APPELLATE CASE LAW UPDATE

Significant Decisions in Juvenile Court Cases, August 2009 – August 2010

Presented by the Honorable Michael C. Livingston

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SECTION I

Appellate Court Decisions In

DEPENDENCY CASES

1. *Dept. of Human Services v. C.Z.,* --- Or App ---, --- P3d --- (July 28, 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).

EXCERPTS FROM OPINION:

> * * * Mother and father have two children, who were ages 19 months and six months at the time of the hearing. The Department of Human Services (DHS) became involved with the children after receiving a report that a man was selling methamphetamine at mother and father's home in October 2009. At that time, DHS visited the home and observed conditions of concern. Father spoke rapidly and his eyes were "glossy" in appearance, raising concerns that father was under the influence of a controlled substance. DHS later discovered that father was a registered sex offender. The DHS representative found a number of empty 40-ounce beer bottles under the sink. Mother then arrived at the home with the children. She denied any drug abuse.
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> * * * * *
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> Both parents agreed to a voluntary protective action plan while the investigation into whether father had completed required sex offender treatment was completed. As part of the voluntary plan, the children went to stay with their maternal grandmother. Mother provided a urine sample for analysis.
>
> ***Mother's urinalysis (UA) results were positive for marijuana. Mother admitted that she had used marijuana at a party a week or two before, but said she was not a frequent user and never used the drug around her children. Mother***

provided another sample UA a few weeks later, which tested negative for marijuana and other drugs. For several weeks, DHS struggled to get in touch with mother because she did not have a working phone. Mother did not appear for a meeting in December 2009, but met with a DHS worker at a scheduled visitation time a week or so later. Mother was asked to do a UA in January of 2010, but did not show up because, as mother explained, she had accompanied father to see his probation officer on that day and had become ill and was unable to return for her UA.

* * * * *

[Under ORS 419B.100(1)(c),] the "key inquiry in determining whether 'condition[s] 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." *State ex rel Juv. Dept. v. T.S.*, 214 Or App 184, 191, 164 P3d 308, *rev den*, 343 Or 363 (2007) (quoting *State ex el Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 122 P3d 116 (2005)).

DHS filed dependency petitions requesting that the juvenile court take jurisdiction of the children under ORS 419B.100(1)(c). The dependency petitions alleged, in allegation 2A, that the children were within the jurisdiction of juvenile court for the following reason:

> "The conditions or circumstances of the child are such as to endanger the welfare of the child by reason of the following facts: The child's mother has a chemical abuse problem involving marijuana that left untreated disrupts her ability and availability to parent, compromises her mental health, and endangers her ability to appropriately parent."
>
> * * * * *

The juvenile court, at the jurisdictional hearing, concluded that the state had met its burden with regard to allegation 2A -- that mother had a chemical abuse problem that endangered the welfare of her children. The juvenile court announced the following findings and conclusions:

> "The evidence regarding [mother] is a little bit more difficult to decipher [than father's]. And really it is the accumulation of things that concerns the Court. On October 14th, 2009, there is a positive UA, positive UA for marijuana. [Mother] admits marijuana use; says she had it at a party about a week before; said it's not something she frequently does; but admits to the use. Her--this somewhat diminishes the testimony of her friends who have come to testify on her behalf, given that they don't believe she uses illegal drugs and never suspected that she does * * *.
>
> "At the--the next few weeks are somewhat concerning, in [mother's] failure to keep in contact with her children or with DHS. A no-show for the December 22nd meeting * * *. There was then a no-show for--I think it was some sort of decision meeting or a family decision meeting on December 22nd.
>
> "The breaking contact between the 29th--December 29th and January 12th is also concerning to the Court, coupled with [the children's grandmother's] frustration over [mother's] involvement or lack thereof with the children. I'm not sure what was going on there. * * *
>
> "And then on [January 12th] DHS asking [mother] to provide a UA. * * * The UA is, frankly, the Court's only way to know if you're on track. And I am certain that you were told that failure to attend the UA, or dilute UAs, are positive UAs to the Court. * * * So now January 12th to me is a positive UA. * * *

> "And so it is the cumulation of all these things together that concerns the Court. I do find that the State has proven by a preponderance of the evidence that Mother has a chemical abuse problem."

Thus, the juvenile court found that the state had proved by a preponderance of the evidence that mother has a chemical abuse problem, as alleged in allegation 2A of the petition, and therefore "found her in jurisdiction." Mother assigns error to that conclusion, arguing that the state had not shown, by a preponderance of the evidence, that there is a reasonable likelihood of harm to the welfare of the child because the state has not shown any nexus between the parent's behavior and the particular risk to the child at issue. *See State ex rel Dept. of Human Services v. N.S.,* 229 Or App 151, 157-58, 211 P3d 293 (2009). We agree.

Our review is governed by ORS 19.415. For this type of case, ORS 19.415(3)(b) provides that "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." The parties have not requested *de novo* review, and we decline to conduct such a review. * * * Therefore, our task is to review the facts found by the juvenile court to determine whether they are supported by any evidence, and then to determine whether, as a matter of law, those facts together with facts impliedly found by the juvenile court, provide a basis for juvenile court jurisdiction under ORS 419B.100(1)(c).

The record lacks evidence showing that mother's use of marijuana, her "chemical abuse problem" as found by the trial court, is a condition or circumstance that poses any risk to her children. That evidence is necessary to establish jurisdiction over the children under ORS 419B.100(1)(c). For example, this court has explained that an unpleasant condition resulting from lack of cleanliness in the children's home, although concerning, would not justify dependency jurisdiction without some showing that the children's welfare is at risk:

> "[A]lthough ORS 419B.090 reflects the legislature's policy decision concerning juvenile dependency, ORS 419B.100 implements those policies and, in the context of the present case, requires a showing that there exist conditions or circumstances that 'endanger the welfare' of the children. ORS 419B.100(1)(c). Endanger connotes exposure to 'danger,' which generally involves 'the state of being threatened with serious loss or injury[.]' *Webster's* [*Third New Int'l Dictionary*] 573 [(unabridged ed 2002)]. A child is not in 'danger,' as that word is commonly understood, simply because the record demonstrates that the child or the child's clothing emits an unpleasant odor."

State ex rel Dept. of Human Services v. Shugars, 202 Or App 302, 321, 121 P3d 702 (2005). Indeed, even where a parent's substance abuse is the "condition or circumstance" at issue, we have reversed a judgment taking jurisdiction where the state had not shown that the parent's substance abuse created a "reasonable likelihood of harm" to the children. In *State ex rel Dept. of Human Services v. D.T.C.*, 231 Or App 544, 555, 219 P3d 610 (2009), the father had had an alcohol abuse problem that had on occasion made him "mean" or "controlling" towards the children and had refused to participate in treatment or provide samples for UA. We nonetheless concluded that there was insufficient evidence that the father's condition created a reasonable likelihood of harm to the children in the past or at the time of the dependency hearing.

* * * It is true that a condition not directly involving a child may nonetheless create a harmful environment for the child, but the burden is on the state to show that harm is, in fact, present. * * *. Here, the juvenile court did not find that mother had used drugs in the presence of children, or in the home, or that her drug use created a harmful environment for the children. The juvenile court did not explicitly find that mother's use of drugs had endangered or would likely endanger the children, and our review of the record reveals no

> evidence that would support an implicit factual conclusion to that effect. Therefore, the facts of this case do not support a necessary finding for taking jurisdiction under ORS 419B.100(1)(c) because there is no evidence that mother's substance abuse was a "condition or circumstance" that "endanger[ed] the welfare" of her children.

Slip Opinion at 2-5 (emphasis in bold italics added) (footnote omitted).

2. ***Dept. of Human Services v. M.J.*, --- Or App ---, --- P3d --- (July 28, 2010) (because child is a "refugee child," as defined by ORS 418.935, juvenile court erred in failing to apply the Refugee Child Welfare Act, ORS 418.925 - 418.945)**

THE COURT OF APPEALS' SUMMARY:

Father appeals a final order in which the juvenile court continued child in the legal custody of the Department of Human Services. Father contends that the juvenile court should have applied the Refugee Child Welfare Act (RCWA) to the proceedings. *Held:* On this record, the RCWA applies because child is a "refugee child," as defined in ORS 418.925: child is under 18 years of age, and father entered the United States within the preceding 10 years and was unable to return to his country of origin because of persecution.

3. ***Department of Human Services v. F. W.*, 234 Or App 365, 228 P3d 736, *rev allowed*, --- Or ---, --- P3d --- (July 8, 2010) (allowing review in permanency proceeding to decide, among other things, whether "the ultimate responsibility to determine which permanent plan should be chosen for the child lie[s] with the juvenile court or with the Department of Human Services" and whether "a determination about whether it is in the child's best interest to terminate parental rights [is] a consideration at the permanency hearing, or must * * * await the termination trial")**

THE SUPREME COURT'S SUMMARY (ALLOWING REVIEW):

Petitioner F.W. (mother) seeks review of a Court of Appeals decision that affirmed without opinion a trial court judgment changing the permanency plan for child from permanent guardianship to adoption.

Child, K.W., was born in 2006. In 2008, child and her half-brother, J.W., were found to be within the jurisdiction of the juvenile court because of neglect and exposure to drugs. Initially, mother made substantial progress toward reunification. However, mother later was involved in an automobile accident, and was imprisoned after being convicted of driving under the influence of intoxicants, vehicular manslaughter, and assault. Her expected release date is in 2016.

In 2009, the juvenile court held a permanency hearing. At the time of the hearing, K.W. and J.W. were in the care of their maternal grandmother, who took the children to visit mother at Coffee Creek Correctional Facility. The children asked about their mother frequently and had no negative effects after the visits. With respect to J.W., all parties were in agreement that the permanency plan of "return to parent" should be retained, because J.W.'s father was making sufficient progress toward reunification. With respect to K.W., mother acknowledged that as a result of her incarceration, the permanency plan could not remain "return to parent." Mother advocated for a change in J.W.'s plan to permanent guardianship with child's maternal grandmother, because mother wanted to parent her children upon her release from prison and wanted to ensure contact between child and her half-brother. The Department of Human Services (DHS) urged that child's plan be changed to adoption. The DHS caseworker testified that adoption would provide a "greater level of stability and permanence" than legal guardianship. He also noted that child was not IV-E eligible (meaning that her guardian would not be eligible for financial assistance). Child's Court Appointed Special Advocate (CASA) also supported adoption, as did the child's attorney. The child's attorney expressed concern that K.W.'s father – who had a history of domestic violence -- might seek return of K.W. to his care if child was placed in a guardianship rather than adopted.

The juvenile court approved adoption as the appropriate permanency plan. The court noted the legislative preference for adoption over legal guardianship, and explained that "the court cannot find that another plan is better suited to the needs of this child than adoption."

Mother appealed, and the Court of Appeals affirmed without opinion.

On review, the issues are:

(1) Does the ultimate responsibility to determine which permanent plan should be chosen for the child lie with the juvenile court or with the Department of Human Services?

(2) Is a determination about whether it is in the child's best interest to terminate parental rights a consideration at the permanency hearing, or must it await the termination trial?

(3) If it appears imminent that the current relative placement would be selected as the permanent placement for the child, and the child has extensive ongoing contact and attachments with her mother and half-brother, may the court determine that a plan of permanent guardianship is more appropriate than a plan of adoption?

(4) On appeal, what standard of review should be applied to judicial determinations under ORS 419B.476(5)(b) and 419B.498(2)?

4. ***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).

5. ***Dept. of Human Services v. L.P.H.*, 235 Or App 69, --- P3d --- (2010)** (reversing permanency judgment changing permanent plan from reunification to adoption because the judgment failed to include a determination, or finding, required by ORS 419B.476(5)(d) that "none of the circumstances enumerated in ORS 419B.498(2) is applicable")

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this juvenile dependency case, mother appeals two judgments involving her son T. The first, entered in the trial court on August 14, 2009, asserts jurisdiction over T and commits him to the custody of the Department of Human Services (the jurisdictional judgment); the second, entered on September 17, 2009, approves a permanency plan of adoption for T (the permanency judgment). In her first assignment of error, mother challenges the jurisdictional judgment on the ground that the allegations contained in the dependency petition are legally insufficient to establish jurisdiction. We reject that assignment of error without discussion. In her second assignment, mother challenges the permanency judgment, arguing that the court failed to make the findings necessary to authorize the change in the permanency plan for T from reunification to adoption. We agree with mother that the permanency judgment failed to include the determination required under ORS 419B.476(5)(d). Accordingly, we reverse and remand the permanency judgment and otherwise affirm.

If, after a permanency hearing, the court concludes that the permanency plan for the child should be adoption, the permanency judgment must include the

court's determination that "none of the circumstances enumerated in ORS 419B.498(2) is applicable." *State ex rel Juv. Dept. v. J.F.B.,* 230 Or App 106, 115, 214 P3d 827 (2009); *see also* ORS 419B.476(5)(d). ORS 419B.498(2) sets forth the circumstances under which the Department of Human Services (DHS) is not required to file a petition to terminate the parental rights of a parent of the child, specifically, if the child is being cared for by a relative and that placement is intended to be permanent, (subsection (a)); if there is a compelling reason, documented in the case plan, for determining that filing a termination petition would not be in the best interests of the child, (subsection (b)); or if DHS has not timely provided to the family the services necessary for the child to safely return home, (subsection (c)).

It is indisputable that the permanency judgment in this case does not explicitly include the determination required by ORS 419B.476(5)(d) and, derivatively, ORS 419B.498(2). Nor, as the state suggests, can we infer that determination from the "judgment as a whole." *See Dept. of Human Services v. G.E.,* 233 Or App 618, 619-20, ___ P3d ___ (2010) (rejecting state's argument that appellate court could infer the required determination from the fact that the judgment ordered the filing of a termination petition). Accordingly, the permanency judgment must be reversed and remanded. *J. F. B.*, 230 Or App at 115. Given that disposition, we need not consider mother's other grounds for challenging the sufficiency of the findings in the permanency judgment.

6. *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.

7. ***Dept. of Human Services v. G.G.*, 234 Or App 652, 229 P3d 621 (2009) (applying UCCJEA provision -- ORS 109.731 -- which requires that communications between Oregon court and court in another state concerning transfer of jurisdiction be disclosed to the parties)**

THE COURT OF APPEALS' SUMMARY:

In this permanency case, father assigns error to the juvenile court's denial of father's motion to transfer jurisdiction to a juvenile court in Montana. Before ruling on father's motion, the Oregon court communicated with the Montana court, but the Oregon court did not permit father to respond to any record of the communications between the two courts. *Held:* When a juvenile court of this state communicates with a juvenile court of another state concerning jurisdiction under ORS 109.731, the juvenile court of this state may not make a jurisdictional decision before disclosing a record of the communication and allowing the parties to present facts and legal arguments related to that record.

8. *State v. L.C.,* 234 Or App 347, 228 P3d 594 (2009) (reversing permanency judgment changing permanent plan from APPLA to adoption because the record showed that it was improbable that a suitable adoptive placement would be found)

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

> * * * [T]he juvenile court changed the permanency plan for the children from "APPLA"--that is, "another planned permanent living arrangement" to adoption and ordered the Department of Human Services (DHS) to file petitions to terminate mother's and father's parental rights; the court declined to find that DHS had made reasonable efforts. In this unusual case, father and mother support, while DHS opposes, a permanency plan of adoption. We conclude that, because the record as of the permanency hearing shows that it is unlikely that an adoptive placement will be found for the children, the juvenile court erred by changing the permanency plan to adoption and, consequently, by ordering DHS to file a termination petition. We therefore reverse and remand.
>
> * * * * *
>
> After removing the children, DHS attempted to recruit an adoptive family and detailed those recruitment efforts for the court, but it was not confident that it would find a suitable family. ***DHS took the position that "[t]he age of these children, combined with their history, high needs and the unsuccessful recruitment to date leaves DHS unable to conclude that it can successfully place and maintain the children in any adoptive placement.***" At a review hearing shortly before the permanency hearing, no one questioned DHS's representation that it was "using all the recruitment resources possible, including things we don't typically use this early in recruitment for kids." * * *.
>
> * * * ***[S]hortly before the permanency hearing, the juvenile court itself expressed skepticism regarding the likelihood of an adoptive placement. The court's primary concern was its sense that "the parents cannot be expected * * * to be able to perform as parents for these children. That is a basis for termination of parental rights." After the permanency hearing, the court changed the permanency plan from APPLA to adoption and ordered DHS to file a petition to terminate parental rights***.
>
> * * * * *
>
> * * * ***[T]he statutory scheme suggests that the legislature intended the termination of parental rights to result in the creation of a new parent-child relationship through adoption.*** ORS 419B.498(3) provides, in part, that a petition for

termination of parental rights may not be filed "until the court has determined that the permanency plan for the child or ward should be adoption after a permanency hearing." In the order entered after the permanency hearing, the court must determine, as part of the permanency plan, whether and when the ward will be placed for adoption and a petition for termination of parental rights will be filed; no such determination is required if the plan is a legal guardianship or APPLA. ORS 419B.476(5)(b).

Furthermore, under ORS 419B.476(5)(d), if the court determines that the permanency plan should be adoption, the court must determine whether one of the circumstances described in ORS 419B.498(2) is applicable. ORS 419B.498(2) creates exceptions to circumstances in which DHS ordinarily would be required to file a termination petition. One such exception is this:

> "There is a compelling reason, which is documented in the case plan, for determining that filing such a petition would not be in the best interests of the child or ward. Such compelling reasons include, but are not limited to:
>
> "* * * * *
>
> "(B) Another permanent plan is better suited to meet the health and safety needs of the child or ward, including the need to preserve the child's or ward's sibling attachments and relationships[.]"

ORS 419B.498(2)(b). ***It is difficult to see how a permanency plan of adoption would be better suited than other permanency plans, such as APPLA, to meet the ward's needs if an actual adoption is unlikely***.

A permanency plan of adoption implicitly requires some likelihood that adoption will be achieved. We cannot conceive of a reason that the legislature would require, as a precondition to the filing of a termination petition, the approval of a plan that was unlikely to be achieved. Consistently with our understanding, Senator Brown, a sponsor of the bill creating that requirement in ORS 419B.498(3), told the Senate Committee on Judiciary that,

> "in order to provide permanency for these children, the department has moved forward on these termination cases, and what has resulted in some cases is that there has not been an adoptive resource for the child, and we're hoping that this will make sure that there is an adoptive resource in place."

[(Citation omitted).] ***That understanding--that termination of parental rights is expected to be followed by adoption--also is consistent with ORS 419B.500, which provides, in part, that parental rights may be terminated "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***." * * *.

Father and mother point to other juvenile code provisions that, in their view, demonstrate that a likelihood of adoption is not a prerequisite to termination of parental rights. Father relies on the final sentence of ORS 419B.500: "The rights of one parent may be terminated without affecting the rights of the other parent." In his view, that provision demonstrates that termination is not necessarily conditioned on adoptability.

To allow the possibility that only one parent's rights will be terminated after a termination hearing, however, is not inconsistent with a requirement that, before any termination petition is filed, the permanency plan must be adoption and, implicitly, that adoption cannot appear to be an unlikely outcome. There is a logical distinction between (1)

requiring approval of a permanency plan of adoption and (2) predicting what the evidence will show about parental fitness at a termination hearing. At a permanency hearing, adoption may appear to be the most appropriate plan for a child; at a subsequent termination hearing, the evidence may show that one parent has made significant progress and that the other parent is unfit and presents a risk of harm to the child, thus justifying termination of only one parent's rights. *See State ex rel Juv. Dept. v. Proctor*, 167 Or App 18, 2 P3d 405, *adh'd to on recons*, 169 Or App 606, 10 P3d 332 (2000) (terminating only one parent's rights). ***Recognizing that the record may be different at the termination hearing, however, does not eliminate the requirement that a permanency plan of adoption must precede the filing of any petition to terminate parental rights.*** * * *.

We acknowledge that our reading of ORS 419B.498(3) means that the termination of one parent's rights under ORS 419B.500 can occur only in limited circumstances. * * *.

We also reject mother's argument relying on ORS 419B.498(1), which provides that, under specified conditions, "the Department of Human Services shall simultaneously file a petition to terminate the parental rights of a child or ward's parents and identify, recruit, process and approve a qualified family for adoption." Mother contends that, because DHS may be required to undertake those actions simultaneously, the possibility of adoption cannot be a prerequisite to the filing of a termination petition. Again, however, we do not understand the legislature to have required DHS to undertake actions that it has reasons to expect will be fruitless--and indeed, here the record reflects that DHS had begun the process of identifying and recruiting an adoptive family without success. Rather, the legislature anticipated that DHS would ultimately "approve a qualified family for adoption"--that is, that adoption likely will follow the termination of parental rights.

* * * * *

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

235 Or App at 350-57 (emphasis in bold italics added) (footnotes omitted).

9. ***Dept. Of Human Services v. G.E.,*** **233 Or App 618, 227 P3d 1180 (2010) (reversing permanency judgment because judgment did not include findings required by ORS 419B.476(5)(d))**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

This is a juvenile dependency case in which mother appeals from a judgment authorizing the concurrent plan of adoption as the permanency plan for her daughter, N. She argues, first, that the trial court erred in failing to make several of the findings required to authorize a change in the permanency plan from reunification to adoption and that, consequently, our review is premature. In her second assignment of error, she contends that the court erred in approving the

change in plan. As explained below, we agree with mother that the court erred by not including in the judgment the determination required by ORS 419B.498(2) and that the case must be remanded. *State ex rel Juv. Dept. v. J.F.B.,* 230 Or App 106, 115, 214 P3d 827 (2009). Accordingly, we reverse and remand without reaching mother's other contentions regarding the trial court's failure to make findings or her second assignment of error.

Under ORS 419B.476(5), the court is required to enter an order within 20 days after a permanency hearing. If the court determines that the permanency plan for a ward should be adoption, the order "shall include," among other things, "the court's determination of whether one of the circumstances in ORS 419B.498(2) is applicable." ORS 419B.476(5)(d). ORS 419B.498(2), in turn, sets forth the circumstances under which proceeding to termination of a parent's parental rights is not required.

In this case, the judgment is a "check-the-box" form. The form includes a box for the court to indicate that "[n]one of the circumstances in ORS 419B.498(2) applies." The court left that box unchecked. However, the state argues that we can nonetheless infer that the court made that finding because the judgment ordered that N be placed for adoption and that a termination of parental rights petition be filed "[a]s soon as possible."

The state's argument is foreclosed by *J. F. B.* In *J .F. B,* we held that, if the court changes the permanency plan from reunification to adoption, ORS 419B.476(5)(d) requires the judgment to include the court's determination that "none of the circumstances enumerated in ORS 419B.498(2) is applicable." 230 Or App at 114-15. We further held that failure to do so is a deficiency requiring reversal and remand. *Id.* at 115. Here, the form judgment provided a check-off box for the court to indicate that it had made the required determination. It is undeniable that the court left that box unchecked. Thus, as in *J. F. B.*, the judgment fails to comply with the statutory directive, and, accordingly, it must be reversed and the case remanded. *See id.*; *see also State ex rel DHS v. M.A.*, 227 Or App 172, 183-84, 205 P3d 36 (2009) (reversing and remanding where the court failed to include the findings required under ORS 419B.476(5)(f) in a judgment changing the permanency plan for the child to "another planned permanency living arrangement").

10. *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).

11. *State v. M.A.H.,* 233 Or App 467, 226 P3d 59 (2010) (dismissing appeal because question raised by DHS on appeal – *i.e.,* whether an adoptive resource must be identified before a permanency plan can be changed from reunification to adoption – had become moot)

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this consolidated appeal, the Department of Human Services (DHS) appeals judgments denying its requests to change the permanency plan for mother's children from reunification to adoption. The juvenile court determined that the requests were premature because DHS had failed to identify and approve an adoptive resource. On appeal, DHS contends that the trial court misinterpreted the governing statute, ORS 419B.498, and that it is not necessary for DHS to identify and approve an adoptive resource before requesting a change in the permanency plan to adoption.

In the time since the consolidated appeal was filed, DHS has identified and approved an adoptive resource for the children. For that reason, the question that DHS asks this court to decide--whether an adoptive resource

must be identified and approved before a permanency plan can be changed from reunification to adoption--is moot. Our answer to that question would be purely advisory and have no practical effect on the rights of the parties, given that those are no longer the circumstances in this case. The only relief that we could grant would be a remand for the court to reconsider the request under the circumstances as they now exist; yet nothing in the trial court's judgment precludes DHS from obtaining that same relief independently of our decision, by requesting a change in the permanency plan based on the changed circumstances. *See* ORS 419B.470(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.").

12. *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.

EXCERPTS FROM OPINION:

> * * * In [*State ex rel Juv. Dept. v. Randall,* 96 Or App 673, 773 P2d 1348 (1989)], the *only* allegation in the petition was that the mother used controlled substances, and we held

only that the allegation was "insufficient *by itself*" to establish jurisdiction. *Id.* at 675 (emphasis added). Here, the allegations regarding mother's substance abuse are complemented by allegations that she allowed untreated sex offenders to be with T. The two allegations together present a more compelling case than either one alone; the danger that is inherent in contact with untreated sex offenders is heightened by the use of controlled substances. Thus, the controlled substance allegations are "a proper consideration." *Id.*

Next, mother argues that, even if the allegations themselves are sufficient, the court erred in finding that the state proved that the children's "condition or circumstances are such as to endanger [their] welfare," the statutory basis for jurisdiction alleged. ORS 419B.100(1)(c). The state responds that the evidence was sufficient. We agree with the state for the following reasons.

"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." *State ex rel Juv. Dept. v. T.S.*, 214 Or App 184, 191, 164 P3d 308, *rev den*, 343 Or 363 (2007) (internal quotation marks omitted). In deciding whether the juvenile court has jurisdiction, "[i]t is the *child's* condition or circumstances that are the focus of the * * * inquiry." *Id.* (internal quotation marks omitted; emphasis in original). The state must prove the facts supporting jurisdiction by a preponderance of the evidence. ORS 419B.310(3); *T. S.*, 214 Or App at 192.

In this case, we conclude that the evidence presented at the hearing is sufficient to prove that the children's circumstances endangered their welfare. First, we disagree with mother's assertion that the state failed to prove that she "allowed" Swift to contact T at her friend's apartment in August 2008. As noted above, the juvenile court found mother's testimony regarding those events not credible. We agree and defer to that finding of credibility. Accordingly, we conclude, consistently with Settell's testimony, that mother did "allow" Swift to contact T as alleged.

The record thus establishes that mother, who has a history of substance abuse, brought T to a known drug house and, despite a moderate odor of marijuana emanating from the second bedroom into other areas of the apartment, stayed there with him. It also establishes that, despite her knowledge that Swift was a convicted and untreated sex offender who was prohibited by the terms of his probation from coming into contact with children, mother allowed Swift to come into contact with L and T in September 2007 and with T in August 2008. Furthermore, the record establishes that Swift received a 58-day jail sentence for his contact with T.

It is true that, in *State ex rel Dept. of Human Services v. N.S.,* 229 Or App 151, 157-58, 211 P3d 293 (2009), we rejected the state's argument that contact with an untreated sex offender is *per se* dangerous to children even where the state has not demonstrated a nexus between the sex offense and the supposed harm. This case is distinguishable for several reasons. First, in *N. S.*, there were two bases for our conclusion: the nature of the sex offense was unknown, and the record did not establish that the offender would have contact with the child. *Id.* Here, by contrast, mother's repeated inability or unwillingness to keep Swift away from her children, despite warnings, shows that mother does not acknowledge that contact with an untreated sex offender could present a risk and that Swift probably *would* have continued contact with the children, mother's promises to the contrary notwithstanding. Second, the petition in *N. S.* contained only the single allegation that potential contact with the sex offender created a risk of danger. Here, as we discussed with respect to the drug use, the presence of untreated sex offenders in combination with the use of controlled substances synergistically creates a whole that is more dangerous than the sum of its parts. And third, we can infer from the fact that a court ordered Swift not to contact children that his violation of that order presented a risk of harm to the children that he did contact--L and T. In short, 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. We thus cannot say that the juvenile court erred in its determination that the children's "condition or circumstances are such as to endanger [their] welfare." ORS 419B.100(1)(c).

* * * [FOOTNOTE 1:] A puzzling situation could be presented (but is not, in this case) under ORS 419B.890, the statute permitting a parent to move for dismissal, after the state has presented its case, on the ground that the petition does not contain allegations that, "if proven, * * * constitute a legal basis" for establishing jurisdiction. What is the correct outcome on appeal if the appellate court determines (1) that the court erred in allowing the case to continue because the allegations are insufficient, but that (2) the state nonetheless has presented evidence sufficient to establish jurisdiction? The Oregon Rules of Civil Procedure do not apply in juvenile court dependency proceedings, ORS 419B.800(1), and there is no rule of Juvenile Court Dependency Procedure analogous to ORCP 23 B, which states that, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." That divergence suggests a curious result--that is, that a party's failure to allege sufficient facts in a dependency petition might sometimes trump evidence presented at the jurisdictional hearing that a child is endangered, resulting in a remand. Because we conclude in this case that the petition contains sufficient allegations, we need not confront this question--which could, of course, be mooted by appropriate legislation.

232 Or App at 109-111.

13. ***State v. A.L.M.*, 232 Or App 13, 220 P3d 449 (2009)** **(juvenile court erred in continuing wardship, where there was no evidence that, at the time of the permanency hearing, child's conditions and circumstances presented a reasonable likelihood of harm to the child)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment vacating the commitment of her child, N, to the Department of Human Services, but continuing the child as a ward of the court. *Held*: In the absence of any evidence that conditions and circumstances existed at the time of the permanency hearing that presented a reasonable likelihood of harm to the child, the juvenile court erred in continuing the wardship.

EXCERPT FROM OPINION:

At the permanency hearing, mother notified the juvenile court that she contested its continued jurisdiction over N. She asserted that "if jurisdiction is establishe[d] under [ORS] 419B.100, and those reasons continue to exist, then wardship can be continued. But here, those reasons no longer continue to exist * * *." Nevertheless, the court ruled that jurisdiction would continue, that father was awarded physical custody of N, and that any visitation by mother with N would be determined by father.

Pursuant to ORS 419B.100(1)(c), the juvenile court has jurisdiction over a child "[w]hose condition or circumstances are such as to endanger the welfare of the [child] * * *."

"The key inquiry in determining whether 'conditions 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." *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005). It is axiomatic that a juvenile court may not continue a wardship "if the jurisdictional facts on which it is based have ceased to exist." *State ex rel Juv. Dept. v. Gates*, 96 Or App 365, 372, 774 P2d 484, *rev den*, 308 Or 315 (1989) (decided under *former* ORS 419.476(1)(c), *repealed by* Or Laws 1993, ch 33, § 373, which was materially indistinguishable from ORS 419B.100(1)(c)).

Based on all the evidence and argument presented in this case, the only allegation of the amended petition that appears to still be present is father's lack of a custody order with respect to N. However, without some evidence that mother is a present danger to N's welfare, the lack of a custody order alone is not sufficient for jurisdiction pursuant to ORS 419B.100.

As to the sufficiency of the evidence issue regarding whether wardship should continue, the dissent relies on the following evidence:

"The juvenile court earlier found that grounds for jurisdiction over N existed because mother was neglectful of N, father's alcohol use endangered N's welfare, and father was unable to protect N from mother because he lacked custody of N. The caseworker reported that mother continued to be assessed to be an unfit parent inasmuch as her oldest child had been made a ward of the court three months previously, and her youngest child was taken into custody at birth six months earlier. Mother was in the midst of termination of parental rights proceedings for two other children at the time of N's review hearing. Mother was not operating under a case plan for reunification with N and had very little personal interaction with N. Mother presented no evidence and made no contention to the court that the dependency jurisdiction facts about her had changed. The caseworker reported in her affidavit that '[father] does not have a legal custody judgment.'" * * *.

What is noticeably lacking from the above recitation is any evidence that, at the time of the review hearing, N's welfare was endangered by his present circumstances or that there was a reasonable likelihood that mother's existing circumstances presented a threat of harm to his welfare. *See Vanbuskirk*, 202 Or App at 405. Jurisdiction over N was originally assumed by the court because mother left the child with inappropriate caregivers and because of father's alcoholism and lack of a custody order. Father's alcohol issues have been rectified so that they no longer endanger N's welfare. Father now has physical custody of N, and mother's act of leaving the child with inappropriate caregivers in the past was not a circumstance that authorized continuing jurisdiction over N in the absence of a continued reasonable likelihood of harm to the child.[(2)] The juvenile court heard no additional evidence that mother continued to represent a threat to N's welfare in light of father's changed circumstances. The facts that mother is involved in other termination proceedings, that she has no case plan for reunification with N, and that she has had little contact with N do not *ipso facto* demonstrate that she represented a threat to N's welfare at the time of the review hearing. Accordingly, in the absence of any evidence in this case that conditions and circumstances existed at the time of the review that presented a reasonable likelihood of harm to the child, the juvenile court erred in continuing the wardship over N.

232 Or App at 15-18.

14. ***State ex rel Dept. of Human Services v. D.T.C.*, 231 Or App 545, 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:

> [T]he state contends that "there is sufficient evidence in the record to establish by a preponderance of the evidence that father's alcohol dependence and his unwillingness to participate in treatment pose a reasonable likelihood of harm to the children."
>
> 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).

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

15. ***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. Judgment of dismissal reversed and remanded; limited judgment vacated.

EXCERPT FROM OPINION:

The standard for the exercise of jurisdiction under ORS 419B.100(1)(c) was stated in *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. It is the *child's* condition or circumstances that are the focus of the jurisdictional inquiry. In deciding if the juvenile court has jurisdiction, the court must determine if the child needs the court's protection, not the nature or extent of the necessary protection."
>
> (Emphasis in original; citations omitted.) We also explained in *State ex rel DHS v. Kamps,* 189 Or App 207, 214, 74 P3d 1123 (2003), that, where the evidence presented clearly establishes a "condition or circumstance" that endangers the child's safety, such as abuse, "[t]he state's failure to prove causation * * * [does] not preclude juvenile court jurisdiction over [the child]." In that case, the child had suffered physical injuries likely caused by intentional abuse, but the evidence did not show who caused the injuries; nonetheless, jurisdiction was warranted. ORS 419B.100(2) provides that the "court shall have jurisdiction under [ORS 419B.100(1)] even though the child is receiving adequate care from the person having physical custody of the child." "Whether those conditions or circumstances are attributable to the mother or father matters not for jurisdictional purposes." *State ex rel Juv. Dept. v. Jordan*, 36 Or App 817, 820, 585 P2d 753 (1978).
>
> We conclude that the juvenile court erred in dismissing the petition. The evidence presented at the hearing proved that child had been physically abused. It is "axiomatic that the physical abuse of a child endangers the child's welfare, and, thus, furnishes a basis for the exercise of dependency jurisdiction." *G.A.C. v. State ex rel Juv. Dept.*, 219 Or App 1, 11, 182 P3d 223 (2008) (citations omitted). Although we defer to the juvenile court's finding that mother's testimony was "credible in every way" and accept the court's conclusion that mother did not inflict child's injuries, the evidence indicates that child suffered physical injuries most likely caused by physical abuse and that therefore child needs the court's protection.
>
> That conclusion, however, does not necessarily mean that child should not remain in mother's care. ORS 419B.331 allows the court, after taking dependency jurisdiction over a child, to place the child with the parent, subject to DHS supervision. The placement that serves a child's best interests is a separate question from whether the court should exercise jurisdiction over the child. *See State ex rel Juv. Dept. v. Brammer*, 133 Or App 544, 549 n 5, 892 P2d 720 (1995) (taking jurisdiction over the child merely places the child under the protection of the court, and whether the child remains in the home is determined in another proceeding); ORS 419B.100(2). The trial court will be able to make an appropriate placement determination on remand. Accordingly, we reverse the judgment dismissing the dependency petition and vacate the limited judgment and remand for reconsideration of placement.

230 Or App at 754-55 (footnote omitted).

16. ***State ex rel Dept. of Human Services v. T.N.*, 230 Or App 575, 216 P3d 341 (2009)** (reversing permanency judgments because defects in the judgments precluded appellate review)

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Mother appeals judgments changing the permanency plan for her two children from permanent foster care to permanent guardianship. One of mother's assignments of error is that the judgments do not comport with the requirements of ORS 419B.476(5), because they do not explain why placement with mother is not appropriate. We agree that the judgments are defective, for an even more fundamental reason. The judgments are essentially boilerplate recitations and, at various points, incorporate by reference certain "attached report(s)." For example,

the judgments state that the court "finds that the attached reports(s) from Department of Human Services / Child Welfare Division do accurately set forth the ward's school attendance; length of attendance at each school," and that "Department of Human Services / Child Welfare Division has made diligent efforts to place the child with a suitable relative, set forth in the report(s) attached hereto and the record herein." No reports are attached to the judgments, and it is impossible to determine what reports the court intended to incorporate. In fact, the state concedes on appeal that the "report(s)" to which the judgments refer might not even be part of the record in this case.

Those defects in the judgments preclude meaningful review in this appeal. We cannot determine what the trial court relied on, or whether we should defer in any way to the trial court's credibility determinations. For that reason, we reverse and remand the judgments so that the trial court can remedy those defects. *Cf. State ex rel DHS v. M.A.,* 227 Or App 172, 183, 183 n 10, 205 P3d 36 (2009) (reversing and remanding judgment that failed to comply with ORS 419B.476(5) and noting that "the court did not incorporate by reference or otherwise adopt the caseworker's court report; in any event, that alone would have been insufficient in this case to satisfy the requirements of the statute").

17. ***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.").

18. ***State ex rel Juv. Dept. v. J. F. B.*, 230 Or App 106, 214 P3d 827 (2009) (reversing permanency judgment because of inadequate findings)**

THE COURT OF APPEALS' SUMMARY:

This is a consolidated appeal by mother from four juvenile court judgments involving two of her children--the July 2008 judgments (changing the permanency plan from reunification to adoption) and the August 2008 judgments (changing the permanency plan from adoption to permanent guardianship). Mother raises multiple arguments on appeal, one of which is that the judgments arising out of the June permanency hearing are defective on their face under ORS 419B.476(5), which provides that "the court shall enter an order within 20 days after the permanency hearing" and "the order shall include[,] * * * [i]f 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. *Held:* (1) The juvenile court failed to include a determination in the July 2008 judgments regarding whether any of the circumstances in ORS 419B.498(2) are applicable, as required by ORS 419B.476(5)(d). Because the July 2008 judgments do not comply with ORS 419B.476(5)(d) and ORS 419B.498(2), they must be reversed and remanded. (2) The August 2008 judgments are invalid because they did not address the issues of mother's progress and whether DHS made "active efforts" to return the children to mother, as required by ORS 419B.476(2)(a).

EXCERPTS FROM OPINION:

> * * * Mother raises multiple arguments on appeal, one of which is that the judgments arising out of the June permanency hearing are defective on their face under ORS 419B.476. That statute requires a judgment to include certain determinations when it approves a plan of adoption. * * *
>
> * * * * *
>
> * * * Insofar as we can discern, mother did not make an express request for determinations under the statute at the time of the hearing. ***But no request for determinations was necessary where ORS 419B.476(5) "dictates that the required finding be made--not at the time of hearing--but in an order issued within 20 days after the hearing."*** *State ex rel DHS v. M.A.,* 227 Or App 172, 181-82, 205 P3d 36 (2009).
>
> ORS 419B.476(5) provides as follows:
>
> "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;

"* * * * *

"(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[.]"

(Emphasis added.) ORS 419B.498(2) provides, in turn, as follows:

"The department shall file a petition to terminate the parental rights of a parent in the circumstances described in subsection (1) of this section unless:

"(a) The child or ward is being cared for by a relative and that placement is intended to be permanent;

"(b) There is a compelling reason, which is documented in the case plan, for determining that filing such a petition would not be in the best interests of the child or ward. Such compelling reasons include, but are not limited to:

"(A) 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);

"(B) Another permanent plan is better suited to meet the health and safety needs of the child or ward, including the need to preserve the child's or ward's sibling attachments and relationships; or

"(C) The court or local citizen review board in a prior hearing or review determined that while the case plan was to reunify the family the department did not make reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to make it possible for the child or ward to safely return home; or

"(c) The department has not provided to the family of the child or ward, consistent with the time period in the case plan, such services as the department deems necessary for the child or ward to safely return home, if reasonable efforts to make it possible for the child or ward to safely return home are required to be made with respect to the child or ward."

Thus, under ORS 419B.476(5)(d), if the juvenile court changes a permanency plan from reunification to adoption, the judgment shall include a determination "whether one of the circumstances in ORS 419B.498(2) is applicable."

The juvenile court's July 2008 judgments provide as follows:

"The above named child having been regularly brought before the entitled Court on a petition filed as provided by law, and testimony having been taken in said matter and good cause appearing therefore; and the court makes the following finding:

"It is in the best interests and welfare of the child to continue in protective custody for care placement and supervision.

"Department of Human Services - Child Welfare Division has made active efforts to prevent or eliminate the need for removal of the child and to make it possible for the child to return to or remain safely in the family home:

"NOW THEREFORE, IT IS THE JUDGMENT OF THE COURT THAT:

"It is in the best interest and welfare of said child to remain a ward of the Court, in the legal care and custody of the Department of Human Services - Child Welfare Division, for continued placement in foster care. The Court approves the implementation of the concurrent plan of adoption."

As mother points out on appeal, the juvenile court failed to include a determination in the judgments regarding whether any of the circumstances in ORS 419B.498(2) are applicable, as required by ORS 419B.476(5)(d). The judgments' failure to find that none of the circumstances enumerated in ORS 419B.498(2) is applicable is fatal. Because those judgments do not comply with the above statutes, they must be reversed and remanded. *M. A.*, 227 Or App at 183-84.

Having concluded that the July 2008 judgments are defective on their face, we next consider the validity of the August 2008 judgments and whether they can exist independently of the July 2008 judgments. To answer that question, we turn to ORS 419B.476(2), which provides as follows:

"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. * * *.

The language of ORS 419B.476(2) reflects the intention of the Oregon legislature to incorporate the policies expressed by Congress in the Indian Child Welfare Act (ICWA) as codified in 25 USC sections 1901 to 1963. * * *.

Because the proposed case plan at the time of the June 2008 hearing was reunification, the juvenile court was required to apply the standards set out in ORS 419B.476(2)(a) in accordance with the policy expressed in 25 USC sections 1901 and 1902 and to determine whether active efforts by DHS had been made to return the children to mother and whether she had made sufficient progress for their safe return. Although the July 2008 judgments arising out of the June 2008 hearing did not address on their face whether mother had made sufficient progress to make it possible for the children to return home safely, they did find that "Child Welfare Division has made active efforts to prevent or eliminate the need for removal of the child and to make it possible for the child to return to or return safely in the family home." The August 2008 judgments also found that "[a]ll reasonable efforts have been made to prevent or eliminate the need for removal of the child and to make it possible for the child to return to or remain safely in the family home[.]" The August 2008 judgments, however, did not address the issues of mother's progress and whether DHS made "active efforts" to return the children to mother as required by ORS 419B.476(2)(a).

> The issue then is whether, under the circumstances of this case, the juvenile court was required at the August hearing to make the assessments required by ORS 419B.476(2)(a). Mother, for her part, sought reunification at both the June and August hearings. The juvenile court, apparently relying on its earlier findings in the June hearing, did not undertake to reconsider mother's circumstances for purposes of reunification at the time of the August hearing, even though that opportunity through mother's advocacy presented itself. We conclude, in light of the policies of the ICWA to afford an opportunity for reunification at every dispositional step that could result in contributing to the permanent removal of children subject to its protections, that it was incumbent on the juvenile court at the August hearing to either make new findings under ORS 419B.476(2)(a) or to find that the circumstances regarding reunification had not changed since the last hearing held under ORS 419.476(2)(a). Otherwise, the policies articulated in 25 USC sections 1901 and 1902 could be frustrated in a hearing held pursuant to ORS 419.476(2)(b) and (c) by a court's reliance to deny reunification on circumstances that no longer exist at the time of the instant hearing. ***For that reason, we conclude that the August 2008 judgments are also defective and must also be reversed so that the juvenile court can make the determinations that ICWA contemplates.***

230 Or App at 109, 112-18 (emphasis in bold italics added) (footnotes omitted).

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

THE COURT OF APPEALS' SUMMARY:

Mother appeals from four judgments of the juvenile court, which changed the permanency plan for three of her children to adoption and for one of them to a planned permanent living arrangement. She asserts that Department of Human Services (DHS) failed to make reasonable efforts to reunify the family and that she made sufficient progress to allow the safe return of her children in a reasonable time. *Held:* DHS expended extensive efforts, including evaluations, parent training, help enrolling in public schools, education assistance, counseling, in-home services, and visitations. DHS's efforts to prevent the removal of the children from mother's home, and then to reunite the family after the removal, were reasonable. Moreover, even with responsibility for only two of the six children, mother had difficulty applying the parenting training that DHS had provided, and the evidence demonstrates that she had even greater difficulty adequately parenting all six children. Given expert recommendations that the children need permanency soon, it is unlikely that mother will make sufficient progress to allow the children to be returned in a reasonable period. The preponderance of the evidence demonstrates that the juvenile court did not err in changing the permanency plan for four of the children.

SECTION II

Appellate Court Decisions In

DELINQUENCY CASES

20. *State ex rel Juvenile Department of Douglas County, Respondent, v. K. C. W. R*., 235 Or App 315, 230 P3d 973 (2010) (construing and applying ORS 163.165(1)(e) – *i.e.,* assault "[w]hile being aided by another person actually present")

THE COURT OF APPEALS' SUMMARY:

Youth appeals a judgment of the juvenile court finding him to be within the jurisdiction of the court based on his conduct that, if committed by an adult, would constitute third-degree assault. Youth wrestled on the ground with the victim while his co-assailant hit the victim in the face with a small bat. He asserts that he cannot be directly liable for third-degree assault because there was insufficient evidence that he caused the victim's injuries while being aided by another person actually present. *Held:* Youth's assaultive conduct was extensively intertwined with his co-assailant's injury-causing assault, such that he is directly liable for the injuries to the victim.

EXCERPTS FROM OPINION:

> Youth appeals a judgment of the juvenile court finding him to be within the juvenile court's jurisdiction for committing acts that, if committed by an adult, would constitute third-degree assault pursuant to ORS 163.165(1)(e). We write only to address a portion of youth's first assignment of error: that the juvenile court erred in finding youth to be within its jurisdiction for third-degree assault, because the state failed to prove beyond a reasonable doubt that youth caused physical injury to the victim--or that, if he did so, he was aided by another person actually present.
>
> * * * * *
>
> On appeal, youth argues that he cannot be found to be directly liable for third-degree assault because there is insufficient evidence either (1) that he caused the victim's injuries or (2) that, if he did cause the victim's injuries, he was aided by another person actually present when he did so.

The state responds that the evidence established that youth directly caused the victim's injuries with his fists, or is liable as an assailant whose assaultive conduct was so intertwined with his mother's assault with the bat that both of them had a legally sufficient role in causing the victim's injuries. *See generally State v. Pine*, 336 Or 194, 207, 82 P3d 130 (2003) (concluding that a defendant who aids another person in committing an assault, but who does not directly cause physical injury to the victim, cannot be convicted of this type of third-degree assault under a theory of direct liability unless he or she engages in conduct so "extensively intertwined" with the assault that his or her conduct can be said to have produced the injury). In *Pine*, the defendant participated in an assault on the victim, but the injury to the victim was, at least arguably, caused solely by the other assailant's assault. *Id.* at 196-98. The Supreme Court stated that

> "the fact that a defendant provided on-the-scene aid to another person who inflicted physical injury upon a victim does not, in itself, render the defendant liable for third-degree assault under that statute. Rather, such a defendant either must have inflicted physical injury directly himself or herself, or must have engaged in conduct so extensively intertwined with infliction of the injury that such conduct can be found to have produced the injury."

Id. at 207. Youth's conduct here is comparable to the assaultive conduct of the defendant in *State v. Derry,* 200 Or App 587, 116 P3d 248, *rev den*, 340 Or 34 (2005), even though the assault in that case did not require an additional person to be present. In *Derry*, the defendant repeatedly shoved the victim during an altercation near a doorway. In the course of that altercation, the victim's finger was injured when the door was closed on his hand. *Id.* at 589. We concluded that "[the] defendant's conduct in repeatedly pushing [the victim] during the altercation was so intertwined with infliction of the injury to [the victim's] finger that it produced that injury." *Id.* at 592.

We conclude that youth's assaultive conduct was extensively intertwined with the mother's injury-causing assault with the bat, such that he is directly liable for the injuries to the victim. ***It is apparent from the record that the blows from the mother's bat injured the victim. Although youth did not directly assault the victim with the bat, the victim could not even try to stop the mother from assaulting him because, while the mother was hitting him, whenever he would attempt to let go of youth, youth would attack him. Without youth's active involvement in the assault by the mother, the victim would likely have been able to block or defend himself against her assault--or to retreat. It follows that youth intentionally injured the victim while being aided by his mother, who was actually present, and is therefore directly liable for third-degree assault.*** The juvenile court did not err in finding youth to be within its jurisdiction for third-degree assault.

235 Or App at 317, 319-20 (emphasis in bold italics added) (footnotes omitted).

21. *Smith v. Jester*, 234 Or App 631, 228 P3d 1232 (2010) (a youth seeking post-adjudication relief in a juvenile delinquency case must do so by filing a petition under ORS 419C.615 in the juvenile court in the county where the delinquency petition was adjudicated; the Post-Adjudication Relief Act, ORS 138.510 to 138.680, does not apply to juvenile court delinquency adjudications)

THE COURT OF APPEALS' SUMMARY:

Petitioner appeals the denial of his petition seeking "post conviction" relief by the Josephine County Circuit Court from the jurisdictional judgment of the Jackson County Juvenile Court. Petitioner had been found within the jurisdiction of the Jackson County Juvenile Court for committing acts that, if committed by an adult, would constitute several felony and misdemeanor offenses. Petitioner framed his petition for relief within the statutory framework provided by the Post-Conviction Hearing Act, ORS 138.510 to 138.680. *Held:* Because an adjudication finding a juvenile to be within the juvenile court's jurisdiction is not a conviction of a crime or offense, a circuit court does not have authority to consider a petition for post-conviction relief from that adjudication under the Post-Conviction Hearing Act. Where a petitioner is adjudicated to be within the jurisdiction of the juvenile court of one county, the circuit court of a different county lacks authority to consider a claim for relief under ORS 419C.615.

22. *State ex rel Juv. Dept. v. L.A.W.,* 233 Or App 456. 226 P3d 60 (2010) (a determination whether a youth's waiver of rights following *Miranda* warnings is valid must be based on the totality of the circumstances that exist in a particular case)

THE COURT OF APPEALS' SUMMARY:

In this juvenile delinquency case, youth was found to be within the jurisdiction of the juvenile court as a result of acts that, if committed by an adult, would constitute unlawful sexual penetration in the first degree. The state appeals from the juvenile court's suppression of a confession made by the 12-year-old youth. The juvenile court ruled that youth's statements were made voluntarily, but that youth's waiver of his rights was not knowing and intelligent. On appeal, the state contends that youth's waiver was voluntary, knowing, and intelligent. *Held:* A determination of whether there was a valid waiver must be based on the totality of the circumstances that exist in a particular case. Taken together, youth's age, intelligence, education, and demonstrated cognitive ability to track with and respond to the detective's questions constitute evidence that he had the

competency to understand the *Miranda* warnings and the consequences of waiving them.

EXCERPT FROM OPINION:

> It appears that the juvenile court's decision in this case was influenced by the fact that some of the circumstances in [*State ex rel Juv. Dept. v.*] *Deford* [177 Or App 555, 34 P3d 673 (2001)] were not demonstrated to exist in this case. However, the methodology used to advise the youth of his *Miranda* rights by the officer in *Deford* is not a litmus test to be used in every case for determining whether a waiver is made knowingly and intelligently. Rather, a determination of whether there was a valid waiver must be based on the totality of the circumstances that exist in a particular case. Those include, as discussed in *Deford* and *Cecil*, the youth's age, education, background, experience, and intelligence. Here, it appears from the evidence presented before the juvenile court that youth understood the warnings that he was furnished in light of his oral and written acknowledgement of them. Unlike the youths in *Cecil* and *Deford*, youth was of average intelligence and the testing administered by the psychologist did not indicate that youth had any learning disabilities. Youth's education level and mental age were both commensurate with his chronological age. In fact, taken together, youth's age, intelligence, education, and demonstrated cognitive ability to track with and respond to the detective's questions constitute evidence that he had the competency to understand the warnings and the consequences of waiving them. The psychologist's testimony does not undermine that conclusion. At most, the psychologist, by his own admission, offered only an opinion about 12-year-olds as a general proposition, without any particularized explanation as to why youth, in light of his particular circumstances and abilities, could not appreciate the nature of the warnings. Based on all the facts of this case, we conclude that youth made a knowing and intelligent waiver of his constitutional rights not to incriminate himself.

233 Or App at 465-66.

23. ***State ex rel Juv. Dept. v. K.I.S.*, 232 Or App 559, 222 P3d 750 (December 16, 2009) (juvenile court erred in committing youth to the custody of the Oregon Youth Authority (OYA) for placement in a youth correctional facility without making a finding that it is in youth's best interests to be placed in OYA custody)**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

The juvenile court found youth to be within the court's jurisdiction for having engaged in conduct that, had it been committed by an adult, would have constituted sexual abuse in the first degree. ORS 163.427. The court committed youth to the custody of the Oregon Youth Authority (OYA) for placement in a youth correctional facility. The court did so without making a finding that it is in youth's best interests to be placed in OYA custody.

Youth appeals, advancing three assignments of error. The first two concern the admissibility and sufficiency of the evidence on which the state relied in establishing that youth had committed first-degree sexual abuse. We affirm as to those assignments without discussion. The third assignment is that the juvenile court erred in ordering youth committed to OYA custody without first making a finding that it is in youth's best interests to do so. The state concedes the point

and argues that the judgment of disposition should be vacated and the matter remanded for further findings. Youth contends that we need not vacate and remand; rather, youth contends, we should simply decide, on *de novo* review, that it is not in his best interests to be committed to OYA custody.

We agree that the juvenile court erred. *See* ORS 419C.478(1) (if the juvenile court places a youth in OYA custody it "shall include written findings describing why it is in the best interests of the youth offender to be placed with [OYA]"); *State ex rel Juv. Dept. v. C.N.W.,* 212 Or App 551, 552, 159 P3d 333 (2007) ("The statutory mandate is unambiguous: the court 'shall include written findings.'"). We decline youth's invitation to make the findings ourselves and instead remand to the juvenile court to do that.

24. *State ex rel Juv. Dept. v. S.P.,* 346 Or 592, 215 P3d 847 (2009) (victim's statements to CARES staff were "testimonial" and, as such, were not admissible under the Confrontation Clause because, although the victim was unavailable as a witness, youth had no prior opportunity to cross-examine)

THE SUPREME COURT'S SUMMARY:

Youth objected to the admission of hearsay statements that the three-year-old victim had made to staff at the CARES Northwest program, after stipulating that the victim was unavailable as a witness. The juvenile court admitted most of the statements and found that the youth was within its jurisdiction for acts that, if committed by an adult, would constitute first-degree sodomy and first-degree sexual abuse. The Court of Appeals held that the statements to CARES were inadmissible under the Confrontation Clause of the Sixth Amendment, vacated the finding of jurisdiction for acts that, if committed by an adult, would constitute first-degree sodomy, remanded on that count, and otherwise affirmed. *Held*: (1) Youth failed to preserve his objection that under *State v. Campbell,* 299 Or 633, 705 P2d 694 (1985), the trial court erred in failing to ensure that the victim was unavailable, and the alleged error was not reviewable as error apparent on the face of the record; (2) the victim's statements to CARES were "testimonial" and, as such, were not admissible under the Confrontation Clause because, although the victim was unavailable as a witness, youth had no prior opportunity to cross-examine. The decision of the Court of Appeals is affirmed. The finding of the juvenile court of jurisdiction on the ground that the youth engaged in conduct that, if committed by an adult, would constitute first-degree sodomy is reversed. The finding of the juvenile court of jurisdiction on other grounds is affirmed, and the case is remanded to the juvenile court for further proceedings.

SECTION III

Appellate Court Decisions In

TERMINATION-OF-PARENTAL-RIGHTS CASES

25. *Dept. of Human Services v. J.L.J,* 233 Or App 544, 226 P3d 112 (2010) (child's reunification with father, who previously had relinquished his parental rights to the child, did not constitute "extraordinary circumstances" required to authorize juvenile court to vacate judgment terminating mother's parental rights)

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (the department) appeals judgments of the juvenile court dismissing child's commitment to the custody of the department, approving child's placement with father, and vacating a judgment terminating mother's parental rights. Father had previously signed a document (the release) "for the purpose of adoption" that relinquished custody and control of child to the department along with a certificate of irrevocability agreeing that the release would become irrevocable as soon as the department placed the child "in the physical custody of a person or persons for the purpose of adoption by them. At that time, child was living with a foster family whom the department had identified as a potential adoptive placement. The issues we must address are whether, in light of the release, the juvenile court properly approved child's return to father and dismissed child's commitment to the department's custody and whether the juvenile court abused its discretion when it, on its own motion, set aside and vacated the judgment terminating mother's parental rights to child. *Held:* The release and surrender did not limit the juvenile court's jurisdiction and authority over child and did not, in itself, effect a termination or severance of child's relationship with father. Further, in its role in the context of dependency proceedings, the juvenile court properly focused on achieving the outcome that all the parties, including the department, agreed was in child's best interest--reunification with her father. Given that child was reunified with father, whose familial ties with child had never been severed by a court, the juvenile court also acted within the scope of its authority when it dismissed child's commitment to the custody of the department. With respect to the judgment vacating termination of mother's parental rights, extraordinary circumstances such that would permit the court to vacate the judgment were not present in this case. Accordingly, the trial court abused its discretion in vacating that judgment.

26. ***State ex rel Dept. of Human Services v. B.A.S/J.S.*, 232 Or App 245, 221 P3d 806 (2009), *rev den*, 348 Or 280 (2010)**

(application of ORS 419B.923(3), which precludes juvenile court from setting aside termination judgment if the adoption proceeding is pending or completed, does not violate the parents' Due Process rights)

THE COURT OF APPEALS' SUMMARY:

Parents appeal the juvenile court's denial of their motions under ORS 419B.923 to set aside a judgment terminating their rights to their three children. The state moves to dismiss the appeal as moot under ORS 419B.923(3) due to the intervening adoption of the children. Parents oppose the motion, arguing that application of ORS 419B.923(3) in this case violates procedural due process under the Fourteenth Amendment to the United States Constitution. *Held:* Because adoption proceedings involving the children have been completed, ORS 419B.923(3) precludes the juvenile court from setting aside the termination judgment. Moreover, it is not within the inherent authority of the court to set aside the judgment pursuant to ORS 419B.923(8) under the circumstances of this case. Finally, application of ORS 419B.923(3) in this case does not violate parents' rights to procedural due process given the state's interest in achieving finality for the children and the alternative procedural protections that were available to parents. Accordingly, the court's decision on appeal can have no practical effect on the rights of the parents, and the case is thus moot. Motion to dismiss appeals granted; appeals dismissed.

EXCERPTS FROM OPINION:

> * * * We understand parents to be arguing that application of ORS 419B.923(3) in this case violates due process because it denies them a mechanism for challenging the validity of the underlying termination judgment, which, if successful, would invalidate the adoption judgment. The issue thus reduces to this: Did the state violate parents' due process in this case by conditioning the availability of the set-aside remedy under ORS 419B.923 on the absence of an adoption judgment? Or, stated another way, is due process satisfied where the ability of parents to obtain redress in the trial court under ORS 419B.923 for an alleged error in the termination trial was limited to the time period before the adoption petition was granted?
>
> "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' * * * interests within the meaning of the Due Process Clause of the * * * Fourteenth Amendment." *Mathews v. Eldridge*, 424 US 319, 332, 96 S Ct 893, 47 L Ed 2d 18 (1976). * * * [W]e consider three factors: (1) the private interest affected by the state action; (2) the risk of erroneous deprivation of that interest, including the probable value of additional safeguards; and (3) the countervailing public interest. *Matthews*, 424 US at 335; *see also Santosky v. Kramer*, 455 US 745, 758-68, 102 S Ct 1388, 71 L Ed 2d 599 (1982) (applying that test to determine standard of proof required in parental termination proceedings).

* * * * *

In *Geist*, the Oregon Supreme Court determined that due process demands a termination proceeding that is "fundamentally fair." 310 Or at 189 (citing, generally, *Santosky,* 455 US at 753-54; *Lassiter v. Department of Social Services*, 452 US 18, 33, 101 S Ct 2153, 68 L Ed 2d 640 (1981)). "The essence of fundamental fairness is the opportunity to be heard at a meaningful time and in a meaningful manner." *Geist*, 310 Or at 189-90.

Applying that standard in *State ex rel Juv. Dept. v. Kopp,* 180 Or App 566, 576-77, 43 P3d 1197 (2002), we concluded that reading ORS 419B.524 (2001), *amended by* Or Laws 2003, ch 396, § 89,[(9)] to deprive a terminated parent of standing to seek an order modifying or setting aside the termination judgment under the predecessor to ORS 419B.923(1)--*former* ORS 419B.420--would have the effect of denying that parent a "fundamentally fair" termination proceeding. * * *.

Kopp, however, is not dispositive of the precise issue presented here, that is, whether, by precluding the availability of a set-aside of the termination judgment under ORS 419B.923 *after adoption proceedings have been completed*, the state has denied parents a "fundamentally fair" termination proceeding in this case. * * *.

* * * * *

[W]e must balance that interest [-- *i.e.,* parental rights --] against the risk of erroneous deprivation--in light of the procedures and processes available--as well as the countervailing interests of the state. * * * In this case, the risk of error inherent in precluding parents' access to a set-aside under ORS 419B.923 is minimal: Parents were entitled to--and did, in fact--appeal the termination judgment. The errors parents assert in their motions to set aside the judgment in the trial court were readily--indeed, properly--addressed in the context of that direct appeal.

* * * * *

[A]fter the Supreme Court denied review of our decision affirming the termination judgment, parents could have moved to stay the issuance of the appellate judgment, pending resolution of their ORS 419B.923 motions. * * *.

* * * * *

Finally, turning to the public interest at stake, both the United States Supreme Court and the Oregon appellate courts have emphasized that the state's interest in finality is "unusually strong" in cases involving child custody. *See Lehman v. Lycoming County Children's Services*, 458 US 502, 513-14, 102 S Ct 3231, 73 L Ed 2d 928 (1982) (few things are as detrimental to children's development as uncertainty about their living situation); *Geist*, 310 Or at 186. In *Geist*, the court held that challenges to the adequacy of appointed trial counsel in termination proceedings must be reviewable on direct appeal, reasoning as follows:

> "Any delay in achieving finality in a termination case adversely affects the rights of all the parties. Delay certainly will weaken the bonds between parents and children by lengthening their separation. Whether or not the eventual result is termination, protracted litigation extends uncertainty in the child(ren)'s life. Where a termination has been affirmed on direct appeal, procedures allowing further litigation or collateral attacks would delay the finality of the termination order and, thus, also delay the possibility of permanent adoption with the probable effect of reducing the chances for successful integration into an adoptive family."

> 310 Or at 186-87. Additionally, the public's considerable interest in maintaining the finality of adoption judgments is clearly reflected in legislative enactments. *See, e.g.*, ORS 109.381(2) (restricting the ability of a party to an adoption to, "either by collateral or direct proceedings, question the validity of a judgment of adoption"); ORS 109.381(3) (providing that, one year after entry of judgment of adoption, adoption shall be binding on all persons, and no person shall question the validity of the adoption for any reason); *J. B. D.*, 218 Or App at 80 ("[O]ne of the legislative policies reflected in the adoption statutes is to promote finality to adoption judgments."). Here, the disruption and uncertainty that would be created by allowing the trial court to set aside the termination judgment--after the judgment has been affirmed on appeal and after the children have been adopted--is manifest.
>
> On balance, given the significant and profound interest in achieving finality for the children--and the alternative procedural protections that were available to parents in this case--the state did not run afoul of due process by narrowly limiting parents' right to obtain a set-aside under ORS 419B.923 to the time period before the adoptions of the children were complete. Due process is not offended by the application of ORS 419B.923(3) in this instance.

232 Or App at 259-65 (footnotes omitted).

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPT FROM OPINION:

> The state argues that mother's mental condition qualifies under ORS 419B.504 as a condition that supports termination of her parental rights because "mother's parental ability has been substantially and detrimentally impacted by her cognitive impairment, historical mental health problems, and severe physical health challenges" and because she has failed "to present a viable plan for the return of the child to the parent's care and custody." ***We agree that the evidence demonstrates that, in 2003, mother's cardiac incident and its effect on her physical and mental health was a condition that prevented her from being a fit parent. Mother's condition in 2003 or 2006, however, is not the same as***

it was at the time of the trial in January 2009, as the trial court acknowledged in its findings.

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

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

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

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

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

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights to her son J. Mother concedes that, because of mental health issues relating to a personality disorder, she was not a minimally adequate parent at the time of the termination hearing. She contends, however, that the trial court erred by

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

EXCERPT FROM OPINION:

> [M]other concedes that, despite making some progress, she was not a minimally adequate parent at the time of the termination hearing. She contends, however, that the juvenile court erred in terminating her parental rights because DHS failed to make reasonable efforts to enable her reunification with J and that, with proper treatment, she will be able to safely care for J. Mother relies on the fact that, although DHS had identified mental health as an issue, it did not refer mother to individual mental health treatment. In mother's view, DHS "treated [her] like a client with no mental health problems." Mother also contends that J could be reintegrated into her home within a reasonable time because all she needs to do to become a minimally adequate parent is to successfully complete her DBT program, which she could do within a year. That period, she argues, is not unreasonable, because J has no special developmental needs and is living in his proposed adoptive home. She also contends that she has made significant progress by becoming sober and employed and obtaining a suitable home. Finally, mother contends that termination is not in J's best interests, because she and J have a meaningful relationship that should be maintained.
>
> DHS responds that it made reasonable efforts to provide services to mother and that the record does not demonstrate that DBT is an effective treatment for mother. DHS contends that J's reintegration into mother's home is improbable within a reasonable time because, even if DBT might make her able to parent in the future, Larsen thought it could take as long as 18 months for mother to complete DBT, and J had already been out of mother's care for almost two years by the time of the termination hearing. In light of mother's problems and the difficulty of treating them, DHS argues, termination is in J's best interests. J agrees.
>
> ***We begin with the reasonable efforts issue. The reasonableness of DHS's efforts depends on the particular circumstances of the case.*** *State ex rel Dept. of Human Services v. R.OW.,* 215 Or App 83, 99, 168 P3d 322 (2007). Here, we conclude that, by providing services that appeared well-suited to mother's difficult-to-identify needs, DHS made reasonable efforts.[15]
>
> At the beginning of the case, DHS promptly provided services designed to address the issues that led to J's removal from mother's care: programs for anger management, drug and alcohol treatment, and parenting skills. Mother's struggles in those programs initially appeared to be related to substance abuse, a problem for which she was already receiving treatment.
>
> ***Mother's problems continued after she attained sobriety, and DHS obtained a psychological evaluation and a follow-up analysis from Basham.*** Basham indicated that mother's anger management program was the service most likely to improve her functioning and also recommended continuing attention to substance abuse issues and an individualized parenting program. Noting that mother did not recognize any issues to work on

in therapy, Basham did not recommend individual mental health therapy for mother. (And Basham's evaluation was, in fact, borne out by Burgess's later, unsuccessful efforts to provide individual mental health therapy.) In the follow-up to his evaluation, Basham recommended a psychiatric assessment. In light of Basham's recommendations and mother's difficulty with the first parenting program in which she participated, DHS provided services that seemed suited to mother's needs: individual parenting training with Kuntz, the special-needs parenting program through VOA, the continuation of the anger management program, and a psychiatric drug and alcohol evaluation with Larsen.

By the time that Larsen recommended that "perhaps the only avenue of appropriate intervention" would be--if mother agreed to participate--long-term individual therapy, the termination petition had already been filed. DHS was no longer able to speak with mother about services. Although mother, commendably, chose to pursue therapy with Burgess after the filing of the termination petition, that therapy ended unsuccessfully after a few months, because mother was not able to identify any goals for the therapy.

In short, DHS made reasonable efforts to address mother's issues: offering a range of services; providing psychological and psychiatric evaluations to identify the source of mother's problems and possible solutions; and offering new, more individualized services when group services were unsuccessful. In light of the information that DHS had at each stage in the case, its efforts were reasonably calculated to address mother's issues and to enable the safe return of J to mother. Although the offered services were not entirely successful, DHS made reasonable efforts by offering them. *R. O. W.*, 215 Or App at 105.

We next consider whether J's reintegration into mother's home is improbable within a reasonable time due to conduct or conditions not likely to change. Here, the most optimistic forecast was Huygen's testimony that mother was likely to complete DBT in a year and thus address what Huygen diagnosed as a borderline personality disorder. Even if mother completes that DBT program in a year, however, it appears improbable that the therapy will be sufficient to address the full range of mother's problems.

The other experts who evaluated or provided therapy to mother--Basham, Larsen, and Burgess--diagnosed her with narcissistic traits as well as borderline traits. Neither Basham nor Larsen diagnosed mother with borderline personality disorder; rather, they diagnosed a personality disorder not otherwise specified, with narcissistic and borderline traits. Although Burgess thought that mother most likely had borderline personality disorder, he too diagnosed narcissistic traits as part of mother's disorder. In light of the more complete history that was available to those experts, we find their opinions more persuasive than Huygen's as to the nature of mother's personality disorder.

Here, the record indicates that DBT is not likely to be effective in resolving some of the obstacles to mother's caring for J, including her misperceptions of J's behavior and her inability to understand him. Thus, even if mother were able to successfully complete DBT within a year, she still would not be prepared for J to return to her care. Although J does not have special needs, he had been in his grandparents' care for about 20 of the 33 months of his life by the time of the termination hearing. With no indication of when mother might be able to safely care for him, return within a reasonable time is improbable.

Finally, we consider whether termination is in J's best interests. J does not appear to have a strong bond with mother, and he is doing well with his paternal grandparents, who wish to adopt him. We conclude that freeing J for adoption is in his best interests.

231 Or App at 326-26 (emphasis in bold italics added) (footnotes omitted).

29. *State ex rel Dept. of Human Services v. A.C.*, 230 Or App 119, 213 P3d 844 (2009) (adhering to earlier decision affirming juvenile court's denial of petition seeking termination of parental rights based on "extreme conduct" under ORS 419B.502)

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (DHS) petitions for reconsideration of the Court of Appeals' decision in this case, 228 Or App 403, 209 P3d 328 (2009), which affirmed the trial court's judgment dismissing DHS's petition to terminate mother's parental rights to her two-year-old son. *Held:* Evidence regarding "extreme conduct" by mother that resulted in the termination of parental rights to two of her children is conduct that occurred before June 2006 and while she remained untreated for her drug addiction. Since that time, there is persuasive evidence that both mother and her new husband have made positive changes in their behavior and their attitudes that support the psychological evaluations concerning their potential to be fit parents. On this record, given the state of circumstances that now exist, the Court of Appeals finds that the conditions giving rise to the previous termination action have been ameliorated to the extent that termination of mother's parental rights based on her prior extreme conduct, ORS 419B.502(6), is not appropriate.

SECTION IV

Appellate Court Decisions of Continuing Significance

30. *State v. McCants/Walker,* 231 Or App 570, 220 P3d 436 (2009), *rev allowed* 348 Or 114 (2010) (sufficiency of evidence to prove criminal mistreatment)

THE SUPREME COURT'S SUMMARY (ALLOWING REVIEW):

Defendants Timothy Lee McCants and Cynthia Geneva Walker seek review of a Court of Appeals decision that affirmed their convictions for first-degree criminal mistreatment.

Police went to defendants' home to investigate suspected drug activity. The house was very cluttered and dirty, with food on the floor and dirty diapers strewn about. While the officers were talking with defendants, they realized that there were three children living in the house (aged three, two, and five and one-half months old). Although the children appeared healthy and well fed, the officers placed defendants under arrest for criminal mistreatment in the first degree, based on the condition of the home. The officers then inspected the house and took photographs of the debris and unsanitary conditions. The officers noticed, among other things, plastic bags, small toys that were choking hazards, and obstructions to the children's bedroom that the officers believed created a fire hazard. They also observed the two-year-old, who had been unattended, trying to put a small toy into his mouth, which presented a choking hazard. With respect to the duration and degree of the conditions in the home, defendant McCants told the officers that the house was in "much worse" condition a few days ago and "even worse before that." Both defendants admitted that the house was not acceptable for the children.

Defendants were each charged with three counts of criminal mistreatment in the first degree for "knowingly withhold[ing] necessary and adequate * * * physical care," ORS 163.205(1)(a). During closing argument, defendants argued that there was insufficient evidence for the trial court to find that the defendants' conduct violated the statute. The trial court convicted defendants on all counts, finding, "This house is absolutely filthy, and I consider it a danger to those children."

Defendants appealed, and the Court of Appeals affirmed. The court first determined that defendants had not preserved their objection to the sufficiency of the evidence as to each individual count, but only globally as to all counts. On the merits, the court noted that the statute encompassed a broad range of conduct that includes "[in]attention to dangers in the body's environment." The court concluded

that the state had presented legally sufficient proof that defendants had exposed the children to choking hazards that were persistently present in the environment for an extended period (as opposed to a mere incidental or isolated exposure). The court also observed that the likelihood of harm was real, given that the two-year-old in fact had tried to put one of the choking hazards into his mouth. Although the court expressed some concern about the broad nature of conduct encompassed by the statute, the court concluded that the evidence was sufficient under its standard of review to establish that defendants violated the statute.

On review, the issues are:

(1) When a defendant, charged with multiple counts of the same offense based on a single criminal episode, challenges the sufficiency of the evidence by arguing that a rational trier of fact could not find the defendant guilty of any of the counts, has the defendant preserved a challenge to the sufficiency of the evidence on each individual count?

(2) Did the legislature, in enacting ORS 163.205(1)(a), intend to criminalize a parent's inattention to dangers in the children's bodily environment, which necessarily create only a risk of harm to a child, when it prohibited "intentionally or knowingly withhold[ing] necessary and adequate * * * physical care?"

(3) If the legislature did so intend, does a parent knowingly withhold necessary and adequate physical care from a toddler when the parent fails to remove from the child's reach common household items that could cause the toddler serious injury if used in a dangerous manner?

31. ***State ex rel Juv. Dept. v. G. L.,*** **220 Or App 216, 185 P3d 483,** ***rev den,*** **345 Or 158 (2008) (juvenile court's authority to order psychological evaluations)**

In this case, the juvenile court found the children to be within the court's jurisdiction pursuant to ORS 419B.100 and, as part of the disposition, ordered the mother to undergo a psychological evaluation, because "it would be 'helpful'" in determining "how [she] could do a better job protecting her children from [the] father than she has done in the past." The record showed, among other things, that: (1) the mother and father "have a historically violent and tumultuous relationship"; (2) the mother "has obtained multiple restraining orders against [the] father, the first a few months before they married in 2000"; (3) when the mother left him two years later, she and the two children became homeless, and the children "were removed from her care"; (4) the juvenile court "ordered" her "to complete services, which she apparently did because the children were returned to her care in June 2004"; (5) between June 2004 and March 2007, despite DHS's continued involvement with the family and the mother's acknowledgement that the

father was a danger to the children and her assurances that she was not having contact with him, she continued to see him and allow him to have contact with the children and did not follow through with voluntary services; and (6) in March 2007, the father was arrested after assaulting one of the children, the children reported that the father "had been in the home frequently," and the children were placed in protective custody.

The juvenile court found the children to be within its jurisdiction, based on findings that

> the state had proved that father physically assaulted one of the children, that mother and father have a demonstrated pattern of domestic conflict that threatens their children, that mother has failed to benefit from services designed to help her address the safety needs of her children, and that mother is unable or unwilling to provide for the safety and protection of her children because she continues to allow father to have contact with them.

220 Or App at 220.

On appeal, in addition to challenging the sufficiency of the evidence to support jurisdiction, the mother argued that the juvenile court lacked authority to require her to submit to a psychological evaluation unless the state proved that she was suffering from a mental health condition and the court made "a jurisdictional finding of a mental problem endangering the welfare of the children." Based on its construction of ORS 419B.343 and 419B.337, the Court of Appeals rejected the mother's argument, explaining, in pertinent part:

> * * * DHS's planning and provision of remedial services must "bear[] a rational relationship to the jurisdictional findings that brought the ward within the court's jurisdiction." ORS 419B.343(1)(a). While "the actual planning and provision of such * * * services is the responsibility of [DHS]" "[t]he court may specify the particular type of * * * services to be provided by [DHS] * * * to the parents or guardians of the wards." ORS 419B.337(2).
>
> * * * * *
>
> * * * [T]he text of ORS 419B.337(2) must be read in the context of ORS 419B.343 * * *. ORS 419B.337(2) does not expressly limit the court's power to order that DHS provide a particular type of service. At the same time, the statute obligates DHS to incorporate such orders in its case plan. * * *. ***Thus, the requirement of ORS 419B.343 that DHS ensure that its case planning bears a rational relationship to the jurisdictional findings must also be understood to require that the court's specification of a particular type of service that DHS provides bears a rational relationship to the jurisdictional findings.***
>
> Having determined that the text and context of the juvenile statutes grant the juvenile court the authority to order DHS to provide a parent with a particular service

> ***only*** if the service is rationally related to its jurisdictional findings, we next consider whether it was within the court's authority to order mother to submit to a psychological evaluation**.** ***Contrary to mother's assertion, ORS 419B.343 does not limit the provision of psychological services to cases in which a parent's mental health condition is a basis for juvenile [court] jurisdiction. Rather, it requires only a rational connection between the service to be provided and the basis for jurisdiction.***
>
> That requirement was met here. Jurisdiction was based, in part, on mother's unwillingness or inability to protect her children and her failure to benefit from past services designed to assist her in doing so. DHS requested a psychological evaluation to assess mother's service needs with respect to those jurisdictional findings. A caseworker involved with the family since 2005 explained that mother has repeatedly stated "that she understands [that father] is dangerous [and] she doesn't want anything to do with [him], [but then she gets] back together with him," and that DHS requires "insight as to if there is some underlying mental health diagnosis that may be leading to this" before the agency could properly assess mother's service needs**.** ***That evidence conclusively establishes that DHS is entitled to a psychological evaluation of mother in order to develop its case plan to include "[a]ppropriate reunification services to parents * * * to allow them the opportunity to adjust their circumstances, conduct or conditions to make it possible for the child to safely return home within a reasonable time," consistent with the legislative policy to strive for reunification expressed in ORS 419B.090(5).***

220 Or App at 222-23 (emphasis in bold italics added).

32. ***G.A.C. v. State ex rel Juv. Dept.,*** **219 Or App 1, 182 P3d 223 (2008) (reversing judgments dismissing 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.").

* * * * *

We have not identified a case concerning juvenile court jurisdiction directly addressing the question of what constitutes lawful discipline. *Cf. State ex rel Dept. of Human Services v. Shugars,* 208 Or App 694, 715, 145 P3d 354 (2006) (*Shugars II*) (recognizing authority of DHS to impose limits on physical discipline). The key inquiry in determining whether "condition or circumstances" jurisdiction is warranted is whether, under the totality of the circumstances, "there is a reasonable likelihood of harm to the welfare of the child[.]" *Smith*, 316 Or at 652-53. The cases treat it as axiomatic that the physical abuse of a child endangers the child's welfare and, thus, furnishes a basis for the exercise of dependency jurisdiction. *See, e.g.*, *State ex rel Dept. of Human Services v. Meyers,* 207 Or App 271, 274-75, 284-85, 140 P3d 1181, *rev den*, 341 Or 450 (2006) (relying, in part, on physical abuse of child as ground for termination of parental rights); *State ex rel DHS v. Kamps,* 189 Or App 207, 213-14, 74 P3d 1123 (2003) (physical abuse of a child constitutes a circumstance that endangers the child's welfare under ORS 419B.100(1)(c)); *State ex rel SOSCF v. Imus,*179 Or App 33, 43-44, 39 P3d 213 (2002) (juvenile court jurisdiction under ORS 419B.100 upheld, in part, based on evidence of physical abuse).

* * * * *

We need not decide whether mother's conduct toward V constituted a criminal assault. As discussed, where juvenile dependency jurisdiction is concerned, conduct that endangers a child's welfare is not limited to criminal conduct, and the evidentiary standard is one of preponderance, not the absence of reasonable doubt. ***If a parent causes physical injury to a child by nonaccidental means, the parent has physically abused the child, and such abuse cannot constitute lawful discipline.*** Mother in this case caused physical injury to V by other than accidental means. V suffered raised red welts and bruising on her arms and thigh that caused her substantial pain, according to her testimony, at a level of eight to eight and a half on a scale of one to ten. The photographs of V's injuries are consistent with her testimony. Because mother abused V by causing her physical injury which, in turn, endangered V's welfare, V was within the juvenile court's jurisdiction under ORS 419B.100(1)(c).

* * * * *

The question remains whether the court properly dismissed the petitions as to A and G on the ground that those cases were "derivative" of V's. We have held that a child may be removed from an abusive environment if there is evidence of abuse of any child. *See, e.g.*, *Brammer*, 133 Or App at 549; *State ex rel Juv. Dept. v. Miglioretto*, 88 Or App 126, 129, 744 P2d 298 (1987). Recently, we have clarified that the axiom that "'harm to one child means a risk to others' is not absolute and immutable." *State ex rel Dept.of Human Services v. Shugars,* 202 Or App 302, 311, 121 P3d 702 (2005) (*Shugars I)*.

* * * * *

In this case, although it was mother's conduct toward one child that precipitated state intervention, the evidence supports establishment of jurisdiction for all three children. In light of the ordinary nature of V's conduct on March 30--losing something and inadequate housekeeping--it is reasonable to infer that the circumstances leading to the abuse that day are likely to recur. Mother gave little indication in her testimony that she would handle things differently in the future. Unlike in *Shugars I*, the evidence here did not differentiate the risk of harm to V from risks to the other children. *See Imus*, 179 Or App at 35 (evidence supported jurisdiction of the juvenile court over two children based on the allegation that younger child was subjected to physical abuse by way of severe facial bruising caused by a nonaccidental physical blow). Although V was the victim of mother's conduct on March 30, all three children have been similarly struck at different times. Both A and G testified that mother has hit them with her hands and with objects when they are "in trouble." Although mother may have stopped hitting G, that change was recent and was a consequence, not of a change of approach on mother's part, but of the grim reality that mother can no longer physically intimidate G. Even though that change may reduce the risk of physical harm to G while he is in the home, G testified that he has run away in the past as a result of mother's mistreatment, which places him at risk of harm. Moreover, the evidence established that mother hits A and is likely to continue doing so.

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

219 Or App at 11-15 (emphasis in bold italics added) (footnotes omitted).