

JUVENILE DEPENDENCY 101

**The Honorable Daniel R. Murphy
&
Michael Livingston, Juvenile Law Staff Counsel**

August 14, 2011

DEPENDENCY 101

Applicable Statutes

Shelter Hearing

419B.185 Evidentiary hearing.

(1) ***When a child or ward is taken, or is about to be taken, into protective custody pursuant to ORS 419B.150, 419B.160, 419B.165, 419B.168 and 419B.171 and placed in detention or shelter care, a parent, child or ward shall be given the opportunity to present evidence to the court at the hearings specified in ORS 419B.183, and at any subsequent review hearing, that the child or ward can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process prior to adjudication. At the hearing:***

(a) ***The court shall make written findings*** as to whether the Department of Human Services has made ***reasonable efforts*** or, if the Indian Child Welfare Act applies, ***active efforts to prevent or eliminate the need for removal of the child or ward from the home and to make it possible for the child or ward to safely return home.*** When the court finds that no services were provided but that reasonable services would not have eliminated the need for protective custody, the court shall consider the department to have made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to prevent or eliminate the need for protective custody. ***The court shall include in the written findings a brief description of the preventive and reunification efforts made by the department.***

(b) In determining whether a child or ward shall be removed or continued out of home, the court shall consider whether the provision of reasonable services can prevent or eliminate the need to separate the family.

(c) In determining whether the department has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to prevent or eliminate the need for removal of the child or ward from the home and to make it possible for the child or ward to safely return home, ***the court shall consider the child or ward's health and safety the paramount concerns.***

(d) ***The court shall make a written finding in every order of removal that describes why it is in the best interests of the child or ward that the child or ward be removed from the home or continued in care.***

(e) When the court determines that a child or ward shall be removed from the home or continued in care, the court shall make written findings whether the department made ***diligent efforts pursuant to ORS 419B.192.*** The court shall include in its written findings a brief description of the efforts made by the department.

(f) ***The court shall determine whether the child or ward is an Indian child*** as defined in ORS 419A.004 or in the applicable State-Tribal Indian Child Welfare Agreement.

(g) ***The court may receive testimony, reports and other evidence without regard to whether the evidence is admissible under ORS 40.010 to 40.210 and 40.310 to 40.585 if the evidence is relevant to the determinations and findings required under this section. As used in this paragraph, "relevant evidence" has the meaning given that term in ORS 40.150.***

(2) To aid the court in making the written findings required by subsection (1)(a), (d) and (e) of this section, ***the department shall present written documentation to the court outlining:***

(a) The efforts made to prevent taking the child or ward into protective custody and to provide services to make it possible for the child or ward to safely return home;

- (b) The efforts the department made pursuant to ORS 419B.192; and
- (c) Why protective custody is in the best interests of the child or ward.

25 USC § 1911(e) Foster care placement orders; evidence; determination of damage to child.

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

Jurisdiction Hearing

ORS 419B.305 When hearing must be held; continuation; priority.

(1) ***Except as otherwise provided in this section, no later than 60 days after a petition alleging that a child is within the jurisdiction of the court under ORS 419B.100 has been filed, the court shall hold a hearing on the petition and enter an order under ORS 419B.325 (1). Upon written order supported by factual findings of good cause, the court may continue a petition beyond 60 days.***

(2) ***No later than 30 days*** after a petition alleging jurisdiction under ORS 419B.100 is filed all parties shall comply with ORS 419B.881.

(3) When a person denies allegations in the petition, the court shall set the case for a hearing within the time limits prescribed by subsection (1) of this section. Upon written order supported by factual findings of good cause, the court may continue the hearing beyond the 60-day time limit.

(4) Upon expiration of any continuance granted by this section, the court shall give a petition filed under ORS 419B.100 that is beyond the time limit imposed by subsection (1) of this section the highest priority on the court docket.

ORS 419B.310 Conduct of hearings.

(1) The hearing shall be held by the court without a jury and may be continued from time to time. During the hearing of a case filed pursuant to ORS 419B.100, ***the court, on its own motion or upon the motion of a party, may take testimony from any child appearing as a witness and may exclude the child's parents and other persons if the court finds such action would be likely to be in the best interests of the child.*** However, the court shall not exclude the attorney for each party and the testimony shall be reported.

(2) Stenographic notes or other report of the hearings shall be taken only when required by the court.

(3) ***The facts alleged in the petition showing the child to be within the jurisdiction of the court as provided in ORS 419B.100 (1), unless admitted, must be established by a preponderance of competent evidence.***

25 USC § 1911(e) Foster care placement orders; evidence; determination of damage to child.

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

Disposition Hearing

419B.325 Disposition required; evidence.

(1) At the termination of the hearing or hearings in the proceeding, the court shall enter an appropriate order directing the disposition to be made of the case.

(2) For the purpose of determining proper disposition of the ward, testimony, reports or other material relating to the ward's mental, physical and social history and prognosis may be received by the court without regard to their competency or relevancy under the rules of evidence

419B.331 When protective supervision authorized; conditions that may be imposed.

When the court determines it would be in the best interest and welfare of a ward, the court may place the ward under protective supervision. The court may direct that the ward remain in the legal custody of the ward's parents or other person with whom the ward is living, or the court may direct that the ward be placed in the legal custody of some relative or some person maintaining a foster home approved by the court, or in a child care center or a youth care center authorized to accept the ward. The court may specify particular requirements to be observed during the protective supervision consistent with recognized juvenile court practice, including but not limited to restrictions on visitation by the ward's parents, restrictions on the ward's associates, occupation and activities, restrictions on and requirements to be observed by the person having the ward's legal custody, and requirements for visitation by and consultation with a juvenile counselor or other suitable counselor.

419B.337 Commitment to custody of Department of Human Services.

(1) ***When the court determines it would be in the best interest and for the welfare of a ward, the court may place the ward in the legal custody of the Department of Human Services for care, placement and supervision.*** When the court enters an order removing a ward from the ward's home or an order continuing care, the court shall make a written finding as to whether:

(a) Removal of the ward from the ward's home or continuation of care is in the best interest and for the welfare of the ward;

(b) Reasonable efforts, considering the circumstances of the ward and parent, have been made to prevent or eliminate the need for removal of the ward from the home or to make it possible for the ward to safely return home. In making this finding, the court shall consider the ward's health and safety the paramount concerns; and

(c) Diligent efforts have been made to place the ward pursuant to ORS 419B.192.

(2) The court may specify the particular type of care, supervision or services to be provided by the Department of Human Services to wards placed in the department's custody and to the parents or guardians of the wards, but the actual planning and provision of such care, supervision or services is the responsibility of the department. The department may place the ward in a child care center authorized to accept the ward.

(3) The court may make an order regarding visitation by the ward's parents or siblings. The Department of Human Services is responsible for developing and implementing a visitation plan consistent with the court's order.

(4) Uniform commitment blanks, in a form approved by the Director of Human Services, shall be used by all courts for placing wards in the legal custody of the Department of Human Services.

(5) If the ward has been placed in the custody of the Department of Human Services, the court shall make no commitment directly to any residential facility, but shall cause the ward to be delivered into the custody of the department at the time and place fixed by rules of the department. A ward so committed may not be placed in a Department of Corrections institution.

(6) Commitment of a ward to the Department of Human Services continues until dismissed by the court or until the ward becomes 21 years of age.

(7) A court may dismiss commitment of a ward to the Department of Human Services if:

(a)(A) Dismissal is appropriate because the ward has been safely reunited with a parent or because a safe alternative to reunification has been implemented for the ward; and

(B) The ward is at least 14 years of age but less than 21 years of age and the court finds that:

(i) The department has provided case planning pursuant to ORS 419B.343 that addresses the ward's needs and goals for a successful transition to independent living, including needs and goals relating to housing, physical and mental health, education, employment, community connections and supportive relationships;

(ii) The department has provided appropriate services pursuant to the case plan;

(iii) The department has involved the ward in the development of the case plan and in the provision of appropriate services; and

(iv) The ward has safe and stable housing and is unlikely to become homeless as a result of dismissal of commitment of the ward to the department; or

(b) The ward has been committed to the custody of the Oregon Youth Authority.

419B.340 Reasonable or active efforts determination.

(1) ***If the court awards custody to the Department of Human Services, the court shall include in the disposition order a determination whether the department has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to prevent or eliminate the need for removal of the ward from the home.*** If the ward has been removed prior to the entry of the order, the order shall also include a determination whether the department has made reasonable or active efforts to make it possible for the ward to safely return home. In making the determination under this subsection, the court shall consider the ward's health and safety the paramount concerns.

(2) ***In support of its determination whether reasonable or active efforts have been made by the department, the court shall enter a brief description of what preventive and reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family.***

(3) When the first contact with the family has occurred during an emergency in which the ward could not remain without jeopardy at home even with reasonable services being provided, the department shall be considered to have made reasonable or active efforts to prevent or eliminate the need for removal.

(4) When the court finds that preventive or reunification efforts have not been reasonable or active, but further preventive or reunification efforts could not permit the ward to remain without jeopardy at home, the court may authorize or continue the removal of the ward.

(5) ***If a court determines that one of the following circumstances exist, the juvenile court may make a finding that the department is not required to make reasonable efforts to make it possible for the ward to safely return home:***

(a) ***Aggravated circumstances*** including, but not limited to, the following:

- (A) The parent by abuse or neglect has caused the death of any child;
- (B) The parent has attempted, solicited or conspired, as described in ORS 161.405, 161.435 or 161.450 or under comparable laws of any jurisdiction, to cause the death of any child;
- (C) The parent by abuse or neglect has caused serious physical injury to any child;
- (D) The parent has subjected any child to rape, sodomy or sexual abuse;
- (E) The parent has subjected any child to intentional starvation or torture;
- (F) The parent has abandoned the ward as described in ORS 419B.100 (1)(e); or
- (G) The parent has unlawfully caused the death of the other parent of the ward;

(b) ***The parent has been convicted in any jurisdiction of one of the following crimes:***

- (A) Murder of another child of the parent, which murder would have been an offense under 18 U.S.C. 1111(a);
- (B) Manslaughter in any degree of another child of the parent, which manslaughter would have been an offense under 18 U.S.C. 1112(a);
- (C) Aiding, abetting, attempting, conspiring or soliciting to commit an offense described in subparagraph (A) or (B) of this paragraph; or
- (D) Felony assault that results in serious physical injury to the ward or another child of the parent; or

(c) The parent's rights to another child have been terminated involuntarily.

(6) If, pursuant to a determination under subsection (5) of this section, the juvenile court makes a finding that the department is not required to make reasonable efforts to prevent or eliminate the need for removal of the ward from the home or to make it possible for the ward to safely return home, and the department determines that it will not make such efforts, the court shall conduct a permanency hearing as provided in ORS 419B.470 no later than 30 days after the judicial finding under subsection (5) of this section.

(7) When an Indian child is involved, the department must 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 proven unsuccessful. Foster care placement may not be ordered in a proceeding in the absence of a determination, supported by clear and convincing evidence, including the testimony of expert witnesses, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the Indian child.

419B.343 Recommendations of committing court; case planning; plan contents.

(1) To ensure effective planning for wards, the Department of Human Services shall take into consideration recommendations and information provided by the committing court before placement in any facility. The department shall ensure that the case planning in any case:

(a) For the reunification of the family bears a rational relationship to the jurisdictional findings that brought the ward within the court's jurisdiction under ORS 419B.100;

(b) Incorporates the perspective of the ward and the family and, whenever possible, allows the family to assist in designing its own service programs, based on an assessment of the family's needs and the family's solutions and resources for change; and

(c) Is integrated with other agencies in cooperation with the caseworkers.

(2) Except in cases when the plan is something other than to reunify the family, the department shall include in the case plan:

(a) Appropriate services to allow the parent the opportunity to adjust the parent's circumstances, conduct or conditions to make it possible for the ward to safely return home within a reasonable time; and

(b) A concurrent permanent plan to be implemented if the parent is unable or unwilling to adjust the parent's circumstances, conduct or conditions in such a way as to make it possible for the ward to safely return home within a reasonable time.

(3) Any time after a ward attains 14 years of age, if the department determines that it is appropriate, but in no case later than the date the ward attains 16 years of age, the department shall ensure that the case planning in the case addresses the ward's needs and goals for a successful transition to independent living, including needs and goals related to housing, physical and mental health, education, employment, community connections and supportive relationships.

(4) The case plan for a ward in substitute care must include the health and education records of the ward, including the most recent information available regarding:

(a) The names and addresses of the ward's health and education providers;

(b) The grade level of the ward's academic performance;

(c) The ward's school record;

(d) Whether the ward's placement takes into account proximity to the school in which the ward is enrolled at the time of placement;

(e) The ward's immunizations;

(f) Any known medical problems of the ward;

(g) The ward's medications; and

(h) Any other relevant health and education information concerning the ward that the department determines is appropriate to include in the records

419B.349 Court authority to review placement.

Commitment of a child or ward to the Department of Human Services does not terminate the court's continuing jurisdiction to protect the rights of the child or ward or the child or ward's parents or guardians. Notwithstanding ORS 419B.337 (5), if upon review of a placement of a child or ward made by the department the court determines that the placement is not in the best interest of the child or ward, the court may direct the department to place the child or ward in the care of the child or ward's parents, in foster care with a foster care provider who is a relative, in foster care with another foster care provider, in residential care, in group care or in some other specific type of residential placement, but unless otherwise required by law, the court may not direct a specific placement. The actual planning and placement of the child or ward is the responsibility of the department. Nothing in this section affects any contractual right of a private agency to refuse or terminate a placement.

419B.449 Review hearing by court; findings.

(1) Upon receiving any report required by ORS 419B.440, the court may hold a hearing to review the child or ward's condition and circumstances and to determine if the court should continue jurisdiction and wardship or order modifications in the care, placement and supervision of the child or ward. The court shall hold a hearing:

(a) In all cases under ORS 419B.440 (2)(b) when the parents' rights have been terminated;

(b) If requested by the child or ward, the attorney for the child or ward, if any, the parents or the public or private agency having guardianship or legal custody of the child or ward within 30 days of receipt of the notice provided in ORS 419B.452;

(c) Not later than six months after receipt of a report made under ORS 419B.440 (1) on a ward who is in the legal custody of the Department of Human Services pursuant to ORS 419B.337 but who is placed in the physical custody of a parent or a person who was appointed the ward's legal guardian prior to placement of the ward in the legal custody of the department; or

(d) Within 30 days after receipt of a report made under ORS 419B.440 (2)(c).

(2) The court shall conduct a hearing provided in subsection (1) of this section in the manner provided in ORS 419B.310, except that the court may receive testimony and reports as provided in ORS 419B.325. At the conclusion of the hearing, the court shall enter findings of fact.

(3) If the child or ward is in substitute care and the decision of the court is to continue the child or ward in substitute care, the findings of the court shall specifically state:

(a)(A) Why continued care is necessary as opposed to returning the child or ward home or taking prompt action to secure another permanent placement; and

(B) The expected timetable for return or other permanent placement.

(b) Whether the agency having guardianship or legal custody of the child or ward has made diligent efforts to place the child or ward pursuant to ORS 419B.192.

(c) The number of placements made, schools attended, face-to-face contacts with the assigned case worker and visits had with parents or siblings since the child or ward has been in the guardianship or legal custody of the agency and whether the frequency of each of these is in the best interests of the child or ward.

(d) For a child or ward 14 years of age or older, whether the child or ward is progressing adequately toward graduation from high school and, if not, the efforts that have been made by the agency having custody or guardianship to assist the child or ward to graduate.

(4) If the ward is in the legal custody of the department but has been placed in the physical custody of the parent or a person who was appointed the ward's legal guardian prior to placement of the ward in the legal custody of the department, and the decision is to continue the ward in the legal custody of the department and the physical custody of the parent or guardian, the findings of the court shall specifically state:

(a) Why it is necessary and in the best interests of the ward to continue the ward in the legal custody of the department; and

(b) The expected timetable for dismissal of the department's legal custody of the ward and termination of the wardship.

(5) In making the findings under subsection (2) of this section, the court shall consider the efforts made to develop the concurrent case plan, including, but not limited to, 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.

(6) In addition to findings of fact required by subsection (2) of this section, the court may order the Department of Human Services to consider additional information in developing the case plan or concurrent case plan.

(7) Any final decision of the court made pursuant to the hearing provided in subsection (1) of this section is appealable under ORS 419A.200.

419B.470 Permanency hearing; schedule.

(1) The court shall conduct a permanency hearing within 30 days after a judicial finding is made under ORS 419B.340 (5) if, based upon that judicial finding, the Department of Human Services determines that it will not make reasonable efforts to reunify the family.

(2) In all other cases when a child or ward is in substitute care, the court shall conduct a permanency hearing no later than 12 months after the ward was found within the jurisdiction of the court under ORS 419B.100 or 14 months after the child or ward was placed in substitute care, whichever is the earlier.

(3) If a ward is removed from court sanctioned permanent foster care, the department shall request and the court shall conduct a permanency hearing within three months after the date of the change in placement.

(4) If a ward has been surrendered for adoption or the parents' rights have been terminated and the department has not physically placed the ward for adoption or initiated adoption proceedings within six months after the surrender or entry of an order terminating parental rights, the court shall conduct a permanency hearing within 30 days after receipt of the report required by ORS 419B.440 (2)(b).

(5) Unless good cause otherwise is shown, the court shall also conduct a permanency hearing at any time upon the request of the department, an agency directly responsible for care or placement of the child or ward, parents whose parental rights have not been terminated, an attorney for the child or ward, a court appointed special advocate, a citizen review board, a tribal court or upon its own motion. The court shall schedule the hearing as soon as possible after receiving a request.

(6) After the initial permanency hearing conducted under subsection (1) or (2) of this section or any permanency hearing conducted under subsections (3) to (5) of this section, the court shall conduct subsequent permanency hearings not less frequently than once every 12 months for as long as the child or ward remains in substitute care.

(7) After the permanency hearing conducted under subsection (4) of this section, the court shall conduct subsequent permanency hearings at least every six months for as long as the ward is not physically placed for adoption or adoption proceedings have not been initiated.

(8) If a child returns to substitute care after a court's previously established jurisdiction over the child has been dismissed or terminated, a permanency hearing shall be conducted no later than 12 months after the child is found within the jurisdiction of the court on a newly filed petition or 14 months after the child's most recent placement in substitute care, whichever is the earlier.

419B.476 Conduct of hearing; court determinations; orders.

(1) A permanency hearing shall be conducted in the manner provided in ORS 418.312, 419B.310, 419B.812 to 419B.839 and 419B.908, except that the court may receive testimony and reports as provided in ORS 419B.325.

(2) At a permanency hearing the court shall:

(a) If the case plan at the time of the hearing is to reunify the family, determine whether the Department of Human Services has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to make it possible for the ward to safely return home and whether the parent has made sufficient progress to make it possible for the ward to safely return home. In making its determination, the court shall consider the ward's health and safety the paramount concerns.

(b) If the case plan at the time of the hearing is something other than to reunify the family, determine whether the department has made reasonable efforts to place the ward in a timely manner in accordance with the plan, including, if appropriate, reasonable efforts to place the ward through an interstate placement, and to complete the steps necessary to finalize the permanent placement.

(c) If the case plan at the time of the hearing is something other than to reunify the family, determine whether the department has considered permanent placement options for the ward, including, if appropriate, whether the department has considered both permanent in-state placement options and permanent interstate placement options for the ward.

(d) Make the findings of fact under ORS 419B.449 (2).

(3)(a) In the circumstances described in paragraph (b) of this subsection, in addition to making the determination required by subsection (2)(a) or (b) of this section, at a permanency hearing the court shall review the comprehensive plan for the ward's transition to independent living and determine and make findings as to:

- (A) Whether the plan is adequate to ensure the ward's successful transition to independent living;
 - (B) Whether the department has offered appropriate services pursuant to the plan; and
 - (C) Whether the department has involved the ward in the development of the plan.
- (b) The requirements of paragraph (a) of this subsection apply when:
- (A) The ward is 16 years of age or older; or
 - (B) The ward is 14 years of age or older and there is a comprehensive plan for the ward's transition to independent living.

(4) *At a permanency hearing the court may:*

(a) If the case plan changed during the period since the last review by a local citizen review board or court hearing and a plan to reunify the family was in effect for any part of that period, determine whether the department has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to make it possible for the ward to safely return home. In making its determination, the court shall consider the ward's health and safety the paramount concerns;

(b) If the case plan changed during the period since the last review by a local citizen review board or court hearing and a plan other than to reunify the family was in effect for any part of that period, determine whether the department has made reasonable efforts to place the ward in a timely manner in accordance with the plan, including, if appropriate, placement of the ward through an interstate placement, and to complete the steps necessary to finalize the permanent placement;

(c) *If the court determines that further efforts will make it possible for the ward to safely return home within a reasonable time, order that the parents participate in specific services for a specific period of time and make specific progress within that period of time;*

(d) *Determine the adequacy and compliance with the case plan and the case progress report,*

(e) *Review the efforts made by the department to develop the concurrent permanent plan,* including but not limited to identification of appropriate permanent in-state placement options and appropriate permanent interstate placement options and, if adoption is the concurrent case plan, identification and selection of a suitable adoptive placement for the ward;

(f) Order the department to develop or expand the case plan or concurrent permanent plan and provide a case progress report to the court and other parties within 10 days after the permanency hearing;

(g) Order the department or agency to modify the care, placement and supervision of the ward;

(h) Order the local citizen review board to review the status of the ward prior to the next court hearing; or

(i) Set another court hearing at a later date.

(5) The court shall enter an order within 20 days after the permanency hearing. In addition to any determinations or orders the court may make under subsection (4) of this section, the order shall include:

(a) The court's determination required under subsections (2) and (3) of this section, including a brief description of the efforts the department has made with regard to the case plan in effect at the time of the permanency hearing;

(b) The court's determination of the permanency plan for the ward that includes whether and, if applicable, when:

- (A) The ward will be returned to the parent;
- (B) The ward will be placed for adoption, and a petition for termination of parental rights will be filed;
- (C) The ward will be referred for establishment of legal guardianship; or
- (D) The ward will be placed in another planned permanent living arrangement;

(c) If the court determines that the permanency plan for the ward should be to return home because further efforts will make it possible for the ward to safely return home within a reasonable time, the court's determination of 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;

(d) If the court determines that the permanency plan for the ward should be adoption, the court's determination of whether one of the circumstances in ORS 419B.498 (2) is applicable;

(e) If the court determines that the permanency plan for the ward should be establishment of a legal guardianship or placement with a fit and willing relative, the court's determination of why neither placement with parents nor adoption is appropriate;

(f) If the court determines that the permanency plan for the ward should be a planned permanent living arrangement, the court's determination of a compelling reason, that must be documented by the department, why it would not be in the best interests of the ward to be returned home, placed for adoption, placed with a legal guardian or placed with a fit and willing relative;

(g) If the current placement is not expected to be permanent, the court's projected timetable for return home or for placement in another planned permanent living arrangement. If the timetable set forth by the court is not met, the department shall promptly notify the court and parties;

(h) If an Indian child is involved, the tribal affiliation of the ward; and

(i) If the ward has been placed in an interstate placement, the court's determination of whether the interstate placement continues to be appropriate and in the best interests of the ward.

(6) If an Indian child is involved, the court shall follow the placement preference established by the Indian Child Welfare Act.

(7) Any final decision of the court made pursuant to the permanency hearing is appealable under ORS 419A.200. On appeal of a final decision of the court under this subsection, the court's finding, if any, under ORS 419B.340 (5) that the department is not required to make reasonable efforts to make it possible for the ward to safely return home is an interlocutory order to which a party may assign error.

419B.500 Termination of parental rights generally.

The parental rights of the parents of a ward may be terminated as provided in this section and ORS 419B.502 to 419B.524, only upon a petition filed by the state or the ward for the purpose of freeing the ward for adoption if the court finds it is in the best interest of the ward. If an Indian child is involved, the termination of parental rights must be in compliance with the Indian Child Welfare Act. The rights of one parent may be terminated without affecting the rights of the other parent.

419B.521 Conduct of termination hearing.

(1) The court shall hold a hearing on the question of terminating the rights of the parent or parents. The court may not hold the hearing any earlier than 10 days after service or final publication of the summons. ***The facts on the basis of which the rights of the parents are terminated, unless admitted, must be established by clear and convincing evidence*** and a stenographic or other report authorized by ORS 8.340 shall be taken of the hearing.

(2) Not earlier than provided in subsection (1) of this section and not later than six months from the date on which summons for the petition to terminate parental rights is served, the court before which the petition is pending shall hold a hearing on the petition except for good cause shown. When determining whether or not to grant a continuance for good cause, the judge shall take into consideration the age of the child or ward and the potential adverse effect delay may have on the child or ward. The court shall make written findings when granting a continuance.

(3) The court, on its own motion or upon the motion of a party, may take testimony from any child appearing as a witness and may exclude the child's parents and other persons if the court finds such action would be likely to be in the best interests of the child. However, the court may not exclude the attorney for each party and any testimony taken under this subsection shall be recorded.

(4) Notwithstanding subsection (1) of this section, if an Indian child is involved, termination of parental rights must be supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child is likely to result in serious emotional or physical harm to the child.

DEPENDENCY 101

JUVENILE COURT DEPENDENCY JURISDICTION

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4. *Dept. of Human Services v. R. H., 237 Or App 245, 239 P3d 505, rev den 349 Or 480 (2010)* (the state proved the allegations of the petition, and the provisions of the juvenile court’s disposition order were rationally related to the bases for jurisdiction) page 7

5. *State v. N.L., 237 Or App 133, 239 P3d 255 (2010)* (father was denied adequate counsel because his attorney misstated the law concerning the applicability of the ICWA at the jurisdictional hearing, and, on this record, the juvenile court lacked authority under ORS 419B.923 to enter an amended jurisdictional judgment applying the ICWA after the parents had filed notices of appeal) page 9

6. *State v. R.T.S., 236 Or App 646, 238 P3d 53 (2010)* (state proved that father’s domestic violence created a reasonable likelihood of harm to the children and, therefore, endangered their welfare) page 11

7. 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)) page 13

8. 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) page 13

9. 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) page 14

10. 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) page 14

11. 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) page 15

12. 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) page 16

13. 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) page 17

14. G.A.C. v. State ex rel Juv. Dept., 219 Or App 1, 182 P3d 223
(2008) (reversing dismissal of petitions alleging physical abuse) page 17

JUVENILE COURT DEPENDENCY JURISDICTION

1. *Dept. of Human Services v. G.E., 243 Or App 471, --- P3d --- (2011)* (mother challenges continuing juvenile court wardship on the ground that the specific facts alleged in the dependency petition, which she admitted, have ceased to exist)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment of the juvenile court denying her motion to dismiss wardship over her daughter N. Mother contends that the trial court erred in denying her motion to dismiss, because she has ameliorated all of the facts on which the court had originally based its judgment of jurisdiction. Held: A juvenile court may not continue a wardship if the jurisdictional facts on which it is based have ceased to exist. The jurisdictional facts are those facts that are the basis for jurisdiction that provide a reasonable parent notice as to what he or she must do in order to prevent the state from assuming or continuing jurisdiction over the child. A mother is not on notice of specific concerns that are different in kind from the concerns in the original jurisdictional judgment. Here, the trial court relied on facts in its permanency judgment that are extrinsic to the original jurisdictional judgment. The Court of Appeals is unable to determine the role that those extrinsic facts played in the trial court's determination.

EXCERPTS FROM OPINION:

"It is axiomatic," we have held, "that a juvenile court may not continue a wardship 'if the jurisdictional facts on which it is based have ceased to exist.'" State v. A.L.M., 232 Or App 13, 16, 220 P3d 449 (2009) (quoting State ex rel Juv. Dept. v. Gates, 96 Or App 365, 372, 774 P2d 484, rev den, 308 Or 315 (1989)). It is equally axiomatic that a juvenile court may not continue a wardship based on facts that have never been alleged in a jurisdictional petition. See ORS 419B.809(4)(b) (dependency petition must "contain the facts that bring the child within the jurisdiction of the court, including sufficient information to put the parties on notice of the issues in the proceeding"). These precepts, however, are the beginning of our inquiry and not the end. That is so, because "facts" come in many levels of specificity. The department urges us to apply a very general level, focusing on the introductory material that repeats or paraphrases the statutory standards set out in ORS 419B.100(1)--for example, the child's condition and circumstances are such as to endanger her welfare, or the custodial parent has failed to provide the child with the care, guidance, and protection necessary for her physical mental or emotional well-being. ***Mother, in essence, urges us to approach the inquiry at a highly specific level, focusing on the "to wit" facts spelled out in "a" through "f" of the jurisdictional petition--for example, the child was present in his grandmother's apartment when grandmother's son threatened the adults with a shotgun, with child in the line of fire; or the home was below community standards due to strong odors, animal feces, and dirty diapers.***

Mother's approach presents insurmountable practical difficulties. It presumes that the court's authority to assert jurisdiction is based on specific facts and not on the conditions or characteristics that those facts demonstrate or exemplify; it mistakes the symptoms for the disease. For example, it would mean that the court

could not continue jurisdiction over N even if the department established that, although the shotgun-wielding person had been evicted, he had been replaced by a different shotgun-wielding person or by a wanted violent felon. The court could not continue jurisdiction on the basis that, although mother no longer lives in grandmother's house, she now lives down the block with armed methamphetamine cooks. Mother acknowledges such possibilities, but contends that the proper way for the state to deal with them is to submit an amended petition. See ORS 419B.809(6) (court on own motion or motion of interested party may direct that the petition be amended at any time). But human relationships, circumstances, and actions are never static; they change constantly, sometimes daily. We cannot imagine that the legislature intended endless sequential motions to amend, and the necessarily ensuing endless delays, every time a minor circumstance changes.

On the other hand, the department's approach has insurmountable problems of its own. Some of the statutory "factual" grounds for the assertion of jurisdiction--a child's "condition or circumstances are such as to endanger the welfare of the person or of others," ORS 419B.100(1)(c), for example--are so elastic or formless that the department could start the process based on one set of events or conditions (for example, the child is in a home with multiple fire hazards) and ultimately litigate the case based on entirely unrelated ones (parent associates with drug dealers), thereby depriving the parent of constitutionally adequate notice as to what, exactly, he or she is supposed to be doing in order to terminate the authority of the state to act as the child's surrogate parent.

ORS 419B.857 informs the proper accommodation of the state's duty to efficiently determine an at-risk child's fate and a parent's right to notice--without which the parent can neither prepare a defense nor properly address the circumstances or conditions that, according to the state, justify displacing parental authority. That statute provides:

"(1) All petitions, answers, motions and other papers must be liberally construed with a view of substantial justice between the parties.

"(2) In every stage of an action, the court shall disregard an error or defect in a petition, answer, motion, other paper or proceeding that does not affect the substantial rights of the adverse party."

This statute supports the inference that the legislature recognizes two situations in which the facts on which the juvenile court bases jurisdiction differ from facts in the original petition or jurisdictional judgment: situations in which the difference "does not affect the substantial rights" of the parent, and situations in which it does. ORS 419B.857(2). In the second situation, in order to preserve the substantial rights of the parent, the court must direct that the petition be amended and grant such continuance as the interests of justice may require. *See* ORS 419B.809(6) (allowing amendment of petition); ORS 419B.923 (allowing amendment of judgment). Typically, such a continuance will allow the parent adequate opportunity to defend against the new or unproven allegation, or opportunity to ameliorate it.

The proven facts depart from the petition so as to substantially affect a parent's rights if a reasonable parent would not have had notice from the petition or the jurisdictional judgment as to what he or she must do in order to prevent the state from assuming or continuing jurisdiction over the child. Thus, for example, if the petition alleges that the child's circumstances endanger her welfare because the child is living in a home where a fellow occupant pointed a loaded gun at her, a reasonable parent would know that the state can assert jurisdiction if it proves by a preponderance of the evidence that the child is living

in a different home where a different occupant exposes her to dangerous weapons or inherently dangerous substances. A reasonable parent could infer from the allegation in the petition that the state is concerned with her ability or willingness to establish a home where the child is safe from people who engage in dangerous conduct.

(Footnote omitted; emphasis in bold italics added).

2. Dept. of Human Services v. A.F. 243 Or App 379, --- P3d --- (2011) (state failed to prove that father's past possession of pornography created a reasonable likelihood of harm to the children)

THE COURT OF APPEALS' SUMMARY:

The juvenile court took jurisdiction over father's children, pursuant to ORS 419B.100(1), on the ground that father's possession of pornography, including child pornography, endangered the children's welfare. Father appeals, arguing that the state failed to prove that his possession of pornography endangered the children's welfare either (1) by creating a risk that they would be exposed to it or (2) by creating a risk that he would sexually abuse them. Held: The state did not present any evidence that exposure to pornography would harm the children, in a way and to a degree, such that the court could take jurisdiction over them, and, even assuming that exposure to pornography can be a basis for juvenile court jurisdiction over a child, the state failed to present evidence that, in this case, there was a current risk of such exposure for the children at the time of the hearing. Relating to the risk that father would sexually abuse the children, the state did not present sufficient evidence that father's possession of pornography created a reasonable likelihood of harm to the children.

EXCERPTS FROM OPINION:

The juvenile court took jurisdiction over father's children, pursuant to ORS 419B.100(1)(c), on the ground that father's possession of pornography, including child pornography, endangered the children's welfare. Father appeals, arguing that the state failed to prove that his possession of pornography endangered the children's welfare. * * *

* * * * *

The state called a sexual offender treatment specialist, Gilbert, to testify about the risks that arise from the possession of pornography. Gilbert testified that repeated exposure to pornography can reduce a person's inhibitions; it can reduce "the threshold of actually acting on fantasy." According to Gilbert, repeated exposure to pornography allows a person to view others "more as objects * * * than as humans[.]" thereby "reduc[ing] them to * * * something less and easier to molest or easier to offend against." Thus, according to Gilbert, "there's an increased likelihood of sexual crime taking place when there's heavy use of pornography."

* * * * *

Gilbert regarded the pornography father had downloaded as a "red flag." Gilbert was concerned by the amount of pornography father had downloaded and the fact that it included

child pornography. He testified that father posed a "potential risk" and "until we can rule out the risk * * * we have to assume there is a risk." Gilbert said that he would need more information to determine whether father posed an actual risk, including information about why and where father obtained the pornography, how recently and frequently he used it, and how he used it. That information would, according to Gilbert, "help clarify this situation."

* * * * *

First, the juvenile court erred by concluding that it had jurisdiction over the children pursuant to ORS 419B.100(1)(c) on the ground that they might be exposed to the pornography. The state did not present any evidence that exposure to pornography would harm the children, in a way and to a degree, such that the court could take jurisdiction over them. Although we can imagine that an expert might be able to testify to that effect, the state did not present any such testimony. Furthermore, even assuming that exposure to pornography can be a basis for juvenile court jurisdiction over a child, the state failed to present evidence that, in this case, there was a current risk of such exposure for the children at the time of the hearing. The pornography was on computers that had been turned over to the police in July 2009--more than a year before the November 2010 hearing that resulted in the judgment at issue in this case--and there was no evidence that father had possessed pornography since that time.

Second, the juvenile court erred by concluding that father himself posed a risk to his children as a result of his possession of pornography. The court relied on Gilbert's testimony. But, as described, Gilbert testified that he needed additional information to determine whether father posed an actual risk to his children. Gilbert emphasized that the fact that a person possesses pornography or engages in behavior relating to pornography that is outside the norm does not, in and of itself, mean that the person will commit a sexual offense. Accordingly, to determine whether a person who possesses pornography endangers the welfare of a child, Gilbert testified that he would need information about, for example, how recently and frequently the person used the pornography and what effects the use had on the person's thoughts and behavior.

That is understandable. ***The fact that a parent engages in behavior that could negatively affect his or her parenting does not necessarily mean that the behavior can serve as a basis for juvenile court jurisdiction over a child.*** See, e.g., *C. Z.*, 236 Or App at 442-43 (parent's substance abuse was an insufficient basis for juvenile court jurisdiction over parent's child); *State ex rel Dept. of Human Services v. D. T. C.*, 231 Or App 544, 554-55, 219 P3d 610 (2009) (same).

* * * Evidence of, *inter alia*, how recently and frequently the parent uses alcohol and the effects of that use on the parent's conduct would be necessary to determine whether the parent's alcohol use creates a "reasonable likelihood of harm to the welfare" of his or her child. *Vanbuskirk*, 202 Or App at 405. The same is true, as Gilbert's testimony indicates, with respect to father's possession of pornography in this case. Father's possession of pornography may well be concerning, as Gilbert testified and the juvenile court concluded. But there is insufficient evidence, on this record, to demonstrate a reasonable likelihood of harm to the children's welfare.

(Footnote omitted; emphasis in bold italics added).

3. **Dept. of Human Services v. D.D., 238 Or App 134, 241 P3d 1177 (2010) , rev den 349 Or 602 (2011)** (mother's admission to allegations that the child has special medical needs and that she would benefit from assistance was sufficient to establish dependency jurisdiction; juvenile court's failure to include in disposition order a "brief description" of DHS's preventive and reunification efforts, as required by ORS 419B.340(2), not reviewable as "plain error," where mother failed to object to the omission, and did not identify any prejudice resulting from it)

EXCERPTS FROM OPINION:

*Because mother waived her right to have DHS prove its allegations, * * * we are not concerned with the sufficiency of evidence offered to prove those allegations. See ORS 419B.310(3) (providing that, unless admitted, facts alleged in petition must be established by a preponderance of the evidence). Rather, we consider only whether, pursuant to the allegations, DHS would have been allowed to offer evidence that would establish juvenile court jurisdiction. * * *.*

The juvenile court has exclusive original jurisdiction in any case involving a person under age 18 "[w]hose condition or circumstances are such as to endanger the welfare of the person or of others." ORS 419B.100(1)(c). The key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the child's welfare. *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005). A petition alleging jurisdiction must "[c]ontain the facts that bring the child within the jurisdiction of the court, including sufficient information to put the parties on notice of the issues in the proceeding." ORS 419B.809(4)(b). The petition "must be liberally construed with a view of substantial justice between the parties." ORS 419B.857(1).

* * * * *

* * * [M]other admitted the allegation that "child has special medical needs. The mother would benefit from assistance from the Department of Human Services Child Welfare Program." The allegation that mother "would benefit from assistance" is ambiguous. It could be construed to mean that mother, although already providing minimally adequate care for child's special medical needs, could become a better parent with assistance; if the evidence established only that much, it would be insufficient to show a reasonable likelihood of harm to child's welfare. On the other hand, however, the allegation could be construed to mean that mother "would benefit" by gaining the ability to meet child's special medical needs; if the evidence established that mother was not able to meet those needs without assistance, it would be sufficient to show a reasonable likelihood of harm to child's welfare. Thus, if DHS had been required to prove the allegation that mother admitted, DHS would have been allowed to offer evidence sufficient to establish juvenile court jurisdiction.

Liberally construing the allegation that mother admitted, the petition contains facts that bring the child within the jurisdiction of the juvenile court. Because the allegation that mother admitted can be construed to contain facts bringing child within the jurisdiction of the court, the petition was sufficient to allege jurisdiction. * * * Because mother waived her right to have DHS put on evidence supporting the petition, the juvenile court did not err by finding child to be within its jurisdiction.

We turn to mother's final assignment of error, in which she contends that the juvenile court erred by failing to make findings required by statute--specifically, that the judgment of jurisdiction and disposition contains no "brief description" of preventive and reunification efforts and whether further efforts could have prevented or shortened the separation of the family, as required by ORS 419B.340(2). Mother acknowledges that she did not object to the juvenile court's failure to enter such a description, but she contends that, under the principles discussed in *State ex rel DHS v.M.A.*, 227 Or App 172, 205 P3d 36 (2009), she was not required to do so. In the alternative, she argues that the error is plain and that we should exercise our discretion to review to ensure compliance with the statutory scheme, because the state has no legitimate interest in defending a failure to make findings and because findings serve an important institutional concern with the appearance of fairness in juvenile proceedings.

* * * * *

**** * * [W]e conclude that ORS 419B.340(2) required the juvenile court to enter a "brief description" in the disposition order (which, in this case, was contained in the judgment of jurisdiction and disposition). We further conclude that mother was required to preserve her claim of error, that she did not do so, and that we should not exercise our discretion to review it.***

* * * ORS 419B.305(1) requires the juvenile court to hold a hearing on a jurisdiction petition and "enter an order under ORS 419B.325(1)." ORS 419B.325(1), in turn, provides that, "[a]t the termination of the hearing or hearings in the proceeding, the court shall enter an appropriate order directing the disposition to be made of the case." ORS 419B.340, in part, requires determinations to be made in the disposition order:

"(1) If the court awards custody to the Department of Human Services, the court shall include in the disposition order a determination whether the department has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to prevent or eliminate the need for removal of the ward from the home. If the ward has been removed prior to the entry of the order, the order shall also include a determination whether the department has made reasonable or active efforts to make it possible for the ward to safely return home. In making the determination under this subsection, the court shall consider the ward's health and safety the paramount concerns.

"(2) In support of its determination whether reasonable or active efforts have been made by the department, the court shall enter a brief description of what preventive and reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family."

Thus, under ORS 419B.340, a determination of reasonable efforts must be included in the disposition order--which must be entered at the termination of the hearing, ORS 419B.325(1)--and "[i]n support of [that] determination," a description must be "enter[ed]." * * *.

(Footnotes omitted; emphasis in bold italics added).

4. Dept. of Human Services v. R. H., 237 Or App 245, 239 P3d 505, rev den 349 Or 480 (2010) (the state proved the allegations of the petition, and the provisions of the juvenile court's disposition order were rationally related to the bases for jurisdiction)

THE COURT OF APPEALS' SUMMARY:

Father appeals a judgment of the juvenile court finding jurisdiction over his son, Z, and from parts of the dispositional judgment in the same case requiring father to undergo counseling in Oregon and to participate in a psychosexual risk assessment. He argues, first, that the juvenile court erred in failing to strike several of the allegations in the state's dependency petition because they were insufficient to establish jurisdiction; second, that, even if those allegations were sufficient, the state failed to prove them by a preponderance of the evidence; and third, that the remedies ordered by the juvenile court do not bear a rational relationship to the jurisdictional findings that brought Z within the court's jurisdiction. *Held:* Father's challenge to the allegations in the dependency petition are not preserved and are not plain error, and therefore the Court of Appeals does not address them; the state did prove the allegations by a preponderance of the evidence; and the remedies ordered by the juvenile court did bear a rational relationship to the jurisdictional findings.

EXCERPTS FROM OPINION:

Father argues that in order to prove that he abandoned Z, the state had to prove that father "relinquish[ed his] parental rights with the intent of never reasserting them." We agree with father that abandonment requires proof of intention; as the Supreme Court held in *State ex rel Dept. of Human Services v. Rardin*, 340 Or 436, 450, 134 P3d 940 (2006), a termination case, "[T]he legal concept of abandonment of a person's right or interest generally requires proof of intent to abandon. See *De Haven & Son Hardware Co. v. Schultz*, 122 Or 493, 497, 259 P 778 (1927) ('Abandonment is a matter of intention and is to be determined in the light of all the facts and circumstances.')." In this case, father argues,

"[t]he mere fact that mother and father moved [to Hawaii in July 2009] fails to prove that father 'abandoned' [Z]. * * * [The] record reflects that mother and father were living together in Hawaii * * *, that mother contacted [Z] to inform him of their move, that mother continued to attempt to contact [Z], and that [Z] refused that contact. Even if father did not himself attempt to contact [Z] after the family moved, that circumstance existed only for the three months preceding the jurisdictional trial. Those circumstances fail to support the inference that father gave up his rights to [Z] with the intent of never reasserting them."

We emphatically disagree. It is exactly father's move to another state and failure even to attempt to contact Z, immediately following a 10-year period of complete lack of contact, that directly supports the inference that father intended to relinquish his parental rights. We reject father's fourth assignment of error.

* * * * *

Finally, father argues that the juvenile court erred in ordering father to complete a psychosexual evaluation and to participate in family counseling in Oregon, as opposed to by phone from Hawaii. Specifically, father argues that, because the state did not prove by a

preponderance of the evidence that father sexually abused Z, there is no rational relation between the psychosexual evaluation and the court's jurisdictional basis. Father also argues that "the juvenile court had no legal or factual basis for requiring father to return to Oregon to be reunified with [Z]. On the contrary, [Z's] counselor testified that family counseling could occur telephonically."

ORS 419B.343 requires that, if a court orders case planning, that it "bears a rational relationship to the jurisdictional findings that brought the child within the court's jurisdiction under ORS 419B.100." As to the psychosexual evaluation, the trial court found that

"the evidence is conflicting around whether abuse occurred. That I think is safe to say. The allegation was that [Z] had said that; that he was the victim of abuse. The fact that there has been no determination, no final determination after, say, for example, a trial to resolve that issue.

"So from the Court's perspective, it is a circumstance that has to be described as one that involves risk, and the question becomes how to manage risk in the face of an ambiguity or something that has not been determined, that is not known.

"[B]ut when it becomes a matter where there is a risk, and the risk is of a very significant nature, and it involves a child, then to my mind, requiring that steps be taken to remove the risk, to understand it better so it can be managed, becomes rationally related to the grounds--the basis for jurisdiction."

We agree with the trial court. Because it is unclear whether sexual abuse did occur and it is clear that Z is confused about what happened, the evaluation is a rational way to see if father does, in fact, pose a risk and, if so, what treatment is necessary.

Lastly, the court's order that father return to Oregon for therapy and treatment is also rationally related to the reasons why the court took jurisdiction. Z has suffered because he feels abandoned by his family, and the court took jurisdiction because it found father fled the state and abandoned Z. By requiring father to return to the state and to begin building a relationship with Z, the court was requiring father to be an active presence in Z's life in order to remedy one of the reasons why the court took jurisdiction in the first place. We therefore reject father's last assignments of error.

(Emphasis in bold italics added).

5. State v. N.L., 237 Or App 133, 239 P3d 255 (2010) (father was denied adequate counsel because his attorney misstated the law concerning the applicability of the ICWA at the jurisdictional hearing, and, on this record, the juvenile court lacked authority under ORS 419B.923 to enter an amended jurisdictional judgment applying the ICWA after the parents had filed notices of appeal)

EXCERPTS FROM OPINION:

* * * After father and mother filed notices of appeal, the juvenile court entered a judgment amending the jurisdictional/dispositional judgment. As we explain below, we conclude that the juvenile court lacked authority to amend the judgment as it did; that father's trial counsel performed inadequately by misstating the law concerning the applicability of the Indian Child Welfare Act (ICWA); that, as to the juvenile court's finding of medical neglect, father suffered no prejudice as a result of counsel's performance; and that, as to additional findings required by ICWA, father did suffer prejudice. Because the jurisdictional/dispositional judgment did not comply with ICWA as to evidence and findings required under ORS 419B.340, we reverse and remand.

* * * In July 2009, DHS was awarded protective custody of the children. In a subsequent shelter order entered later that month, the juvenile court determined that the children were Indian children under ORS 419A.004(13), which defines "Indian child" as a child who either (a) is a member of a tribe or (b) is eligible for membership and is the biological child of a member of a tribe. Father is a member of the Choctaw Nation of Oklahoma, and the court found by clear and convincing evidence that the children were enrolled or eligible for enrollment. The court further found, by clear and convincing evidence, that removal from the home was in the children's best interest because the parents' continued custody was likely to result in serious emotional or physical damage to the children and that, under the circumstances, no efforts would have prevented the need for removal or made possible the return of the children.

The jurisdictional hearing was held in October. Near the end of the hearing, the court and counsel discussed the applicability of ICWA. A DHS caseworker testified that she had inquired of the Choctaw Nation whether the children were eligible for enrollment, had received conflicting information in response, and was gathering information to apply for enrollment; the Choctaw Nation did not intend to intervene until the children were enrolled. The caseworker believed that there was a "strong possibility" that they were eligible but that, "based on * * * letters from the Tribe, there is still some confusion about that matter."

The juvenile court made no findings about enrollment eligibility but did express concern about whether ICWA applied, which would trigger the requirements of proof by clear and convincing evidence and testimony from a qualified expert. ORS 419B.340(7). Counsel for all parties (father, mother, the children, and the state)--apparently confused by the tribe's lack of intervention--responded by agreeing that the applicable evidentiary standard was a preponderance of the evidence. The court accordingly applied that standard and made oral findings that, under ORS 419B.100(1)(c), the children's conditions and circumstances were such as to endanger their welfare because mother and father had (1) failed to provide dental care, (2) failed to provide for the children's medical needs, and (3) failed to provide for their educational needs. The court noted that it would find medical neglect by clear and convincing evidence, if needed. The court subsequently entered a "Judgment of Jurisdiction/Disposition (Non-ICWA)." (Uppercase and boldface omitted.) Mother and father appealed, and father argued, in part, that the juvenile court had erred by failing to apply ICWA.

* * * [A]fter the entry of the jurisdictional judgment and the filing of the notices of appeal in this case, mother filed in the juvenile court a "Motion for Reconsideration of ICWA Ruling at Jurisdictional Hearing." She contended that the juvenile court had "the authority to correct an error or mistake at any time under ORS 419B.923, even during the pendency of an appeal." DHS also received information that the children were eligible for enrollment and that the Choctaw Nation intended to intervene. The juvenile court held a hearing on April 13, 2010 (two days before oral argument in the appeal of the jurisdictional judgment), decided that ICWA applied, and set a date for an evidentiary hearing under ICWA standards.

* * * * *

On June 1, the juvenile court held a hearing in which it heard qualified expert testimony from a Choctaw Nation social worker. The court then entered an amended judgment of jurisdiction; applying a standard of clear and convincing evidence, the court found that DHS had made active efforts and that mother and father had failed to provide for children's medical needs, thereby endangering their health and welfare.

* * * * *

* * * In some circumstances, ORS 419B.923 allows a juvenile court to modify or set aside an order or judgment after the filing of a notice of appeal[.] * * *

* * * Nothing in the record before this court suggests that the juvenile court modified its judgment on the basis of newly discovered evidence [under ORS 419B.923(1)(c)]. * * * Rather, the parties appear to have agreed that mistakes were made at the jurisdictional hearing and that the court should have applied ICWA based on the record *at the time of that hearing*. * * *.

We also reject the state's argument that amending the judgment was within the juvenile court's "inherent power" under ORS 419B.923(8). * * * We are aware of no source of authority for the juvenile court to enter the amended judgment in this case during the pendency of this appeal. Because the amended judgment is ineffective, we consider the original jurisdictional/dispositional judgment only.

* * * * *

We begin with [father's] fifth assignment of error because it frames our resolution of the other issues. We agree that the juvenile court erred by not applying ICWA at the jurisdictional hearing--but ordinarily, given the agreement of father's trial counsel that the court did not need to do so, we would conclude that the error was invited and thus not a basis for reversal. *State ex rel Juv. Dept. v. S.P.*, 346 Or 592, 606, 215 P3d 847 (2009). Father, however, contends that his counsel was inadequate in that regard and that he should not be penalized for counsel's misstatement of the law; in his view, his counsel's statement was not a tactical decision, and no advantage could have accrued to father from it. We agree.

* * * * *

Here, father's counsel performed inadequately by mistakenly telling the juvenile court that ICWA did not apply. In a case involving an Indian child, the court must comply with ICWA before finding the child to be within its jurisdiction. State ex rel Juv. Dept. v. Cooke, 88 Or App 176, 178, 744 P2d 596 (1987). On the record at the time of the jurisdictional hearing, the juvenile court should have applied ICWA. ORS 419B.878 (providing in part that "[i]f the court knows or has reason to know

that an Indian child is involved, the court * * * shall enter an order that the case be treated as an Indian Child Welfare Act case until such time as the court determines that the case is not an Indian Child Welfare Act case"). Here, we can conceive of no strategic or tactical advantage that could have accrued to father from the application of the less stringent standards applicable to a non-ICWA case.

We next consider whether the result at the jurisdictional hearing would have been the same if father's counsel had asserted that ICWA applied. *Geist*, 310 Or at 191. As requested by father, we review *de novo*. ORS 19.415(3)(b); ORAP 5.40(8).⁽⁶⁾ We conclude that, as to the finding of educational and dental neglect, the result would have been different (although a discussion of those issues would not benefit the parties or the bench and bar); that, as to the finding of medical neglect, the proceeding below was fundamentally fair and the result would have been the same; and that, as to additional evidence and findings required by ORS 419B.340(7), the result would have been different. Thus, although educational and dental neglect are not proper bases for jurisdiction in this case, medical neglect may be a proper basis for jurisdiction if, on remand, the requirements of ORS 419B.340(7) are satisfied.

* * * * *

[W]e turn to the requirements of ORS 419B.340(7), which provides:

"When an Indian child is involved, the department must 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 proven unsuccessful. Foster care placement may not be ordered in a proceeding in the absence of a determination, supported by clear and convincing evidence, including the testimony of expert witnesses, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the Indian child."

When the juvenile court entered the jurisdictional/dispositional judgment, the requirements of ORS 419B.340(7) had not been met. If the applicability of ICWA had been asserted, presumably the juvenile court would have proceeded in compliance with that statute. With respect to the requirements of ORS 419B.340(7), father was prejudiced. Accordingly, the juvenile court must address that issue on remand.

(Footnotes omitted; emphasis in bold italics added).

6. *State v. R.T.S., 236 Or App 646, 238 P3d 53 (2010)* (state proved that father's domestic violence created a reasonable likelihood of harm to the children and, therefore, endangered their welfare)

THE COURT OF APPEALS' SUMMARY:

In this juvenile dependency case, the state alleged that father's domestic violence against mother presented a reasonable likelihood of harm to the couple's two children, and the juvenile court took jurisdiction over both children as to father on that basis. Father challenges the court's finding of jurisdiction, arguing that the state failed to prove that his conduct presented a current risk of harm to either of the children. After the case was submitted to the Court of Appeals, the juvenile court dismissed jurisdiction, and the Department of Human

Services (DHS) filed a motion to dismiss father's appeal as moot. *Held*: Father's appeal is not moot, but the juvenile court's finding of jurisdiction was appropriate.

EXCERPT FROM OPINION:

We are no longer required to review the evidence in a juvenile dependency case *de novo*. See ORS 19.415(3)(b) (providing that, in this type of case, "the Court of Appeals, acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record"). As we have noted, father does not request that we exercise our discretion to review this case *de novo*, and we decline to do so. Accordingly, we review the juvenile court's legal conclusions for errors of law, but are bound by the court's findings of historical fact so long as there is any evidence to support them. * * * Where findings are not made on disputed issues of fact and there is evidence from which those facts could be decided more than one way, we will presume that they were decided in a manner consistent with the juvenile court's ultimate conclusion. *Id.*

In this case, * * * the state was required to prove that the children's condition or circumstances currently endanger the children's welfare, although it need only prove a risk of harm and not that actual harm has already occurred. As we have also noted, the juvenile court made express factual findings: (1) that father had physically abused mother "often" and (2) that father's physical and verbal abuse of mother "endangers the welfare" of the two children.

As to the court's first finding, father is correct that the inquiry does not end with whether father committed physical violence against mother; our inquiry relates to the *children's* conditions and circumstances and not those of the parents. Instead, our inquiry in this case is whether the violence between the parents creates a current risk of harm to the children's welfare--that is, the court's second finding. Given our standard of review, we must determine whether there is any evidence in the record to support such a finding.

We conclude that, although the record is slim on that point, the state's evidence meets the low any-evidence standard. There is evidence in the record that the older child is scared when the parents argue and that, according to the county mental health specialist, when there is physical violence in the home, a child may suffer an inadvertent injury. There is also evidence that, even if the parents were separated at the time of the hearing with no current plans to reunite, mother and father have been on and off again throughout their seven-year relationship. And, given that the incidents of father's physical and verbal abuse have occurred throughout that period, there is a reasonable likelihood that it would continue were the couple to again reunite. For that reason, there is evidence to support the court's finding that the parents' conduct presents a risk of harm even to the parents' newborn who has never lived with father and mother together.

Accordingly, we cannot say that there is no evidence to support the juvenile court's factual findings. Because those findings are sufficient to meet the statutory standards, we agree with the state that juvenile court jurisdiction was warranted in this case.

(Footnote omitted; emphasis in bold italics added).

7. 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).

8. 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.

9. 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).

10. 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.

11. 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, that,

"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).

(Footnote omitted; emphasis in bold italics added).

12. *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.

13. 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.").

14. 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).

(Emphasis in bold italics added).