (considering "sequellae" of past criminal conduct in assessing the mother's conduct and its detriment to her children). Father's condition, in conjunction with his earlier incarceration, has prevented and will continue to prevent him from providing a stable home to child for a prolonged period that is seriously detrimental to child. According to treatment providers, child has made great progress while in his grandmother's care, but he still needs a stable environment to prevent him from

developing full-blown RAD. Unlike the children in *Stillman*, who were generally well-adjusted and attached to the father and suffered only some anxiety about their future as a result of the father's incarceration, 333 Or at 150-53, child here has a significant need for stability to avoid regression and severe emotional harm. Father's condition leaves child without the stable home that child needs and thus is seriously detrimental to child.

***Second, child's integration into father's home is improbable within a reasonable time due to conditions not likely to change. Child cannot wait as long as the two years likely required to change father's PPS so as to allow him to integrate child into his home. The statutory definition of "reasonable time" requires a child-specific inquiry and "testimony in psychological and developmental terms regarding the particular child's requirements." Id. at 146; see also State ex rel SOSCF v. Freeman, 174 Or App 194, 204-05, 23 P3d 1009, rev den, 332 Or 430 (2001) (noting that the legislature amended the time for integration from "in the foreseeable future" to "within a reasonable time," as defined by the child's emotional and developmental needs; those amendments "shifted the statute's focus from the parent to the child in the sense that the time frame for integration now is to be measured by the child's needs, not by the parent's potential for reform"). Here, child's therapist testified that waiting up to two years for permanency will be harmful to child, who already has been diagnosed with adjustment disorder and is at risk for developing full-blown PTSD and RAD. Father will likely need two years before he could obtain approval from his parole officer to integrate child into his home. Thus, at the time of the termination hearing, it is improbable that father's condition would change, allowing integration of child into father's home, within a reasonable time as measured by child's needs.***

In his dissent, Judge Wollheim takes a different view, contending that DHS can meet its burden to prove that integration of the child into the parent's home "is improbable within a reasonable time due to conduct or conditions not likely to change," ORS 419B.504, only "by showing that services have failed or will fail." \_\_\_ Or App at \_\_\_ (Wollheim, J., dissenting) (slip op at 14). Certainly, unless excused from doing so, ORS 419B.340(5), DHS is required to make reasonable efforts during dependency proceedings. The issue at this stage of the case, however, is whether "integration of the child or ward into the home of the parent or parents *is* improbable within a reasonable time due to conduct or conditions not likely to change." ORS 419B.504 (emphasis added). The legislature's use of the present tense requires the court to decide the improbability of integration due to conduct or conditions not likely to change *at the time of the termination hearing*, not to decide whether the parent's conduct or condition might have been susceptible to change at some point in the past. *See State ex rel Dept. of Human Services v. Rardin*, 340 Or 436, 447, 134 P3d 940 (2006) (holding that use of present tense in "the parent or parents are unfit," ORS 419B.504, means that court must consider whether the parent is unfit at time of termination hearing, not whether the parent was unfit at some point in past). The legislature's choice of verb tense in ORS 419B.504 takes on particular force in the context of other provisions of the Juvenile Code that require, during proceedings that precede any termination hearing, a determination whether DHS "has made reasonable efforts." ORS 419B.185(1)(a), (c); ORS 419B.340(1); ORS 419B.476(2)(a); *see also* ORS 419B.337(1)(b) (requiring, in removal order or order continuing care, finding whether "[r]easonable efforts \* \* \* have been made"); ORS 419B.498(2)(b)(C) (reason not to file termination petition where court or citizen review board determined that DHS "did not make reasonable efforts"). If the legislature had intended to require a finding regarding past reasonable efforts in every ORS 419B.504 case, it knew how to do so. It chose not to.

We hasten to add that, in some cases, DHS's failure to make reasonable efforts may be relevant to the determination regarding integration. In *Keeton*, for example, we concluded that the state had failed to prove that the children could not be integrated into the mother's home

within a reasonable time due to conduct or conditions not likely to change. 205 Or App at 583. We assumed, without deciding, that the mother's "condition as an untreated sex offender" was seriously detrimental to her children, but concluded that the state had failed to prove that that condition was "not likely to change" or that integration was "improbable within a reasonable time." *Id.* The record there showed that the mother was committed to following through with treatment, but DHS had failed to make a timely referral for such treatment. *Id.* at 573-75. The children, who were doing well and who wanted to return to the mother, could be returned to her after she began treatment but before she completed it, according to a psychosexual evaluator. *Id.* at 573, 575-76. Thus, the condition that prevented the children's integration into the mother's home (the mother's failure to begin sex offender treatment) could be ameliorated within a reasonable time, as of the termination hearing, if DHS provided a referral.

Those facts are markedly different from the facts in this case. Here, father's condition is his PPS, which prevents him from providing a stable home to child. As of the termination hearing, his PPS conditions were unlikely to change to allow integration for two years, regardless of whether DHS provided any services at that time. Integration thus is improbable within a reasonable time due to a condition not likely to change.

(239 Or App at 129-32, 134-35, 137-41) (emphasis in bold italics added; footnotes omitted).

**19. *State ex rel Dept. of Human Services v. L.S., 232 Or App 1, 220 P3d 457 (2009)* (although mother's health issues and history with DHS are of some concern, given the significant improvements in mother's health, DHS failed to prove by clear and convincing evidence that, at the time of trial, she was unfit for purposes of ORS 419B.504)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment terminating her parental rights in her child, R, on the ground that the mother is unfit because of conduct or condition seriously detrimental to R. Mother contends that her health has significantly improved since the time R was removed from her custody and[, ] with help from the community and her family[, ] she is fit to parent. *Held:* Trial court erred in determining that there was no viable plan before determining if mother was a fit parent. Considering the significant improvements in mother's health, DHS failed to prove by clear and convincing evidence that mother was unfit, therefore termination of mother's rights is not appropriate.

EXCERPT FROM OPINION:

The state argues that mother's mental condition qualifies under ORS 419B.504 as a condition that supports termination of her parental rights because "mother's parental ability has been substantially and detrimentally impacted by her cognitive impairment, historical mental health problems, and severe physical health challenges" and because she has failed "to present a viable plan for the return of the child to the parent's care and custody." ***We agree that the***

***evidence demonstrates that, in 2003, mother's cardiac incident and its effect on her physical and mental health was a condition that prevented her from being a fit parent. Mother's condition in 2003 or 2006, however, is not the same as it was at the time of the trial in January 2009, as the trial court acknowledged in its findings.***

In *State ex rel Dept. of Human Services v. Rardin*, 340 Or 436, 447, 134 P3d 940 (2006), the court reiterated its prior holding, expressed in *Stillman*, that the legislature assumes that conditions can change and that the termination of parental rights can occur only on the basis of present unfitness at the time of trial. ***Here, the most recent neuropsychological evaluation undisputedly demonstrates that mother's intellectual functioning has returned to normal, that she has the ability to recognize R's basic needs, and that she is able to be a fit parent if provided with some assistance from others, memory aids, and assistance in comprehending new information.***

Despite the above evidence, which the trial court apparently took into account, the court ruled that "[t]he real issue at trial was whether mother was able to provide a plan that would make up for her deficiencies." The meaning of that ruling is not clear. ***Termination of parental rights under ORS 419B.504 requires that DHS demonstrate both that the parent is unfit and that the child cannot be integrated into the parent's home within a reasonable time. If the trial court's judgment is understood to have conflated those two requirements, then the trial court committed error.*** In other words, if mother is not unfit, then her parental rights may not be terminated without regard to the viability of the plan that she presented. See *Rardin*, 340 Or at 445. However, we need not decide this case on that issue because of the underlying inadequacy of the evidence.

Mother's alleged unfitness under ORS 419B.504 is not established by the purported inadequacy of the resources that she chooses to assist her, as the trial court judgment implies. Although she may be physically and/or mentally impaired to some degree, there is persuasive evidence that she is able recognize R's basic needs and to make decisions regarding his best interests, including obtaining assistance in providing for his care. Her present abilities indicate that she will be able to arrange for R's needs to be met when she is personally unable to provide for them. That evidence, even when weighed with conflicting evidence, does not establish that it is highly probable that mother's mental condition at the time of trial rendered her unfit to be R's parent.

232 Or App at 9-11 (emphasis in bold italics added).

**20. *State ex rel Juv. Dept. v. S.W.*, 231 Or App 311, 218 P3d 558, rev den, 347 Or 446 (2009) (juvenile court did not err in terminating mother's parental rights, because the state proved that mother's mental health problems rendered her presently unfit, she would require at least another year of DBT therapy, that therapy would not resolve all of her problems, DHS's efforts were reasonable, and termination was in the child's best interests)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights to her son J. Mother concedes that, because of mental health issues relating to a personality

disorder, she was not a minimally adequate parent at the time of the termination hearing. She contends, however, that the trial court erred by terminating her parental rights, because the Department of Human Services (DHS) failed to make reasonable efforts to enable J's safe return to her care, because J's return would be possible within a reasonable time, and because termination is not in J's best interests. *Held*: DHS made reasonable efforts, in light of the information that it had at each stage of the case, to provide services to address mother's issues. J's return within a reasonable time is improbable, given that mother would need at least a year to complete her current therapy and that therapy is unlikely to address the full range of mother's problems. Termination is in J's best interests.

**21. *State ex rel Dept. of Human Services v. A.L.S., 228 Or App 700, 209 P3d 817 (2009)* (termination of parental rights warranted where, among other things, the mother remains addicted to alcohol, the child has multiple special needs and requires a stable placement immediately, and a disruption of the child's bond with the foster family would result in a regression in her development)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment terminating her parental rights to her five-year-old child. Mother, who has struggled with drug and alcohol addiction for 15 years, has participated in at least eight substance abuse treatment programs. Mother's only significant period of abstinence from substance use followed residential treatment and, since 2007, mother has been under a court order to complete residential treatment. Six months before trial, mother completed her eighth drug and alcohol treatment program--an outpatient program. Several weeks later, mother consumed alcohol "four or five times" but, in the four months preceding trial, did not consume drugs or alcohol. Mother does not believe that she requires any further treatment. The state's expert testified that mother would need to demonstrate 18 to 24 months of sobriety--dating from her last use of alcohol--before child could be returned to mother. Child has been diagnosed with focal onset epilepsy, an adjustment disorder, and methicillin-resistant staphylococcus aureus, a disease that causes painful boils to form on child's skin. Child is well-bonded to her foster family and there was expert testimony that child, who has been waiting for a permanent home for three years, has already waited too long for a permanent placement. *Held*: The Department of Human Services proved by clear and convincing evidence that mother has failed to effect a lasting adjustment to her addiction to intoxicating substances; that child has special needs, is well-bonded to her foster family, and that any disruption of those bonds would cause a regression in child's development; that return home was not possible within a reasonable time; and that termination was in child's best interests.

**22. *State ex rel Dept. of Human Services v. R.T.*, 228 Or App 645, 209 P3d 390 (2009) (reversing judgment terminating parental rights)**

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal judgments terminating their parental rights in their child on the ground that they are unfit, ORS 419B.504, and with regard to father, on the ground that he neglected his child, ORS 419B.506. Both parents assign error to the court's determination that the state has proved by clear and convincing evidence that their rights should be terminated on the basis of unfitness. Father also asserts that the trial court erred in terminating his parental rights on the basis of neglect. *Held:* The state failed to establish by clear and convincing evidence that integration of the child into parents' home is improbable within a reasonable period where (1) parents had made substantial and sustained efforts to address their drug abuse and domestic violence issues, and they were maintaining consistent contact with their child; (2) their child did not suffer from special needs that required immediate permanency; and (3) the state's expert acknowledged that he was unable, at the time of the termination trial, to render an opinion as to the likelihood that parents would be able to assume care of their child within a reasonable time and that he would need an additional three to five months to do so. Further, although father had been ordered to pay support for his child, the state failed to establish by clear and convincing evidence the statutory grounds for neglect where (1) the evidence in the record established that father had little disposable income after paying for necessities; (2) he had made substantial efforts to address his issues; and (3) he had a record of consistent and positive contacts with his child.

**23. *State ex rel Dept. of Human Services v. K.C.J.*, 228 Or App 70, 207 P3d 423 (2009) (holding that, in an ICWA case, each finding required to support termination of a parent's rights must be proved beyond a reasonable doubt, and construing "active efforts")**

THE COURT OF APPEALS' SUMMARY:

In this termination of parental rights case governed by the Indian Child Welfare Act, the trial court terminated father's parental rights on the ground of unfitness. On appeal, father contends that the court erred for three reasons: (1) the Department of Human Services (DHS) failed to prove his parental unfitness beyond a reasonable doubt; (2) the testimony of DHS's "qualified expert witness" did not establish beyond a reasonable doubt that returning the children to father is "likely to result in serious emotional or physical damage" to them; and (3) DHS failed to make "active efforts" to

reunite him with his children. *Held*: On *de novo* review, the trial court did not err in terminating father's parental rights.

EXCERPTS FROM OPINION:

The parties agree that the three children at issue in this case qualify as Indian children under ICWA. 25 USC § 1903(4). ICWA does not relieve DHS of its obligation to prove a state law ground for the termination. *See* 25 USC § 1902 (stating the purpose of ICWA as, in part, to establish "minimum Federal standards for the removal of Indian children from their families"); *Cain*, 210 Or App at 239 ("The ICWA's requirements supplement and, where in conflict, displace state law governing the termination of parental rights to Indian children."); *State ex rel SOSCF v. Amador*, 176 Or App 237, 243, 30 P3d 1223, *rev den*, 333 Or 73 (2001) (same). ICWA does, however, impose additional procedural and substantive safeguards.

Two of those safeguards are relevant in this case. First, under ICWA, before a court may terminate parental rights, it must determine "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC § 1912(f); *see also* ORS 419B.521(4) (incorporating that standard into Oregon's juvenile code). That determination must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses." 25 USC § 1912(f). Such a witness "must possess special knowledge of social and cultural aspects of Indian life." *Amador*, 176 Or App at 243 (quoting *State ex rel Juv. Dept. v. Charles*, 70 Or App 10, 17 n 3, 688 P2d 1354 (1984), *rev dismissed*, 299 Or 341 (1985)). "Where cultural bias is not implicated," however, "the expert witness need not possess special knowledge of Indian life." *State ex rel SOSCF v. Lucas*, 177 Or App 318, 326 n 5, 33 P3d 1001 (2001), *rev den*, 333 Or 567 (2002); *accord State ex rel Juv. Dept. v. Tucker*, 76 Or App 673, 683, 710 P2d 793 (1985), *rev den*, 300 Or 605 (1986). Nevertheless, an expert witness is still necessary, and the expert must testify as to whether serious emotional or physical damage to the child is likely to occur if the child remains in the custody of the parent and must have substantial expertise in his or her area of specialty, although "[t]he expert need not express a conclusion on the ultimate question that the trial court must decide." *Lucas*, 177 Or App at 326. "Rather, \* \* \* it is sufficient if the expert's testimony *supports* the court's determination \* \* \*." *Id.* (emphasis added).

Second, ICWA requires DHS to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC § 1912(d); *see also* ORS 419B.498(2)(b)(C) (incorporating that standard into Oregon's juvenile code). "**Active efforts entails more than "reasonable efforts" and "impose[s] on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently."** *State ex rel Juv. Dept. v. T.N.*, 226 Or App 121, 124, 203 P3d 262 (2009) (elaborating that "[a]ctive effort means that the agency must assist the client through the steps of a reunification") (citing *A.M. v. State*, 945 P2d 296, 306 (Alaska 1997)).

\* \* \* \* \*

***In examining the standard of proof question, we note that, in at least one prior case, Cain, 210 Or App at 240, we already have stated that ORS 419B.521(4) requires the state to prove all the facts that form the basis for termination of parental rights beyond a reasonable doubt and applied that standard to the facts of that case.*** We did not expressly engage in extensive analysis of the point, to be sure. But, as a rule, we adhere to our prior interpretations of statutes unless they are shown to have been "plainly" wrong. *Newell v. Weston*, 156 Or App 371, 380, 965 P2d 1039 (1998), *rev den*, 329 Or 318

(1999). ***In this case, our analysis of the text of ORS 419B.521 suggests that the legislature intended that, when an Indian child is involved, all the facts that form the basis for termination of parental rights must be established beyond a reasonable doubt.*** \* \* \*

228 Or App at 73-74, 78-79 (emphasis in bold italics added).

**24. State ex rel DHS v. A.T., 223 Or App 574, 196 P3d 73 (2008), rev den 345 Or 690 (2009) (reversing judgment denying petition to terminate father's rights; discussing proof of present unfitness and serious detriment to child)**

THE COURT OF APPEALS' SUMMARY:

The state appeals a judgment that denied its petition to terminate father's parental rights to his child. The state argues that the trial court erred in failing to terminate father's rights under ORS 419B.504 on the ground of unfitness. *Held:* The state has demonstrated by clear and convincing evidence that father is unfit to parent his child and that the termination of his parental rights is in the child's best interest.

EXCERPTS FROM OPINION:

ORS 419B.504 governs the court's consideration of a petition to terminate parental rights on the ground of unfitness. \* \* \*

\* \* \* \* \*

***Whether a parent's conduct or condition has had a seriously detrimental effect on the child is a "child-specific" inquiry that calls for "testimony in psychological and developmental terms regarding the particular child's requirements." Id. That is, "minimally adequate parenting skills may be different for a severely disabled child from those for a child that has no disabilities." State ex rel SOSCF v. Wilcox, 162 Or App 567, 576, 986 P2d 1172 (1999).***

Moreover, a parent's fitness must be measured as of the time of the parental rights termination hearing. Thus, evidence that grounds for termination may have existed previously, without evidence that those grounds continued to exist at the time of the hearing, is insufficient to support the conclusion that parental rights should be terminated. *Stillman*, 333 Or at 148-49. \* \* \*

\* \* \* \* \*

\* \* \* DHS has proved that father has various conditions--cannabis dependency, opiate dependency, and cocaine dependency--and has engaged in conduct--domestic violence--that are in various stages of treatment but that, in combination, render father presently unfit to parent any child, particularly a child with N's anxiety issues and need for constant supervision. ***Father***

***does not dispute that his substance abuse has been seriously detrimental to N in the past. For example, when in the throes of his addiction, father neglected N's needs and associated with individuals who directly threatened the safety of his family. The evidence in the record demonstrates that, although those chemical dependencies were in the process of being treated, father had not yet completed treatment that would provide any degree of certainty that father would maintain his recovery. Moreover, although father took a 16-hour anger management class, he has not engaged in any treatment specifically aimed at domestic violence--an issue that has permeated his previous relationships.***

***The more difficult question, given the timing of the termination hearing and the stage of father's treatment upon his release from prison, is whether N's integration into father's home is improbable within a reasonable time due to conduct or conditions not likely to change. Whether a particular time for reintegration is "reasonable" depends on the particular needs of the child.*** ORS 419A.004(20) (a "reasonable time" is a "period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments").

As noted above, the evidence demonstrates that father was still in the process of being treated for chemical dependency. The trial court was convinced that father would complete that treatment and maintain sobriety, based primarily on the court's factual determination that father was earnest in his desire to achieve recovery and to reunify with N. Although we, like the trial court, find father's efforts to be commendable, father's *intentions* are not the only predictor of success in this case. \* \* \*.

***The past, in this case, is the best predictor of father's future success; we find it to be highly unlikely that father would be able to balance the stresses of everyday living, work, recovery, and domestic violence and parenting training, and to progress to the point where integration is possible, in less than six months.*** Thus, we conclude, given father's extensive drug abuse history and the testimony of McClafin, that father is at least six months away--likely more--from achieving a level of recovery that would permit the reintegration of N into father's home.

***Six months to a year is too long for N to wait, particularly given how speculative reintegration is at this point. At the time of trial, N had been in DHS custody for half of her life. Although she had done well in foster care, she needs stability and permanence at this stage of her development, as well as the opportunity to form lasting attachments. Because of her anxiety, N has a heightened need for a structured, consistent, and stable routine in the immediate future. For that reason, we find that integration into father's home within a reasonable time is improbable.***

223 Or App at 585-88 (emphasis in bold italics added).

**25. State ex rel Juv. Dept. v. J. L. M., 220 Or App 93, 182 P3d 1203 (2008) (father's conduct and conditions, considered in combination, rendered him "presently unfit" because he could not provide the steady, patient care needed to sustain the child's improved, but still fragile, mental health)**

THE COURT OF APPEALS' SUMMARY:

Father appeals from a judgment terminating his parental rights. *Held:* Father had a long history of drug abuse that was seriously detrimental to child and failed to engage in services following his completion of a drug treatment program and release from prison. He had not addressed his drug addiction to a level that would enable child's safe return. In addition, father's pattern of anger and instability demonstrated that he could not provide the steady, patient care necessary to meet child's special needs. DHS made reasonable efforts, but it was improbable that child could be reintegrated into father's home within a reasonable time. Termination was in child's best interests. Affirmed.

EXCERPTS FROM OPINION:

\* \* \* The [juvenile court] found clear and convincing evidence of unfitness on multiple fronts. Most pertinent to our analysis, the juvenile court found that father had a pattern of residential and employment instability that substantially interfered with his ability to care for child, that he had failed to adjust his circumstances despite offers of services, and that he had a pattern of ignoring court orders and resisting DHS. The court found that father did nothing after his release from prison to demonstrate that his various conditions had been ameliorated. Father had not participated in aftercare and had lied to his probation officer about it. He had "continued to manipulate the system to avoid taking" UAs, and his own statements were not credible, according to the trial court. Father also had not done parenting classes. The court noted, "If he had done the services after his release, perhaps this case would not be in the posture it is in. [Father] has no one to blame but himself."

***The court observed that father listened to sad testimony about child's condition "without any affect whatsoever. It is absolutely clear that [child] requires a degree of parenting and care that \* \* \* father is not capable of understanding, let alone \* \* \* perfecting, even with the assistance of social service agencies." The court concluded that termination was in child's best interests.***

\* \* \* \* \*

ORS 419B.504 requires a two-step analysis. First, the court must examine (a) whether the parent has engaged in conduct or is characterized by a condition and (b) whether the conduct or condition is seriously detrimental to the child. Second, if the parent is unfit, the court must determine whether it is improbable that the child will, within a reasonable time, be integrated into the parent's home. *State ex rel Dept. of Human Services v. Smith*, 338 Or 58, 80-81, 106 P3d 627 (2005); *State ex rel SOSCF v. Stillman*, 333 Or 135, 145-46, 36 P3d 490 (2001). ***A formerly unfit parent may become fit, and a parent's rights may be terminated only***

**if the parent is presently unfit.** *State ex rel Dept. of Human Services v. Rardin*, 340 Or 436, 448, 134 P3d 940 (2006).

**The focus is on the detrimental effect of the parent's conduct or condition, not in the abstract, but on the child.** *State ex rel Dept. of Human Services v. Simmons*, 342 Or 76, 96, 149 P3d 1124 (2006); *State ex rel Juv. Dept. v. F.W.*, 218 Or App 436, 456, 180 P3d 69 (2008). **In examining whether a parent is unfit, the "inquiry necessarily focuses on the severity of the adverse effect of a parent's conduct or condition on the child. That is, the more adverse its effect on the child, the more likely it is that the parent's conduct or condition will render him or her unfit."** *F. W.*, 218 Or App at 462.

Facts supporting termination must be proved by clear and convincing evidence, which is evidence that makes the asserted facts highly probable. ORS 419B.521(1); *State ex rel Dept. of Human Services v. Radiske*, 208 Or App 25, 48, 144 P3d 943 (2006). **In assessing a parent's fitness, we view all proven conduct or conditions in combination.** *Radiske*, 208 Or App at 49.

Here, father's conduct or condition is difficult to characterize succinctly, in part because father has avoided providing reasonable means for assessing his situation, particularly with respect to his sobriety and his psychological state. He manipulated the system to avoid UAs and lied to his PO about participating in aftercare, thus avoiding a requirement that he engage in treatment. He prevented any reliable psychological evaluation by being dishonest with Sacks and by failing to show up for the evaluation with Basham.

\* \* \* \* \*

\* \* \* **[E]ven apart from his drug addiction, viewing father's conduct and history in light of child's specific needs, we find a pattern of conduct demonstrating that father cannot provide the steady, patient care needed to sustain child's improved, but still fragile, mental health.** Father's failure to engage meaningfully in services during most of the time that child has been out of his care, particularly on his release from prison, constitutes a failure to adjust his conditions, conduct, and circumstances to make it possible for child to safely return to father's care within a reasonable time. *See* ORS 419B.504(5). We address below the further specific aspects of father's conduct that are seriously detrimental to child--his inability to manage his anger, his unstable living situation, and his inadequate parenting skills, as well as his failure to engage in services to address each of those concerns.

\* \* \* [F]ather is unable or unwilling to manage his anger. Although Smith identified anger management as an issue for father to address in aftercare, father failed to engage in that recommended treatment. Father's problems in managing anger are evident in his past behavior--including threats, assault, and admitted verbal abuse and occasional domestic violence with mother--and in his conduct during trial, a time when he reasonably would be expected to be on his best behavior.

**Given child's anxiety and anger issues and his high need for stability, father's anger management issues would prevent him from meeting child's needs and thus are seriously detrimental to child.** Indeed, father acknowledged that, as a result of his disputes with mother during child's earliest years, child is probably more sensitized to confrontations between adults. Child requires consistency, and father's inability to control his own anger is among the reasons why he cannot provide that consistency.

220 Or App at 116, 118-121 (emphasis added).

**26. State ex rel Dept. of Human Services v. J. S., 219 Or App 231, 182 P3d 278 (2008) (the serious detriment requirement of ORS 419B.504 does not mean that the detriment to the child must already have occurred as a prerequisite to termination)**

THE COURT OF APPEALS' SUMMARY:

Child appeals a judgment denying his petitions to terminate mother's and father's parental rights. *Held:* On *de novo* review, the Court of Appeals concluded that child had established, by clear and convincing evidence as of the time of trial, grounds for terminating mother's and father's parental rights on the basis of unfitness. ORS 419B.504. It is unlikely that child will be integrated into mother's or father's home within a reasonable time, and termination is in child's best interests. Reversed.

EXCERPTS FROM OPINION:

ORS 419B.504 sets out a two-part test for determining whether to terminate parental rights, both parts of which must be met before the court orders termination. First, the court must assess the parent's present fitness. ***A parent is unfit, such that termination may be warranted, if the parent has engaged in conduct or is characterized by a condition and that conduct or condition is seriously detrimental to the child.*** *State ex rel SOSCF v. Stillman*, 333 Or 135, 145, 36 P2d 490 (2001); *State ex rel Dept. of Human Services v. L.S.*, 211 Or App 221, 239, 154 P3d 148 (2007). ***Termination is permissible only if the parent is unfit under that standard at the time of the termination trial.*** *State ex rel Dept. of Human Services v. Rardin* 340 Or 436, 448, 134 P3d 940 (2006). Second, if the parent is unfit, the court must assess the likelihood that the child will be integrated into the parent's home; termination may be warranted if it is improbable that the child will be integrated into the parent's home within a reasonable time because of conduct or conditions unlikely to change. The facts supporting termination must be proved by clear and convincing evidence; in other words, the court must find that the evidence establishes that the truth of the facts asserted is highly probable. ORS 419B.521(1); *Simmons*, 342 Or at 95; *State ex rel Dept. of Human Services v. Smith*, 338 Or 58, 79, 106 P3d 627 (2005).

\* \* \* \* \*

***\* \* \* [T]he detriment requirement [of ORS 419B.504] "does not specify that the serious detriment must already have occurred as a prerequisite to termination. A condition or conduct can be deemed 'detrimental' based on potential harm even before that harm comes to pass."*** *State ex rel Dept. of Human Services v. J.A.C.*, 216 Or App 268, 279, 172 P3d 295 (2007) (some internal quotation marks omitted). ***In a case such as this, where there have been several previous terminations based on similar conduct and conditions, and where the instant child has been in state custody since birth, we must necessarily focus in large part on the likelihood of future detriment should the child be returned to the parents.***

\* \* \* \* \*

***\* \* \* We agree that father's inability to comprehend and apply offered information about mother's drug use, and his continuing relationship with mother in***

***light of that information and the effects of mother's drug use on the older children, create a substantial likelihood that father will not protect child from known risks.***

Moreover, given that child has already exhibited symptoms consistent with methamphetamine exposure, it is likely that he will exhibit additional symptoms as he develops, and it does not appear that father has the capacity to parent a child with special needs. \* \* \*

***In addition, we conclude that father's inability to protect child from those risks has been and will continue to be seriously detrimental to child.*** For the reasons explained above in connection with mother, child was detrimentally affected by mother's use of methamphetamine while she was pregnant with child and is highly likely to continue to be detrimentally affected by mother's methamphetamine use; because father did not, and will not, protect child from mother's methamphetamine use, father's conduct is detrimental to child. The limitations on father's parenting skills are also likely to be detrimental to child; in particular there are substantial risks that father will fail to recognize child's developmental problems and seek appropriate help for them.

219 Or App at 257, 261, 265-66 (emphasis added).

**27. *State ex rel Juv. Dept. v. F.W.*, 218 Or App 436, 180 P3d 69 (2008) (although father's drug dependency was in remission at the time of trial, the combination of father's drug dependency and mental disorders and the children's special needs made the father unable to adequately appreciate and meet the children's needs and rendered him presently unfit)**

THE COURT OF APPEALS' SUMMARY:

The state appeals and children cross-appeal from judgments dismissing the state's petition to terminate father's parental rights. The state and the children assert that the trial court erred in failing to terminate father's parental rights under ORS 419B.504 on the ground of unfitness. *Held:* The children and the state have proved by clear and convincing evidence that father is unfit by reason of drug dependency and personality disorders that, in combination, are seriously detrimental to the children. Moreover, the state and the children have proved that integration of the children into father's home is improbable within a reasonable time due to conduct or conditions not likely to change and that termination is in the children's best interests. Because of the children's compelling special needs and father's substance abuse and mental disorders, father was presently unfit at the time of trial. Reversed.

EXCERPTS FROM OPINION:

\* \* \* The central issue in this case--as the juvenile court and the parties have framed it--is whether, as a consequence of his drug dependency and mental health conditions, father was unfit at the time of trial. Father asserts that, "[g]iven his progress over the year before the trial,

his willingness to seek assistance, and the ample evidence of his empathy and sensitivity to his children's needs, the state failed to establish by clear and convincing evidence that father is presently unfit to parent E and F." \* \* \* .

\* \* \* \* \*

**\* \* \* The children here have special needs, they are healthily bonded with their foster parents, but not with father, and the issue is not whether father is minimally adequate in light of his intellectual deficiencies but, rather, whether, he has simply waited too long to reform in light of the children's pressing needs.**

\* \* \* \* \*

\* \* \* It may be, as father contends, that his cyclical history of addiction and relapse alone is insufficient to prove his present unfitness. However, father's drug dependency, when viewed in combination with his mental disorders and the children's special needs, rendered father presently unfit at the time of trial. **Those conditions, which deprived the children of their father for most of their early childhood years, have also--except to a rudimentary extent-- made him unable to adequately appreciate and accommodate the children's special needs. Despite his progress at the time of trial, father was still at least a year removed from being ready to parent the children.**

\* \* \* \* \*

Except in cases where the juvenile court initially finds that no further services are required, ORS 419B.470(2) gives the Department of Human Services no more than 12 months after a child is found to be within the jurisdiction of the court under ORS 419B.100, or 14 months after the child is placed in substitute care, whichever is the earlier, to conduct a permanency hearing. **That statute evinces the specific policy objective that children not be left indefinitely in a placement limbo, and it also more generally reflects a child-centered policy orientation to the dependency process. At the time of trial in this case, two special needs children had been enmeshed in the child protection system for six and five years, respectively, and DHS had invested substantial resources in assisting father through multiple relapse and recovery cycles.**

Unlike *Huston*, this is not a case where "the agency should have taken more [time]" to prepare father for the challenge of parenting these children. *Huston*, 203 Or App at 660 (Brewer, C. J., concurring). **To the contrary, in this case, the "child-specific" testimony in psychological and developmental terms regarding the relationship between father's substance abuse and mental disorders and the special needs of E and F is compelling and essentially un rebutted.** \* \* \* .

218 Or App at 456-57, 464, 467-69 (emphasis added).