

# APPENDIX

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**Dept. of Human Services v. B.J.W., 235 Or App 307, 230 P3d 965 (2010) (construing and applying ORS 419B.325 – i.e., “[evidence] relating to the ward’s mental, physical and social history and prognosis”)**

**THE COURT OF APPEALS’ SUMMARY:**

Father appeals from a judgment that authorized the Department of Human Services to change its plan for his child from reunification to adoption. He argues that the trial court erred by admitting certain hearsay evidence that did not fall within the exception for evidence "relating to the ward's mental, physical and social history and prognosis[.]" ORS 419B.325(2). He also argues that, without the allegedly inadmissible evidence, the state did not establish that the permanency plan should be changed. *Held:* Evidence relates to a ward's "mental, physical and social history and prognosis" if it provides information that is relevant to a forecast or prediction of how the ward will fare in the future, and it necessarily includes information about the ward's future potential caregivers; the statute also allows the admission of material in reports that either the court or Department of Human Services ordered for the purpose of evaluation whether, or to what extent, father can maintain his relationship with his child; in this case, although some exhibits are of dubious relevance to the child or her prognosis, the documents provide no information that was not properly before the court and, therefore, if there was any error, it was harmless; and, finally, the trial court did not err in determining that the state proved by a preponderance of the evidence that changing the child's plan from reunification to adoption was in the child's best interest.

**EXCERPTS FROM OPINION:**

On appeal, father renews his objection to the admission of certain exhibits and argues that the record, purged of that evidence, does not establish by a preponderance of the evidence that the change in plan is in the child's best interest. The dispute requires us, as an initial matter, to construe ORS 419B.325(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.”

(Emphasis added.) The disputed evidence in this case consists entirely of "reports or other material," and it focuses primarily on *father's* mental, physical and social history and prognosis. Some of the reports focus entirely on father; one, for example, is a collection of documents involving father's arrest, plea, conviction, and sentence for criminal mischief in 1997, over two years before E was born. The state contends that father's history and character have an obvious, if indirect, bearing on the degree to which child might or might not be harmed by reunification, and therefore to child's "prognosis." Father maintains that the statute applies only to material that deals directly with E. ***We conclude that an all-purpose bright line rule defining what "relating to the ward's \* \* \* prognosis" means is not necessary in the present case.***

\* \* \* \* \*

***[W]e conclude that evidence relates to a ward's "mental, physical and social \* \* \* prognosis" if it provides information that is relevant to a forecast or prediction of how the ward will fare in the future, and it necessarily includes information about the ward's future potential caregivers.*** We therefore reject father's contention that ORS 419B.325(2) encompasses material only if its direct and exclusive subject is the ward.

***That rejection, however, does not necessarily mean that ORS 419B.325(2) allows the court to receive any and all evidence that has a relationship, no matter how tenuous, with any of the ward's past, present, or potential future caregivers.*** In this case, however, we need not define a precise line between admissible and inadmissible. Material that deals expressly with E's history is admissible. Additionally, the statute allows the admission of material in reports that either the court or DHS ordered for the purpose of evaluating whether, or to what extent, father can maintain his relationship with E. Of the 11 exhibits to which father objects, eight fall within one or another of those categories. The remaining exhibits, some of which are of dubious relevance to E or her prognosis, provide no information that was not properly before the court in either the contested but clearly admissible exhibits as described above, or exhibits to which father did not object. Thus, if admitting any or all of the more dubious exhibits was error, it was harmless.

235 Or App at 311-13 (emphasis in bold italics added) (footnote omitted).



## JELI

### Reasonable Efforts Work Group

*Referee/Judge Pro Tem Linda Hughes(Chair)*

*The Honorable Cynthia Beaman*

*The Honorable Patricia Crain*

*The Honorable Eve Miller*

*The Honorable Ronald Pahl*

*The Honorable Tracy Prall*

*Referee/Judge Pro Tem Paulette Sanders*

*The Honorable Janet Stauffer*

*The Honorable Patricia Sullivan*

*The Honorable Kathryn Villa-Smith*

# Conditions of Return - as Related to Reasonable Efforts Findings

## JUDICIAL REFLECTION

- What is the basis for Jurisdiction?
- Can the child be returned home today?
- If not, why not?
- What must the parent do, or stop doing, to allow the child to return home?

## CAVEAT

- The ability to safely return children home is different than the readiness to terminate wardship.
- Lack of clarity of conditions - Specific, Time Limited, Understandable, - can cause loss of focus on efficient return of children.

## JUDICIAL INQUIRY

### For the DHS Caseworker...

- If the condition for return statement uses vague terms or phrases (for example: appropriately, take steps towards addressing, in a prompt manner, change of attitude, demonstrate, sustainable amount of time...) ask the caseworker to clarify.
- Can this child go home today? If not, why not?
- What creative ways can we come up with to get the child back in the home safely?
- What would an in-home safety plan look like if the child went home today?
- Specifically, what does the parent need to do to have the child returned?
- What services are/should the Department be offering to assist in the child returning home?
- Are the services rationally related to the jurisdictional safety threats?
- Will the offered services accomplish the return home?
- Are visits reasonable? Number, duration, location, parent availability
- What does the child need?

### For the Parent...

- Do you know what you need to do or stop doing to have your child returned home to you?
- What does your child need?

***Initiative:*** Judges and referees hearing juvenile dependency matters will look at Conditions of Return statements and ensure they are clear and concise, and if they are not, clarify during court. This segues into judicial inquiry to be made at every hearing; **What is preventing this child from returning home today?**

***Performance Measures:*** The % of case plans that include clear conditions of return language that meets the standard in the OAR.

## **OAR 413-040-0009: REQUIREMENTS FOR CONDITIONS FOR RETURN**

1. The caseworker must determine the conditions that must exist prior to the return of the child to a parent or legal guardian.
2. The conditions for return are documented in the case plan and must describe:
  - a. The specific behaviors, conditions, or circumstances that must exist before the Department may develop an in-home ongoing safety plan that assures a child's safety, as described in OAR 413-015-0450(2)(b)(A)(i)-(iii); and
  - b. The actions, services, and time requirements of all participants in the in-home ongoing safety plan.

DATE: \_\_\_\_\_  
 TO: The Honorable \_\_\_\_\_  
 \_\_\_\_\_ County Juvenile Court  
 \_\_\_\_\_, Oregon \_\_\_\_\_

**PURPOSE OF HEARING**

The hearing set for \_\_\_\_\_ (date) is for the purpose of \_\_\_\_\_ (hearing type).

**IDENTIFYING INFORMATION**

**Child(ren):**

Child(ren):	Age:	Legal case #:
Number of times in foster care:		
Number of placements since DHS legal custody:		
Months in substitute care during past 22 months:		
<input type="checkbox"/> In home with:		
How long in this placement:		
<input type="checkbox"/> In substitute care with:		
How long in this placement:		
Number of schools attended since DHS legal custody:		
Number of face-to-face contacts w/caseworker since DHS legal custody: _____ since last hearing: _____		
Number of visits with: Mother - since DHS legal custody: _____ since last hearing: _____		
Number of visits with: Father - since DHS legal custody: _____ since last hearing: _____		

**Parent(s):**

Name:	Parent of:
Address:	

Name:	Parent of:
Address:	

Name:	Parent of:
Address:	

**LEGAL**

Bases for Juvenile Court Jurisdiction

[Redacted]

Date(s) Jurisdiction Established

[Redacted]

**NOTICE OF HEARING:**

Foster parent(s) notified of hearing?

[Redacted]

Legal grandparents notified of hearing?

[Redacted]

If ICWA applies, Tribe notified of hearing?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**HEARING RECOMMENDATIONS:**

DHS respectfully recommends the following:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CONDITIONS OF RETURN TO PHYSICAL CUSTODY OF PARENT(S):**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**DHS REUNIFICATION EFFORTS & PARENT PROGRESS:**

DHS efforts to address Bases for Jurisdiction:

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DHS efforts to achieve Conditions for Return and to prevent, or eliminate need for, out-of-home placement:

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Parent Progress & Future Expectations

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Proposed Modifications to Case Plan (including visitation, conditions of return, services, and treatment)

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**DHS EFFORTS TO DEVELOP CONCURRENT PLAN:**

Plan and why it would provide the highest degree of permanency for the child:

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Efforts:

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Progress made and what remains to be done:

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**CURRENT PLAN IS NOT REUNIFICATION – DHS EFFORTS TO PLACE CHILD IN TIMELY MANNER ACCORDING TO THE PLAN & WHY PLAN PROVIDES HIGHEST DEGREE OF PERMAENCY FOR THE CHILD:**

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**SIBLING PLACEMENT**

Efforts:

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Progress:

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**RELATIVE SEARCH AND PLACEMENT:**

Who	When	Status	Comments

**CHILD(REN)'S INFORMATION:**

Physical and Mental Health Updates (doctor, dental, mental health or other counseling, medication(s), vision, etc.):

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Developmental/Educational Updates (progress, attendance, IEP, motor skills, ASQ, physical disabilities, etc.):

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For child 14 years of age or older – Progress toward high school graduation, credits needed, expected date of graduation, and DHS efforts to assist:

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Comprehensive Transition Plan description and progress (for child 16 yrs and older or child 14 yrs and older with a comprehensive plan) – including whether plan has been completed, whether child is involved in planning, what services DHS provided, and how plan ensures successful transition to independent living:

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**PLACEMENT, "REASONABLE TIME" & TERMINATION OF DHS LEGAL CUSTODY AND JUVENILE COURT WARDSHIP:**

What is the child's "reasonable time" for permanent placement, as defined by ORS 419B.004(20)?

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If child currently is in substitute care, is continued out-of-home placement necessary and, if so, why?

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If child currently is in the physical custody of a parent, is continued DHS legal custody necessary and, so, why?

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Termination of child's commitment to the legal custody of DHS is expected to occur by or before (date):

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Termination of wardship is expected to occur by or before (date):

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**ATTACHMENTS:**

Respectfully submitted,

Social Service Specialist

Cc:

**Dept. Human Services v. A.D., 255 Or App 567, 300 P3d 185 (2013) (affirming the juvenile court's permanency judgment changing the plan for the child from reunification to adoption)**

**THE COURT OF APPEALS' SUMMARY:**

In this dependency case, mother and father separately appeal from a judgment of the juvenile court changing the permanency plan for their child, C, from reunification to adoption. ORS 419B.476. On appeal, parents assert that the trial court erred in concluding that the Department of Human Services (DHS) had made reasonable efforts. Parents also assert that the trial court erred in concluding that parents had not made sufficient progress to make it possible for C to safely return home and would not do so within a reasonable time. Held: There is adequate support in the record for the findings made by the juvenile court, and those findings provide a basis for its determinations as a matter of law. The juvenile court did not err in determining that DHS made reasonable efforts, that mother and father did not make sufficient progress, and that, in view of their cognitive limitations, parents would not make sufficient progress "within a reasonable time" in order for C to safely return home. Affirmed.

**COMMENTS:**

The parents' final argument on appeal in this case was that, even if DHS's reunification efforts were reasonable and their progress was insufficient to permit the safe return of the child at the time of the permanency hearing, "their progress was nevertheless sufficient to allow for such a return within a reasonable time following the provision of additional services." (Slip opinion at 13). The Court of Appeals – citing as authority ORS 419B.476(2)(a) – responded that "[t]he juvenile court was not required to make a finding on that point *before* changing the permanency plan from reunification to adoption." (Slip opinion at 13) (emphasis in original). Unfortunately, that response misstates the law. Later in its discussion of the issue, the Court of Appeals corrected that misstatement, but only in part:

Under ORS 419B.476(5)(d), if the court determines that the permanency plan should be adoption, the court's order "shall include" a "determination of whether one of the circumstances in ORS 419B.498(2) is applicable." That statute, in turn, provides that DHS shall file a petition for termination unless, among other reasons, "[t]here is a compelling reason \* \* \* for determining that filing such a petition would not be in the best interests of the child," including the fact that the parent "is successfully participating in services that will make it possible for the child \* \* \* to safely return home within a reasonable time \* \* \*." Accordingly, the juvenile court's evaluation of whether reunification may be possible within a reasonable time is relevant to the *timing* for filing a petition for termination.

255 Or App at 580.

It is true, as the Court of Appeals apparently concluded in this case, that **ORS 419B.476(2)(a)** requires that the juvenile court determine whether DHS has made the required reunification efforts and whether the parents' progress is sufficient to permit the safe return of the child and does not require (when the answer to the latter question is "no") that the juvenile court then consider whether further efforts will permit the child's safe return within a reasonable time. However, **ORS 419B.476(2)(a)** does not include all of the findings that the juvenile court must make to support a determination that the permanent plan in a case should be changed from reunification to adoption. For example, **ORS 419B.476 (5)(d)** provides that, if the court determines that "the permanency plan for the [child] should be adoption," the permanency judgment "shall include" "the court's determination whether one of the circumstances in

ORS 419B.498(2) is applicable." Although somewhat awkwardly worded, the necessary implication of that requirement is that, if one or more of those circumstances is "applicable," adoption is not (or, at least, may not be) an appropriate plan. In any event, the juvenile court "shall" determine whether one of the "circumstances" specified "in ORS 419B.498(2) is applicable," and one of those "circumstances" is described in ORS 419B.498(2)(b)(A), as follows:

"The parent is successfully participating in services that will make it possible for the child or ward to safely return home *within a reasonable time as provided in ORS 419B.476 (5)(c).*"

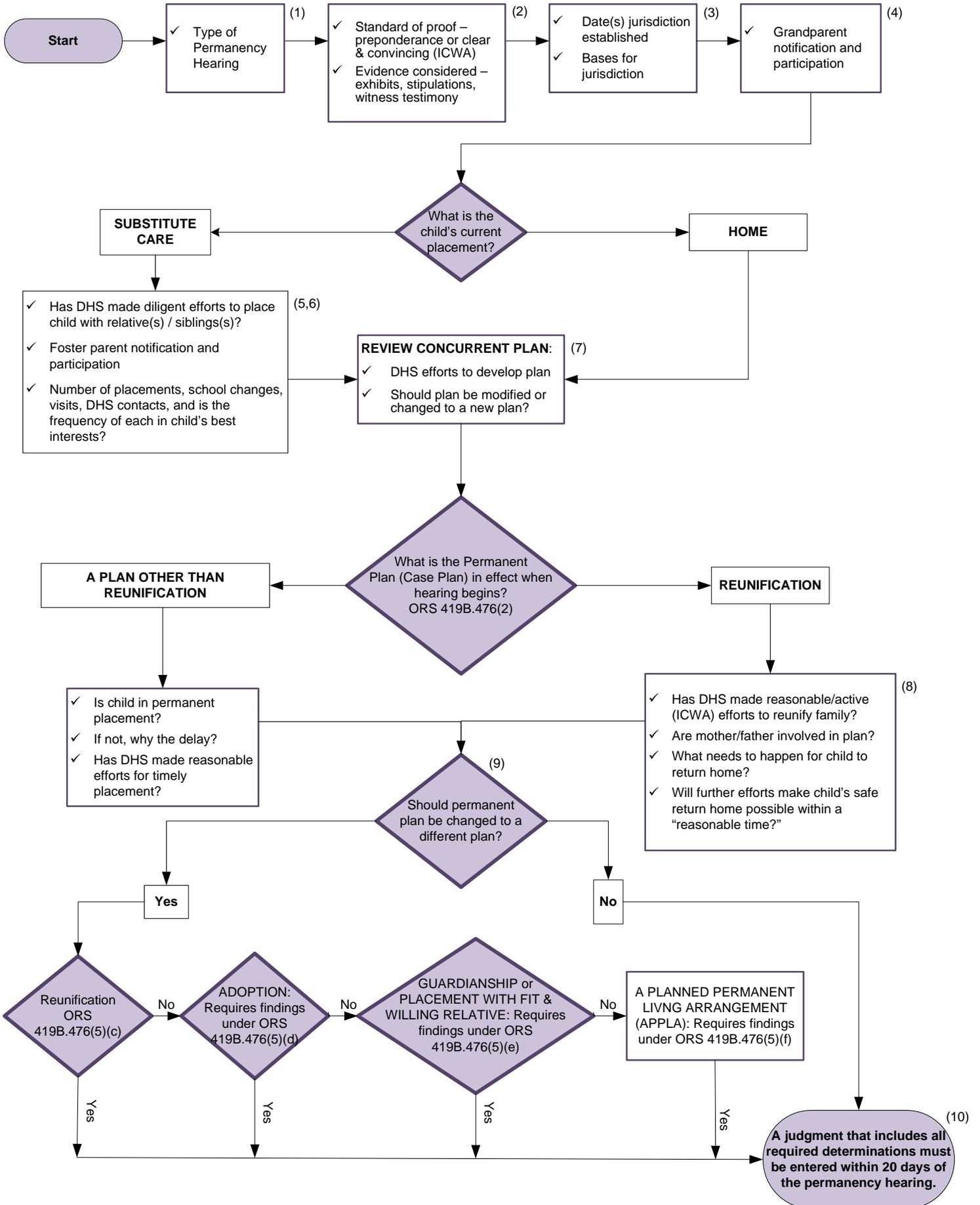
(Emphasis added). **ORS 419B.476 (5)(c)**, in turn, provides that, "[i]f the court determines that the permanency plan for the ward should be to return home because further efforts will make it possible for the ward to safely return home within a reasonable time," the permanency judgment must include "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." ***In other words, under ORS 419B.476(5)(d), 419B.498(2)(b)(A) and 419B.476(5)(c), even if the juvenile court finds that DHS has made the requisite reunification efforts and that, despite those efforts, the child cannot be safely returned home at the time of the hearing, BEFORE the juvenile court can enter a judgment ordering a change of plan from reunification to adoption, the court must consider/determine whether further reunification efforts will permit the child's safe return home "within a reasonable time."***

Even assuming that the "further efforts" inquiry discussed above is not required by ORS 419B.476(5)(d), 419B.498(2)(b)(A) and 419B.476(5)(c), other statutory provisions in the juvenile dependency code make that inquiry a practical necessity in such cases. For example:

- ORS 419B.343(2)(a) requires that the initial DHS case plan include "[a]ppropriate services to allow the parent the opportunity to adjust the parent's circumstances, or conditions to make it possible for the [child] to safely return home ***within a reasonable time.***" "'Reasonable time' means a period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments." ORS 419A.004(20). The ***within-a-reasonable-time*** "inquiry is child-specific" and "calls for testimony in psychological and developmental terms regarding the particular child's requirements." *State ex rel SOSCF v. Stillman*, 333 Or 135, 146, 35 P3d 490 (2001). Therefore, depending on the circumstances of a particular case, the "reasonable time" for the child to be reunified with a parent may extend beyond the date of the initial permanency hearing, and, in such a case, if the record at the permanency hearing shows that further reunification efforts would permit the child to reunite safely with the parent within that reasonable period of time, there is no basis for changing, or seeking to change, the case plan to adoption.
- Most TPR petitions seek termination of parental rights based on unfitness under ORS 419B.504. To establish that a parent is unfit under ORS 419B.504, the petitioner must prove that the parent's conduct and/or condition is "seriously detrimental to the child \* \* \* and reintegration of the child \* \* \* into the home of the parent \* \* \* is improbable ***within a reasonable time***" because the conduct and/or condition is "not likely to change." No termination petition can be filed until the juvenile court has determined, after a permanency hearing, "that the permanency plan for the child \* \* \* should be adoption." ORS 419B.498(3). It follows that (at least in cases where the TPR petition would be based on ORS 419B.504), if further reunification efforts ***will*** permit the child to return home ***within a reasonable time***, the juvenile court should not order that the plan be changed from reunification to adoption.

# PERMANENCY HEARING ROADMAP

## JCIP JELI Juvenile Code & Forms Work Group



## ***PERMANENCY HEARING ROADMAP – Annotations***

1. **Types of, or circumstances requiring, permanency hearings** – See ORS 419B.470 and 419B.498(3). The *initial* permanency hearing must be held “no later than 12 months after the [child] was found within the jurisdiction of the court \* \* \* or 14 months after the child \* \* \* was placed in substitute care, whichever is the earlier.” And, the “reasonable time” determination for a child in a particular case may require that a permanency hearing be held even sooner. See ORS 419A.004(20), 419B.343(2)(a), and ORS 419B.476(4)(c) and (5)(c).

2. **Evidence considered** – Regardless whether the hearing is “contested” or “uncontested,” the permanency judgment must include the findings (determinations) required by ORS 419B.476, and those findings must be based on evidence in the hearing record. Evidence in the hearing record means: exhibits admitted at the hearing, sworn testimony of witnesses at the hearing, facts to which the parties have stipulated, and facts judicially noticed by the court. See *State ex rel Juv. Dept. v. Lewis*, 193 Or App 264, 89 P3d 1219 (2004); ORS 419A.253.

3. **Bases for jurisdiction** – In a permanency hearing, the court assesses both the sufficiency of DHS’s reunification efforts and the parent’s progress by reference to the bases for jurisdiction in the particular case. See *Department of Human Services v. N. M. S.*, 246 Or App 284, 266 P3d 107 (2011).

4. **Grandparent notification/participation** – See ORS 419B.875(7).

5. **Diligent efforts + foster parent notification/participation** – See ORS 419B.476(2)(d); ORS 419B.449(3); ORS 419B.875(6).

6. **Number of placements, etc., & the child’s best interests** - See ORS 419B.476(2)(d); ORS 419B.449(3).

7. **Concurrent plan review** – See ORS 419B.476(4)(e) and (f); ORS 419B.343(2)(b).

8. **When the child can’t go home today** – If the court finds that DHS has made the required reasonable/active (ICWA) reunification efforts and that, despite those efforts, the child can’t be returned home safely at the time of the hearing, the court must then determine whether “further efforts will make it possible for the [child] to safely return home within a reasonable time.” See ORS 419B.476(4)(c) and (5)(c). “Reasonable time” means a period of time that is reasonable given a child or ward’s emotional and developmental needs and ability to form and maintain lasting attachments.” ORS 419A.004(20). “The [reasonable time] inquiry is child-specific” and “calls for testimony in psychological and developmental terms regarding the particular child’s requirements.” *State ex rel SOSCF v. Stillman*, 333 Or 135, 146, 35 P3d 490 (2001). If further efforts will make reunification possible within a reasonable time, the court must specify in the judgment “the services in which the parents are required to participate, the progress the parents are required to make and the period of time within which the specified progress must be made.” ORS 419B.476(5)(c).

9. **When the current plan is a plan other than reunification** – Always consider whether, given the child’s circumstances at the time of the hearing, the current plan continues to provide the child with the highest degree of permanency and is otherwise in the child’s best interests.

10. **The judgment and findings** – The permanency judgment must include the determinations required by ORS 419B.476(5) and must be entered within 20 days of the hearing. In addition to the determinations identified on the “Roadmap” and in these “Annotations,” the judgment also should include, when applicable, findings re: (a) the need for continuing the child in substitute care and DHS legal custody; (b) when DHS legal custody and juvenile court wardship will end; (c) the adequacy of the child’s “transition plan,” see ORS 419B.476(3); (d) if the child is 14 years old or older, the child’s progress toward high school graduation; and (f) whether the court consulted with the child in an age-appropriate manner about the child’s permanency plan.



# Timeliness of Adoptions - Identification of the Adoption Resource

## JELI

### Timeliness of Adoptions Work Group

## JELI ADOPTIONS WORKGROUP INITIATIVE

We strongly urge the **juvenile judges in Oregon to have a review hearing every 60 days when the concurrent plan of adoption has been implemented and there is not an identified adoptive resource/placement**; however, with judicial time being coveted and the drain on DHS, attorneys, CASA, etc. to try to add another review hearing to the already busy court dockets, **an alternative would be to require, in lieu of a hearing, DHS to supply a written report** answering questions about the status of recruiting and identifying an adoptive resource/placement. If the court is not satisfied with the information DHS has provided, then a review hearing could immediately be scheduled.

## JUDICIAL INQUIRY

### For the DHS Caseworker...

These questions are meant as a guideline for judges. Some questions may not be applicable to every case.

(1) If the current placement resource is unwilling to be the adoptive resource, has the agency attempted to address any underlying concerns and explained the benefits of adoption to the current resource?

(2) If the current placement resource was rejected as the adoptive placement, are there any concerns that could be remedied (i.e., square footage of the home, household member permanently leaves the home) to make that placement viable?

(3) If an adoptive placement has not been identified, what is the agency doing to recruit and process potential adoptive resources?

(4) What is the child specific recruitment plan?

(5) What ongoing efforts been made to locate and contact relatives? Are there adults/families with whom the child has or has had a positive relationship who are potential adoptive resources? What is the status of contacting and investigating these adults/families?

(6) How many individuals have expressed an interest in adopting the child and what is the status of investigating these individuals?

(7) Has the child been placed on adoption lists locally, regionally, and nationally? Has the agency utilized the media, adoption exchange programs, and the internet to seek adoptive resources? What sites/lists is the child on?

(8) What is the status of any pending home studies?

(9) If an interstate compact is needed, has the process begun? Has the ICPC referral (form 100A) been submitted? If there are delays in the ICPC process, what is being done to resolve them?

*The Honorable  
Lisa Greif (Chair)*

*The Honorable  
Gregory Baxter*

*The Honorable  
Cynthia Easterday*

*Referee/Judge Pro  
Tem Michele Rini*

*The Honorable  
Katherine Weber*

**IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR \_\_\_\_\_ COUNTY**

In the Matter of:

) Case Number: \_\_\_\_\_  
)

) **COURT REPORT** In Lieu Of Review Hearing When Primary  
) Plan Has Changed To Adoption and No Adoptive  
) Resource/ Placement Has Been Identified  
)

\_\_\_\_\_  
A Child.

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***If the current placement resource is unwilling to be the adoptive resource,*** has the agency attempted to address any underlying concerns and explained the benefits of adoption to the current resource?

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***If the current placement resource was rejected as the adoptive placement,*** are there any concerns that could be remedied (i.e., square footage of the home, household member permanently leaves the home) to make that placement viable?

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***If an adoptive placement has not been identified,*** what is the agency doing to recruit and process potential adoptive resources? What is the child specific recruitment plan? Has the child been placed on adoption lists locally, regionally, and nationally? Has the agency utilized the media, adoption exchange programs, and the internet to seek adoptive resources? What sites/lists is the child on?

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How many individuals have expressed an interest in adopting the child and what is the status of investigating these individuals? What is the status of any pending home studies?

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***What ongoing efforts been made to locate and contact relatives?*** Are there adults/families with whom the child has or has had a positive relationship who are potential adoptive resources? What is the status of contacting and investigating these adults/families?

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***If an interstate compact is needed,*** has the process begun? Has the ICPC referral (form 100A) been submitted? If there are delays in the ICPC process, what is being done to resolve them?

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\_\_\_\_\_, 20\_\_\_\_

Date

\_\_\_\_\_  
DHS Caseworker's Signature

# **APPELLATE CASE LAW UPDATE**

## **Recent Decisions in Juvenile Court Dependency Cases Concerning “Current Risk of Harm”**

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**Prepared and presented by Michael Livingston**

# TABLE OF CASES

1. *Dept. Human Services v. M.H.*, 256 Or App 306, --- P3d --- (2013)  
(affirming the juvenile court's finding that the child is within the court's jurisdiction based on proof of certain allegations in the petition, but *remanding* for entry of a new judgment omitting findings that DHS had proved that the parents' living conditions, unemployment, or lifestyle created a current risk of harm to the child).....1
2. *Dept. of Human Services v. L.F.*, 256 Or App 114, 299 P3d 599 (2013)  
(affirming the juvenile court's judgment finding jurisdiction based on the mother's inability, or unwillingness, to meet or understand the child's medical and developmental needs).....3
3. *Dept. of Human Services v. M.E.*, 255 Or App 381, 298 P3d 1227 (2013) (setting out apparently contradictory standards for jurisdiction under ORS 419B.100(1)(c) and *reversing* judgment finding jurisdiction because the totality of the circumstances failed to establish a current threat of harm to the child -- *i.e.*, the stepfather's sexual abuse of the child was a one-time incident that occurred four years ago, the results of a psychosexual risk assessment of the stepfather indicated that he did not pose a risk of sexual harm to any children, and the mother had agreed to protective measures) .....4
4. *Dept. of Human Services v. N.P.*, 255 Or App 51, 296 P3d 606 (2013)  
(reversing judgment continuing dependency jurisdiction under ORS 419B.100(1)(c) because the evidence was insufficient to establish that the father's condition -- *i.e.*, his "anger and frustration" "viewed in the light of the risk that is represented by his use of controlled substances" -- exposed the child to a current threat of "serious loss or injury") .....6
5. *Dept. of Human Services v. G.J.R.*, 254 Or App 436, 295 P3d 672 (2013)  
(reversing the jurisdiction judgment as to father because the evidence that he had not completed sex-offender treatment was not sufficient to establish a current threat of harm to the child and leaving unresolved the questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (threat of "serious loss or injury"), which appears to state a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("reasonable likelihood of harm to the welfare of the child")) .....6

6. Dept. of Human Services v. M.Q., 253 Or App 776, 292 P3d 616 (2012)  
(reversing judgment of jurisdiction because the evidence failed to establish a current threat harm to the child, but leaving unresolved questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (threat of "serious loss or injury"), which appears to state a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept, v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("reasonable likelihood of harm to the welfare of the child")).....8
7. Dept. of Human Services v. R.V., 252 Or App 567, 287 P3d 1281 (2012)  
(reversing judgment finding child within the within the juvenile court’s jurisdiction under ORS 419B.100(1)(c) based on the state’ concession that the evidence failed to prove a current risk of harm to the child) .....10
8. Dept. of Human Services v. B.B., 248 Or App 715, 274 P3d 242, adhered to on reconsideration 250 Or App 566 (2012) (reviewing the record *de novo* and reversing judgments finding children within the jurisdiction of the juvenile court under ORS 419B.100(1)(c), because the state failed to prove that the children’s welfare currently was endangered).....10
9. Dept. of Human Services v. B.L.J., 246 Or App 767, 268 P3d 696 (2011) (proof that a parent with cognitive limitations cannot care for a child independently, without more, does not establish jurisdiction under ORS 419B.100(1)(c)).....11
10. 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)) .....12

# Jurisdictional Proceedings

## “Current risk of harm” under ORS 419B.100(1)(c)

1. **Dept. Human Services v. M.H., 256 Or App 306, --- P3d --- (2013)** (*affirming the juvenile court’s finding that the child is within the court’s jurisdiction based on proof of certain allegations in the petition, but remanding for entry of a new judgment omitting findings that DHS had proved that the parents’ living conditions, unemployment, or lifestyle created a current risk of harm to the child*)

### THE COURT OF APPEALS’ SUMMARY:

Mother and father appeal juvenile court judgments in which the court asserted jurisdiction over their daughter, V, and placed her in the custody of the Department of Human Services (DHS) on the ground that her condition and circumstances endangered her welfare. Mother asserts that the juvenile court lacked personal jurisdiction over V and also lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Both parents contend that the court erred in concluding that V’s condition and circumstances endangered her welfare. Held: Under ORS 109.741(3), personal jurisdiction over V was not required for the juvenile court to make a custody determination. Even if it were required, ORS 419B.803(1)(b) confers personal jurisdiction under the facts of this case. The juvenile court had subject matter jurisdiction under the UCCJEA because Oregon is V’s home state. On the merits, sufficient evidence supports the juvenile court’s findings that V is at risk of serious harm as a result of father’s sexual abuse of two children when he was a teenager, both parents’ failure to engage in services, and father’s unwillingness or inability to protect V from abuse or neglect by mother. The Court of Appeals agreed with parents, however, that the record does not support allegations that their living conditions, unemployment, or lifestyle created a risk of harm to V. Nevertheless, the court concluded that the totality of the circumstances supported the conclusion that V is within the juvenile court’s jurisdiction. Remanded with instructions to enter a new jurisdictional judgment omitting the findings that DHS proved allegations 2(c) and (h); otherwise affirmed.

### EXCERPT FROM OPINION:

***We begin with whether DHS proved that father’s sex offenses exposed V to a [current]risk of serious harm. Parents argue that DHS failed to demonstrate a nexus between father’s offenses when he was a teenager and his ability to safely parent his own child. Parents acknowledge that Jensen testified, in essence, that a former child sex offender always presents a risk of harm to children, but they contend that our case law establishes that a parent’s former criminal acts toward children are not enough to demonstrate a risk of harm to the parent’s own child. In particular, parents rely on Dept. of Human Services v. B. B., 248 Or App 715, 274 P3d 242, adh’d to on recons, 250 Or App 566, 281 P3d 653 (2012).***

In that case, the father had sexually abused two young children when he was 11 or 12 years old and later sexually abused a three-year-old girl in his care in 1994, when he was 21 years old. *Id.* at 719-20. He was released on post-prison supervision and began sex-offender

treatment in 1996. He admitted to viewing child pornography several times in 1998. *Id.* at 720. He discontinued his treatment in 1999 when his post-prison supervision ended. The parents had their first child in 1999 and later had three other children. *Id.* at 721. The family moved to another state later that year, and then moved back to Oregon in 2010. *Id.* at 722. **Soon thereafter, DHS filed petitions alleging that jurisdiction was warranted because the "father 'has a history of inappropriate sexual contact with minors and such behavior un-remediated endangers the child's welfare and safety.'" *Id.* DHS also alleged that the children were endangered because the father "had 'disclosed inappropriate sexual contact with minors and failed to complete the sex offender treatment as recommended by child welfare authorities.'" *Id.* The juvenile court found that DHS had proved both allegations.**

We conducted *de novo* review, and we reversed because we were not persuaded that the evidence demonstrated a current risk of serious harm to the children. **We concluded that the juvenile court's finding that the father's sexual-offender conduct was unremediated was the determinative fact that—if supported by the record—would support the conclusion that his children were in danger. *Id.* at 723. We went on to conclude, however, that the evidence did not support a finding that the father's condition was unremediated. We based that decision in part on the fact that no evidence suggested that the father had had sexual contact with any children since 1994. Significantly, however, we also focused on the lack of expert testimony establishing that father was at risk of reoffending.** The juvenile court had stated that the only evidence regarding the risk that the father posed to the children was "'the information from the treatment provider' that 'as time goes on, the longer you're away from treatment, the greater the risk [of sexually inappropriate behavior] actually becomes.'" *Id.* at 723-24 (brackets in *B. B.*). We noted that the trial court had misunderstood the evidence, as the only treatment provider who had testified actually had stated that sex-offender treatment was not required for the father to be "in remission." *Id.* at 724. Rather, his testimony indicated that the father "could have made changes in his life during the 11 years following [his] last treatment \* \* \* so as not to 'recommit these types of offenses.'" *Id.* at 725. The only admissible evidence concerning the connection between sex-offender treatment and the likelihood of reoffending was the treatment provider's testimony that "the prevailing trend in the treatment community was that 'therapy would increase the likelihood for remission and reduce the likelihood of recidivism[.]'" *Id.* at 724. We found, on *de novo* review, that that evidence did not satisfy DHS's burden of proof. *Id.* at 726.

**We also concluded, with respect to the second allegation, that, on the record before us, the father's failure to complete sex-offender treatment did not establish a current risk of abuse. *Id.* at 727. We held that "there is no presumption that father's failure to complete treatment some 11 years before the jurisdictional hearing, by itself, makes father 'an unremediated sex offender,' who in turn would be presumed dangerous to his children." *Id.***

Parents argue that, under *B. B.*, DHS was required in this case to prove that father had not ameliorated the condition that caused him to commit sex offenses in the 1980s and, consequently, that his status as a sex offender currently endangered V. Parents acknowledge Jensen's testimony that father was at "moderate to high" risk for reoffending, but they ask that we review *de novo* the testimony of all three psychologists and give greater weight to Gordon's and Robinson's conclusions.

**Parents place more weight on *B. B.* than it will bear. Our opinion in that case was premised entirely on our *de novo* review of the facts.** Indeed, the court emphasized that standard of review when it explained its disagreement with what it characterized as the dissent's argument "that we should affirm the juvenile court because it was entitled to draw different inferences and DHS had established evidence from which a reasonable factfinder could conclude that father was a danger to his children." *Id.* at 728 n 2. The court explained that, "[e]ven assuming \* \* \* that the juvenile court could have drawn the inference that father is a current risk to

his children's safety, we review this case *de novo*, and not under the standard of review the dissent applies." *Id.* Here, unlike in *B. B.*, we have declined to conduct *de novo* review. Accordingly--and again unlike in *B. B.*--we review the evidentiary record to determine whether any evidence, and the inferences that reasonably can be drawn from the evidence, supports the juvenile court's findings. Applying that standard of review, we are bound by the juvenile court's implicit finding that psychological evidence was persuasive.

***Part of that evidence is Jensen's testimony, which itself is sufficient to support the court's finding that father's earlier offenses placed V at risk of serious harm. In addition to testifying that sexual deviance "doesn't go away," Jensen also stated that "[u]ntreated sex offenders are much, much more likely to reoffend. There's an extremely high risk of untreated sex offenders reoffending, if they place themselves in situations to have access to young children of the age they're attracted to." The juvenile court was not presented with any evidence that father could have remediated his condition as a sex offender by means other than treatment. Furthermore, unlike any expert evidence in B.B., Jensen's conclusion was based on a current assessment of father's risk.***

256 Or App at --- (footnotes omitted; emphasis in bold italics added).

**2. Dept. of Human Services v. L.F., 256 Or App 114, 299 P3d 599 (2013) (affirming the juvenile court's judgment finding jurisdiction based on the mother's inability, or unwillingness, to meet or understand the child's medical and developmental needs)**

THE COURT OF APPEALS' SUMMARY:

The juvenile court entered jurisdictional and dispositional judgments related to mother's son, H. Mother appeals from the jurisdictional judgment, contending that the evidence in the record is insufficient to support jurisdiction under ORS 419B.100(1)(c) on the basis that mother was unable or unwilling to meet or understand the medical and developmental needs of H, who had been diagnosed with autism. Mother also appeals from the dispositional judgment, assigning error to the provision ordering her to submit to urinalysis. Held: There is evidence in the record to support the juvenile court's finding that mother is unable or unwilling to meet and understand H's medical and developmental needs, and that evidence is sufficient for the juvenile court to conclude that mother's inability or unwillingness to meet H's medical and developmental needs subjected H to a threat of harm or neglect. Therefore, continued jurisdiction under ORS 419B.100(1)(c) was appropriate. The state agrees that the juvenile court decided that it would not require mother to submit to urinalysis and that the requirement that mother do that was erroneously included in the dispositional judgment. Jurisdictional judgment affirmed. Dispositional judgment reversed and remanded with instructions to enter a dispositional judgment that does not require urinalyses; otherwise affirmed.

**3. Dept. of Human Services v. M.E., 255 Or App 381, 298 P3d 1227 (2013) (setting out apparently contradictory standards for jurisdiction under ORS 419B.100(1)(c) and reversing judgment finding jurisdiction because the totality of**

**the circumstances failed to establish a current threat of harm to the child -- i.e., the stepfather's sexual abuse of the child was a one-time incident that occurred four years ago, the results of a psychosexual risk assessment of the stepfather indicated that he did not pose a risk of sexual harm to any children, and the mother had agreed to protective measures)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a juvenile court judgment asserting jurisdiction over two of her children, twin girls who were 13 years old at the time of the jurisdictional hearing. The juvenile court found that mother's current husband--the twins' stepfather--had, on one occasion approximately four years before the hearing, sexually abused one of the twins; that mother did not believe that the incident occurred; and, therefore, that the twins were at risk of harm sufficient to warrant juvenile court jurisdiction under ORS 419B.100(1)(c). The court also determined that mother's "negative comments" to one of the girls created a risk of injury to her emotional and physical wellbeing. Held: (1) Because one of the juvenile court's essential findings does not comport with the uncontroverted evidence in the record, the Court of Appeals exercised its discretion to review the facts de novo. (2) Considering the totality of the circumstances--including that the prior abuse was approximately four years previously, it was a one-time incident, the results of a psychosexual risk assessment of father indicated that he did not pose a risk of sexual harm to any children, including his stepchildren, and mother had agreed to protective measures-- the evidence is insufficient to establish that the twins' welfare is presently endangered. (3) The record does not support a conclusion that mother's negative comments to one of the girls--either alone or together with the other allegations--creates a current threat of serious loss or injury to that child. Reversed.

EXCERPTS FROM OPINION:

ORS 419B.100(1)(c) grants the court "exclusive original jurisdiction" in a case involving a child "[w]hose condition or circumstances are such as to endanger the welfare of the person or of others." Under the relevant case law, "a child's 'condition or circumstances' warrant the protection of juvenile court jurisdiction when, **'under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child.'** *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005) (citing *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652-53, 853 P2d 282 (1993))." *State v. S. T. S.*, 236 Or App 646, 654, 238 P3d 53 (2010). The focus is on the child's current conditions and circumstances and not on some point in the past. *Id.* Thus, as we recently summarized,

**"[t]o endanger the child's welfare, the condition or circumstances must create a current 'threat of serious loss or injury to the child'** and 'there must be a reasonable likelihood that the threat will be realized.' *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011); *Dept. of Human Services v. D. M.*, 248 Or App 683, 686, 275 P3d 971 (2012) (formulations in *Smith* and *A. F.* 'complement each other and correctly state the standard' for juvenile court jurisdiction under ORS 419B.100(1)(c)). The burden is on the state to prove facts sufficient to warrant jurisdiction. *Dept. of Human Services v. B. L. J.*, 246 Or App 767, 773, 268 P3d 696 (2011)."  
*Dept. of Human Services v. S. P.*, 249 Or App 76, 84, 275 P3d 979 (2012).

Here, the court concluded that the girls' welfare was endangered based on the circumstances alleged in paragraph A of the petitions--that stepfather had sexually abused MI several years ago and mother did not believe that it happened or that stepfather was a threat to the girls--and that father was unable to protect the girls because of the custody order. Necessarily implicit in that conclusion is the court's finding that stepfather continues to pose a threat of sexual abuse to MI and MA and that mother will not take steps to prevent that harm because she does not believe that it exists.

\* \* \* \* \*

[I]t has been approximately four years since the abuse occurred, and the court expressly found that it was a one-time incident. That finding is amply supported by the record. There is no hint in the record that there has been any sexual behavior by stepfather toward MI since the one incident, even though the incident of abuse was not disclosed and, consequently, there was no intervention. MI consistently denied that stepfather had acted inappropriately with her at any time after the single incident. She told the CARES interviewer that it was "awkward" between them at first, but "everything is fine now." There also is no evidence that stepfather has ever touched MA inappropriately.

***Moreover, Dr. Colistro was quite definite in his opinion that stepfather presented no risk of sexual harm to MA and MI, particularly given his social-anxiety disorder. He wrote, "A sexual person-to-person crime is particularly unlikely given [stepfather's] intensely felt moral values and the fact that his social anxiety is at its highest in the context of close interpersonal relations."***

***In addition, Dr. Zorich, whom the trial court also found credible, opined that mother was capable of being protective even if she did not believe that the abuse had occurred. Indeed, although mother did not believe MA's disclosure about stepfather, she immediately agreed to a voluntary protection plan so that the twins would not be in his presence.*** In particular, she agreed that stepfather would leave the home, that MA and MI would stay with father, and that she would have only supervised visits with them. Mother also requested counseling for the twins as soon as she learned about MA's disclosure. Zorich testified that mother was willing to put into place whatever safety measures were needed to protect her children, including putting cameras in her home. In addition, mother had a policy--the "rule of three"--to never let one of the twins be alone in a room with an adult male. Although there was conflicting testimony regarding whether mother consistently applied that policy with regard to stepfather, there is no reason to doubt that she will do so in the future.

Given the totality of those circumstances, we are not persuaded that the evidence is sufficient to establish, by a preponderance of the evidence, that stepfather's four-year-old abuse of MI and mother's denial of that abuse present a current risk of harm to MI and MA.

255 Or App at --- (footnotes omitted; emphasis in bold italics added).

**4. Dept. of Human Services v. N.P., 255 Or App 51, 296 P3d 606 (2013) (reversing judgment continuing dependency jurisdiction under ORS 419B.100(1)(c) because the evidence was insufficient to establish that the father's condition -- *i.e.*, his "anger and frustration" "viewed in the light of the risk that is**

**represented by his use of controlled substances" -- exposed the child to a current threat of "serious loss or injury")**

THE COURT OF APPEALS' SUMMARY:

Father appeals from a juvenile court judgment that continued jurisdiction over his son, T. He argues that the court erred in basing its decision on father's "anger and frustration," "viewed in light of the risk that is represented by his use of controlled substances," because there was insufficient evidence in support of the court's finding that father's condition exposed T to a serious loss or injury and, in any event, undisputed evidence showed that, at the time of the hearing, father had successfully completed substance abuse treatment, and there was no evidence regarding risk of relapse. Held: The court based its judgment on allegations regarding father's substance abuse issues that had been ameliorated; therefore, the court erred in relying on those issues in finding that father's condition presented a risk of harm to the child. Reversed and remanded.

**5. Dept. of Human Services v. G.J.R., 254 Or App 436, 295 P3d 672 (2013) (reversing the jurisdiction judgment as to father because the evidence that he had not completed sex-offender treatment was not sufficient to establish a current threat of harm to the child and leaving unresolved the questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (threat of "serious loss or injury"), which appears to state a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept, v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("reasonable likelihood of harm to the welfare of the child"))**

THE COURT OF APPEALS' SUMMARY:

Father appeals from, and seeks reversal of, a judgment in which the juvenile court concluded that the Department of Human Services (DHS) proved an additional allegation in an amended dependency petition that father's prior convictions for public indecency and his failure to complete court-ordered sex offender treatment created a risk of harm to child. The juvenile court had already taken jurisdiction over child as to father when father defaulted to allegations in an earlier dependency petition that his substance abuse and residential instability created a current risk of harm to child. On appeal, father does not challenge the original bases for jurisdiction, but instead contends that DHS failed to prove that father's prior conduct or status as an untreated sex offender created a risk of current harm to child, even when considered in light of the already established bases for jurisdiction. DHS counters that the evidence produced at the hearing on the additional allegation, when considered in context with the established allegations from the original petition, was sufficient to prove that father's sex offense and failure to complete sex offender treatment creates a risk of harm to child. Held: The record does not contain evidence from which a reasonable factfinder could conclude, by a preponderance of the

evidence, that father's sex offense and failure to complete sex offender treatment presented a current risk of harm to child. Further, even when considered in light of the established allegations, i.e., substance abuse and residential instability, there is no evidence that father's sex offense and failure to complete treatment contributed to or enhanced a current risk of harm to child. Reversed.

EXCERPTS FROM OPINION:

As a general matter, a person's status as a sex offender does not *per se* create a risk of harm to a child. *State ex rel Dept. of Human Services v. N. S.*, 229 Or App 151, 157-58, 211 P3d 293 (2009); *see also Dept. of Human Services v. B. B.*, 248 Or App 715, 722-23, 274 P3d 242, *adh'd to on recons*, 250 Or App 566, 281 P3d 653 (2012) (evidence that the father engaged in inappropriate sexual conduct with minors 16 years before the dependency petition at issue did not, by itself, justify jurisdiction). Generally there must be some nexus between the nature of the prior offense and a current risk to the child at issue. *N. S.*, 229 Or App at 158. Similarly, there is no presumption that a party's status as an "untreated" sex offender presents a safety risk to a child. *B. B.*, 248 Or App at 727. Rather, there must be evidence that the party's failure to engage in treatment endangered the child's welfare at the time of the jurisdictional hearing. *Id.*

In this case, we are left with only that presumption and without a sufficient nexus to a risk of harm to Z. There is no evidence that father has reoffended in the 10 years since his last conviction and no evidence from which a reasonable factfinder could find that Z fits within the class of father's victims. The record also lacks evidence that father's failure to complete sex offender treatment presents a current risk that he will offend. Given the record, a reasonable factfinder could not conclude, by a preponderance of the evidence, that the additional allegation of father's sex offense and failure to complete treatment presented a current risk of harm to Z.

\* \* \* \* \*

\* \* \* Given that there was no evidence that father's prior conviction and failure to complete sex offender treatment, even when considered in light of the established allegations, contributed to or enhanced a current risk of harm to Z, the trial court erred by asserting jurisdiction on the basis of the additional allegation.

254 Or App at ---.

**6. Dept. of Human Services v. M.Q., 253 Or App 776, 292 P3d 616 (2012) (reversing judgment of jurisdiction because the evidence failed to establish a current threat harm to the child, but leaving unresolved questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (threat of "serious loss or injury"), which appears to state**

**a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("reasonable likelihood of harm to the welfare of the child"))**

THE COURT OF APPEALS' SUMMARY:

Father appeals a juvenile court judgment in which the court took jurisdiction over his child. The court determined that the child's welfare was endangered because the child had previously been a ward of the court; father had failed to complete court-ordered treatment, including substance abuse treatment; and father has a history of criminal activity and incarceration. Father argues that the evidence in the record is insufficient to support jurisdiction on that basis. Held: The record does not support a determination that the child currently is endangered because of the conditions and circumstances cited by the juvenile court. The record includes no evidence that father used drugs in the year preceding the jurisdictional hearing. The evidence also does not support an inference that father is at such a high risk of relapse that there is a reasonable likelihood that he will start using drugs again and will do so in a way that puts the child at risk of serious harm. The record also includes no evidence establishing how father's past criminal activity presents a current threat of serious harm to the child. Jurisdictional judgment reversed as to father; otherwise affirmed.

EXCERPTS FROM OPINION:

The [juvenile] court determined that jurisdiction was warranted because the child's welfare was endangered "by reason of the following facts":

"the child was previously a ward of the court, and the child's father failed to complete court ordered treatment, including chemical abuse treatment; coupled with a history of criminal activity, and incarceration, compromises his ability to safely and consistently and appropriately parent."

We agree with father that the evidence in this case is insufficient, as a matter of law, to support jurisdiction on that basis.

\* \* \* \* \*

This is a close case. Certainly DHS has reason to be concerned about the welfare of a child whose father has a history of using methamphetamine, repeatedly has engaged in other criminal behavior, and currently is homeless with no plan for obtaining stable housing suitable for a child. But the juvenile court did not take jurisdiction based on the totality of those conditions and circumstances. ***Cf. State ex rel Juv. Dept. v. Vanbuskirk, 202 Or App 401, 405, 122 P3d 116 (2005) ("The key inquiry in determining whether 'condition or circumstances' warrant jurisdiction is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child.")***. To the contrary, the court dismissed as "not proven" the allegation (as amended at hearing) that father's homelessness and lack of a consistent relationship with the child endangered her welfare. Instead, the court took jurisdiction based solely on the following determination:

"the child was previously a ward of the court, and the child's father failed to complete court ordered treatment, including chemical abuse treatment; coupled with a history of criminal activity, and incarceration, compromises his ability to safely and consistently and appropriately parent."

**We agree with father that, as a matter of law, the record does not support a determination that the child currently is endangered-- that the child is reasonably likely to suffer serious harm in the absence of a jurisdictional judgment--because of those conditions and circumstances.** Although father's methamphetamine abuse apparently resulted in the child being removed from his care in 2005, the record includes no evidence that he had used drugs in the year preceding the February 2012 jurisdictional hearing. Indeed, if father had not admitted to a DHS caseworker in December 2011 that he had used drugs 11 months earlier, there would be no evidence that he had had any involvement with drugs since his 2009 arrest.

We do agree with DHS that the evidence, including father's initial denial that he had been arrested on drug-related charges after 2005 and the excuses he gave for missing his UA, would support a determination that he is not credible. **But the juvenile court's apparent disbelief of father's claimed sobriety is not affirmative evidence that he still was using drugs at the time of the 2012 hearing. See *State v. Reed*, 339 Or 239, 245, 118 P3d 791 (2005) (disbelieving a witness's testimony "does not add anything affirmative to the state's evidence").** Nor does the evidence from which the court could find that father lacked credibility itself support an inference that father continued to use drugs. Father's agreement to submit to UAs was voluntary, as jurisdiction had not yet been established, and DHS had requested only one UA by the time of the jurisdictional hearing. Thus, this case does not involve the kind of pattern of missed court-ordered UAs from which a factfinder reasonably could infer that a person was attempting to hide his or her drug use. Moreover, father had been visiting the child weekly for several months preceding the 2012 jurisdictional hearing and never had been observed in a drug affected state. **In sum, the record simply includes no evidence supporting an inference that father was using drugs at the time that the juvenile court made the jurisdictional determination. Jurisdiction cannot be based on speculation that a parent's past problems persist at the time of the jurisdictional hearing in the absence of any evidence that the risk, in fact, remains. *Dept. of Human Services v. S. P.*, 249 Or App 76, 90-91, 275 P3d 979 (2012).**

**The evidence also does not support an inference that father is at such a high risk of relapse that there is "a reasonable likelihood" that he will start using drugs again and will do so in a way that puts the child at risk of serious harm. See *C. Z.*, 236 Or App at 442-44 (reversing jurisdictional judgment based on the mother's use of marijuana because the record lacked "evidence showing that mother's use of marijuana, her 'chemical abuse problem' as found by the trial court, [was] a condition or circumstance that pose[d] any risk to her children").** DHS relies, in part, on the caseworker's testimony that she has not worked with any other parent who has recovered from a methamphetamine addiction without undergoing treatment. But that generalized lay observation is not enough, standing alone, to support an inference that father is reasonably likely to relapse in a way that is reasonably likely to endanger the child, as it is not tied to any evidence related specifically to father. In the absence of relevant individualized evidence about father's current circumstances, the juvenile court erred in asserting jurisdiction on the basis of any concern about his potential for relapse.

In addition to relying on his history of untreated substance abuse, the juvenile court cited father's "history of criminal activity, and incarceration" as part of its reason for asserting jurisdiction. But the record includes no evidence establishing that the child suffered in the past because of father's few nondrug-related convictions and no evidence establishing how that past criminal history presents a current threat of serious harm to the child, even in combination with father's history of methamphetamine abuse. In sum, the record does not include any evidence supporting the juvenile court's assertion of jurisdiction as to father.

A question remains regarding the appropriate disposition. The juvenile court also asserted jurisdiction as to mother, based on an allegation that she admitted. Mother is not a party to this appeal, and father has not challenged the jurisdictional determination as to mother. Accordingly, we reverse the judgment only as to father, and we otherwise affirm. See *Dept. of*

*Human Services v. J. H.*, 248 Or App 118, 119, 273 P3d 203 (2012) (ordering that disposition in analogous circumstances).

253 Or App at --- (footnote omitted; emphasis in bold italics added).

**7. *Dept. of Human Services v. R.V.*, 252 Or App 567, 287 P3d 1281 (2012) (reversing judgment finding child within the within the juvenile court's jurisdiction under ORS 419B.100(1)(c) based on the state' concession that the evidence failed to prove a current risk of harm to the child)**

THE COURT OF APPEALS' PER CURIAM OPINION:

Mother appeals a judgment finding her daughter, C, to be within the jurisdiction of the juvenile court under ORS 419B.100(1)(c) based on allegations that mother had a history of choosing violent or unsafe partners, had knowingly failed to protect C from sexual abuse by mother's partner, had continued to allow contact between her partner and C, and had possessed pornography within reach of C. Mother argues that the trial court erred in finding that C's welfare was endangered at the time of the hearing. The state concedes the error. We agree and accept the state's concession. See *State v. S. T. S.*, 236 Or App 646, 654, 238 P3d 53 (2010) (to establish jurisdiction under ORS 419B.100(1)(c), the state must prove "that there is a *current* risk of harm and not simply that the child's welfare was endangered at some point in the past" (emphasis in original)).

**8. *Dept. of Human Services v. B.B.*, 248 Or App 715, 274 P3d 242, adhered to on reconsideration 250 Or App 566 (2012) (reviewing the record *de novo* and reversing judgments finding children within the jurisdiction of the juvenile court under ORS 419B.100(1)(c), because the state failed to prove that the children's welfare currently was endangered)**

THE COURT OF APPEALS' SUMMARY:

Father and mother appeal the juvenile court's judgment taking jurisdiction over their children, K, E, and S, pursuant to ORS 419B.100(1)(c). The parties dispute whether the Department of Human Services (DHS) proved that father and mother were endangering the welfare of the children, as DHS alleged in its petition to the court to take jurisdiction. The juvenile court concluded that father would endanger the children because (1) he had a history of inappropriate sexual contact with minors; (2) his inappropriate sexual contact with minors was "unremediated"; and (3) he failed to complete offender treatment, as recommended by the child welfare authorities. The juvenile court also concluded that mother would endanger the children because she had exposed the children to an unsafe person, namely father. Held: Reviewing the facts *de novo* under ORS 19.415(3)(b), some of the juvenile court's finding of fact, including its key finding regarding risk to the children, are not supported by the evidence, and the findings that are supported by the record are insufficient to establish that the current condition or circumstances of the children are such as to endanger their welfare.

## EXCERPTS FROM OPINION:

Our analysis begins with the allegations against father. DHS alleged that the juvenile court had jurisdiction over each of the children and parents under ORS 419B.100(1)(c), which provides that the juvenile court "has exclusive original jurisdiction in any case involving a person who is under 18 years of age and \* \* \* [w]hose condition or circumstances are such as to endanger the welfare of the person or of others." The key inquiry for determining whether jurisdiction lies under ORS 419B.100(1)(c) is "whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child." *Dept. of Human Services v. C. Z.*, 236 Or App 436, 440, 236 P3d 791 (2010).

\* \* \* \* \*

[A]s to the allegation in paragraph 2.C, the court found that the children were in danger because (1) father had a history of inappropriate sexual contact with minors; and (2) his inappropriate sexual contact with minors was "unremediated," in other words, uncorrected or ongoing. DHS must prove a current risk of harm, so the evidence of father's past--inappropriate sexual contact with minors in 1994 when father was 21 and when father was himself a child, at age 11 or 12--does not by itself justify jurisdiction. Nor does father's viewing of child pornography in 1998, which the juvenile court also considered, provide a basis for a finding of *current* risk of serious harm to the children. *See, e.g., Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (the threat of serious loss or injury "must be current"); *State ex rel Juv. Dept. v. S. A.*, 230 Or App 346, 347, 214 P3d 851 (2009) (in dependency petitions, as the state conceded, the agency must allege a current risk of harm). Rather, the court's second finding--that father's conduct is unremediated--is the determinative historical fact that would support the conclusion that the children are in danger as DHS alleged in paragraph 2.C.

248 Or App at 722-23.

### **9. *Dept. of Human Services v. B.L.J.*, 246 Or App 767, 268 P3d 696 (2011) (proof that a parent with cognitive limitations cannot care for a child independently, without more, does not establish jurisdiction under ORS 419B.100(1)(c))**

#### THE COURT OF APPEALS' SUMMARY:

Mother appeals the juvenile court's judgments taking jurisdiction over her children, N and A, asserting that the judgments are not supported by sufficient evidence. Mother acknowledges that she has cognitive deficits that prevent her from parenting independently, but contends that, because the undisputed evidence at the jurisdictional hearing was that she was living with another adult, Bingham, who was willing to supervise and support her in her parenting, the children's circumstances did not justify juvenile court jurisdiction. Held: There is no legal requirement that a parent be able to care for his or her children independently. Because DHS failed to prove that the children would be at risk of serious loss or injury while living with mother in Bingham's house, the trial court erred in taking jurisdiction over the children.

**10. 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). Reversed.