APPELLATE CASE LAW UPDATE

Summaries of Significant Appellate Court Decisions in Juvenile Court Cases

August 2010 to August 2011

Prepared and presented by Michael Livingston
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DEPENDENCY
Jurisdictional Proceedings

DEPENDENCY
Review & Permanency Proceedings

DEPENDENCY
Termination-of-Parental-Rights Proceedings

DELINQUENCY Proceedings

DEPENDENCY

Jurisdictional Proceedings

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

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

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

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

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

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

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

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

The proven facts depart from the petition so as to substantially affect a parent's rights if a reasonable parent would not have had notice from the petition or

the jurisdictional judgment as to what he or she must do in order to prevent the state from assuming or continuing jurisdiction over the child. Thus, for example, if the petition alleges that the child's circumstances endanger her welfare because the child is living in a home where a fellow occupant pointed a loaded gun at her, a reasonable parent would know that the state can assert jurisdiction if it proves by a preponderance of the evidence that the child is living in a different home where a different occupant exposes her to dangerous weapons or inherently dangerous substances. A reasonable parent could infer from the allegation in the petition that the state is concerned with her ability or willingness to establish a home where the child is safe from people who engage in dangerous conduct.

(Footnote omitted; emphasis in bold italics added).

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

> The juvenile court took jurisdiction over father's children, pursuant to ORS 419B.100(1)(c), on the ground that father's possession of pornography, including child pornography, endangered the children's welfare. Father appeals, arguing that the state failed to prove that his possession of pornography endangered the children's welfare. * * *.
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> The state called a sexual offender treatment specialist, Gilbert, to testify about the risks that arise from the possession of pornography. Gilbert testified that repeated exposure to pornography can reduce a person's inhibitions; it can reduce "the threshold of actually acting on fantasy." According to Gilbert, repeated exposure to pornography allows a person to view others

"more as objects * * * than as humans[,]" thereby "reduc[ing] them to * * * something less and easier to molest or easier to offend against." Thus, according to Gilbert, "there's an increased likelihood of sexual crime taking place when there's heavy use of pornography."

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

* * * * *

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

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

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

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

evidence, on this record, to demonstrate a reasonable likelihood of harm to the children's welfare.

(Footnote omitted; emphasis in bold italics added).

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

EXCERPTS FROM OPINION:

> ***Because mother waived her right to have DHS prove its allegations, * * * we are not concerned with the sufficiency of evidence offered to prove those allegations. See ORS 419B.310(3) (providing that, unless admitted, facts alleged in petition must be established by a preponderance of the evidence). Rather, we consider only whether, pursuant to the allegations, DHS would have been allowed to offer evidence that would establish juvenile court jurisdiction. * * *.***
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> The juvenile court has exclusive original jurisdiction in any case involving a person under age 18 "[w]hose condition or circumstances are such as to endanger the welfare of the person or of others." ORS 419B.100(1)(c). The key inquiry is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the child's welfare. *State ex rel Juv. Dept. v. Vanbuskirk,* 202 Or App 401, 405, 122 P3d 116 (2005). A petition alleging jurisdiction must "[c]ontain the facts that bring the child within the jurisdiction of the court, including sufficient information to put the parties on notice of the issues in the proceeding." ORS 419B.809(4)(b). The petition "must be liberally construed with a view of substantial justice between the parties." ORS 419B.857(1).
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> * * * [M]other admitted the allegation that "child has special medical needs. The mother would benefit from assistance from the Department of Human Services Child Welfare Program." The allegation that mother "would benefit from assistance" is ambiguous. It could be construed to mean that mother, although already providing minimally adequate care for child's special medical needs, could become a better parent with assistance; if the evidence established only that much, it would be insufficient to show a reasonable likelihood of harm to child's welfare. On the other hand, however, the allegation could be construed to mean that mother "would benefit" by gaining the ability to meet child's special medical needs; if the evidence established that mother was not able to meet those needs without assistance, it would be sufficient to show a reasonable likelihood of harm to child's welfare. Thus, if DHS had been required to prove the

allegation that mother admitted, DHS would have been allowed to offer evidence sufficient to establish juvenile court jurisdiction.

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

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

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

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

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

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

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

(Footnotes omitted; emphasis in bold italics added).

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

> Father argues that in order to prove that he abandoned Z, the state had to prove that father "relinquish[ed his] parental rights with the intent of never reasserting them." We agree with father that abandonment requires proof of intention; as the Supreme Court held in *State ex rel Dept. of Human Services v. Rardin,* 340 Or 436, 450, 134 P3d 940 (2006), a termination case, "[T]he legal concept of abandonment of a person's right or interest generally requires proof of intent to abandon. *See De Haven & Son Hardware Co. v. Schultz*, 122 Or 493, 497, 259 P 778 (1927) ('Abandonment is a matter of intention and is to be determined in the light of all the facts and circumstances.')." In this case, father argues,
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> > "[t]he mere fact that mother and father moved to Hawaii in July 2009 fails to prove that father 'abandoned' [Z]. * * * [The] record reflects that mother and father were living together in Hawaii * * *, that mother contacted [Z] to inform him of their move, that mother continued to attempt to contact [Z], and that [Z] refused that contact. Even if father did not himself attempt to contact [Z] after the family moved, that circumstance existed only for the three months preceding the jurisdictional trial. Those circumstances fail to support the inference that father gave up his rights to [Z] with the intent of never reasserting them."

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

* * * * *

Finally, father argues that the juvenile court erred in ordering father to complete a psychosexual evaluation and to participate in family counseling in Oregon, as opposed to by phone from Hawaii. Specifically, father argues that, because the state did not prove by a preponderance of the evidence that father sexually abused Z, there is no rational relation between the psychosexual evaluation and the court's jurisdictional basis. Father also argues that "the juvenile court had no legal or factual basis for requiring father to return to Oregon to be reunified with [Z]. On the contrary, [Z's] counselor testified that family counseling could occur telephonically."

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

> ***"the evidence is conflicting around whether abuse occurred. That I think is safe to say. The allegation was that [Z] had said that; that he was the victim of abuse. The fact that there has been no determination, no final determination after, say, for example, a trial to resolve that issue.***
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> ***"So from the Court's perspective, it is a circumstance that has to be described as one that involves risk, and the question becomes how to manage risk in the face of an ambiguity or something that has not been determined, that is not known.***
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> ***"[B]ut when it becomes a matter where there is a risk, and the risk is of a very significant nature, and it involves a child, then to my mind, requiring that steps be taken to remove the risk, to understand it better so it can be managed, becomes rationally related to the grounds--the basis for jurisdiction."***

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

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

(Emphasis in bold italics added).

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

EXCERPTS FROM OPINION:

> * * * After father and mother filed notices of appeal, the juvenile court entered a judgment amending the jurisdictional/dispositional judgment. As we explain below, we conclude that the juvenile court lacked authority to amend the judgment as it did; that father's trial counsel performed inadequately by misstating the law concerning the applicability of the Indian Child Welfare Act (ICWA); that, as to the juvenile court's finding of medical neglect, father suffered no prejudice as a result of counsel's performance; and that, as to additional findings required by ICWA, father did suffer prejudice. Because the jurisdictional/dispositional judgment did not comply with ICWA as to evidence and findings required under ORS 419B.340, we reverse and remand.
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> * * * In July 2009, DHS was awarded protective custody of the children. In a subsequent shelter order entered later that month, the juvenile court determined that the children were Indian children under ORS 419A.004(13), which defines "Indian child" as a child who either (a) is a member of a tribe or (b) is eligible for membership and is the biological child of a member of a tribe. Father is a member of the Choctaw Nation of Oklahoma, and the court found by clear and convincing evidence that the children were enrolled or eligible for enrollment. The court further found, by clear and convincing evidence, that removal from the home was in the children's best interest because the parents' continued custody was likely to result in serious emotional or physical damage to the children and that, under the circumstances, no efforts would have prevented the need for removal or made possible the return of the children.
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> The jurisdictional hearing was held in October. Near the end of the hearing, the court and counsel discussed the applicability of ICWA. A DHS caseworker testified that she had inquired of the Choctaw Nation whether the children were eligible for enrollment, had received conflicting information in response, and was gathering information to apply for enrollment; the Choctaw Nation did not intend to intervene until the children were enrolled. The caseworker believed that there was a "strong possibility" that they were eligible but that, "based on * * * letters from the Tribe, there is still some confusion about that matter."
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> The juvenile court made no findings about enrollment eligibility but did express concern about whether ICWA applied, which would trigger the requirements of proof by clear and convincing evidence and testimony from a qualified expert. ORS 419B.340(7). Counsel for all parties (father, mother, the children, and the state)--apparently confused by the tribe's lack of intervention--responded by agreeing that the applicable evidentiary standard was a preponderance of the evidence. The court accordingly applied that standard and made oral findings that, under ORS 419B.100(1)(c), the children's conditions and circumstances were such as to endanger their welfare because mother and father had (1) failed to provide dental care, (2) failed to provide for the children's medical needs, and (3) failed to provide for their educational needs. The court noted that it would find medical neglect by clear and convincing evidence, if needed. The court subsequently entered a "Judgment of Jurisdiction/Disposition (Non-ICWA)."

(Uppercase and boldface omitted.) Mother and father appealed, and father argued, in part, that the juvenile court had erred by failing to apply ICWA.

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

* * * * *

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

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

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

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

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

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Here, father's counsel performed inadequately by mistakenly telling the juvenile court that ICWA did not apply. In a case involving an Indian child, the court must comply with ICWA before finding the child to be within its jurisdiction. State ex rel Juv. Dept. v. Cooke, 88 Or App 176, 178, 744 P2d 596 (1987). On the record at the time of the jurisdictional hearing, the juvenile court should have applied ICWA. ORS 419B.878 (providing in part that "[i]f the court knows or has reason to know that an Indian child is involved, the court * * * shall enter an order that the case be treated as an Indian Child Welfare Act case until such time as the court determines that the case is not an Indian Child Welfare Act case"). Here, we can conceive of no strategic or tactical advantage that could have accrued to father from the application of the less stringent standards applicable to a non-ICWA case.

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

* * * * *

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

"When an Indian child is involved, the department must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful. Foster care placement may not be ordered in a proceeding in the absence of a determination, supported by clear and convincing evidence, including the testimony of expert witnesses, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the Indian child."

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

(Footnotes omitted; emphasis in bold italics added).

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

THE COURT OF APPEALS' SUMMARY:

In this juvenile dependency case, the state alleged that father's domestic violence against mother presented a reasonable likelihood of harm to the couple's two children, and the juvenile court took jurisdiction over both children as to father on that basis. Father challenges the court's finding of jurisdiction, arguing that the state failed to prove that his conduct presented a current risk of harm to either of the children. After the case was submitted to the Court of Appeals, the juvenile court dismissed jurisdiction, and the Department of Human Services (DHS) filed a motion to dismiss father's appeal as moot. *Held:* Father's appeal is not moot, but the juvenile court's finding of jurisdiction was appropriate.

EXCERPT FROM OPINION:

> We are no longer required to review the evidence in a juvenile dependency case *de novo*. *See* ORS 19.415(3)(b) (providing that, in this type of case, "the Court of Appeals, acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record"). As we have noted, father does not request that we exercise our discretion to review this case *de novo*, and we decline to do so. Accordingly, we review the juvenile court's legal conclusions for errors of law, but are bound by the court's findings of historical fact so long as there is any evidence to support them. * * * Where findings are not made on disputed issues of fact and there is evidence from which those facts could be decided more than one way, we will presume that they were decided in a manner consistent with the juvenile court's ultimate conclusion. *Id.*
>
> In this case, * * * the state was required to prove that the children's condition or circumstances currently endanger the children's welfare, although it need only prove a risk of harm and not that actual harm has already occurred. As we have also noted, the juvenile court made express factual findings: (1) that father had physically abused mother "often" and (2) that father's physical and verbal abuse of mother "endangers the welfare" of the two children.
>
> As to the court's first finding, father is correct that the inquiry does not end with whether father committed physical violence against mother; our inquiry relates to the *children's* conditions and circumstances and not those of the parents. Instead, our inquiry in this case is whether the violence between the parents creates a current risk of harm to the children's welfare--that is, the court's second finding. Given our standard of review, we must determine whether there is any evidence in the record to support such a finding.
>
> ***We conclude that, although the record is slim on that point, the state's evidence meets the low any-evidence standard. There is evidence in the record that the older child is scared when the parents argue and that, according to the county mental health specialist, when there is physical violence in the home, a child may suffer an inadvertent injury. There is also evidence that, even if the parents were separated at the time of the hearing with no current plans to reunite, mother and father have been on and off again throughout their seven-year relationship. And,***

given that the incidents of father's physical and verbal abuse have occurred throughout that period, there is a reasonable likelihood that it would continue were the couple to again reunite. For that reason, there is evidence to support the court's finding that the parents' conduct presents a risk of harm even to the parents' newborn who has never lived with father and mother together.

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

(Footnote omitted; emphasis in bold italics added).

DEPENDENCY

Review & Permanency Proceedings

7. *Dept. of Human Services v. J.R.F.,* --- Or App ---, --- P3d --- (July 20, 2011) (the juvenile court had authority to order father not to obstruct visitation between child and her siblings, even though her siblings were not within the court's jurisdiction)

THE COURT OF APPEALS' SUMMARY:

Father appeals a juvenile court judgment ordering him not to interfere or obstruct contact between his daughter, who is within the court's jurisdiction, and her siblings, who are not in the court's jurisdiction. He argues that the juvenile court lacked statutory authority to enter that judgment because the siblings are not within the court's jurisdiction. He also asserts, for the first time on appeal, that the court's order violates ORS 419B.090(4) and his constitutional right under the Fourteenth Amendment to the United States Constitution to direct the upbringing of his children. *Troxel v. Granville*, 530 US 57, 65, 120 S Ct 2054, 147 L Ed 2d 49 (2000). Held: ORS 419B.337(3), which provides that the juvenile court "may make an order regarding visitation by the ward's parents or siblings," authorizes the court to make an order regarding visitation with siblings who are not wards of the court or within the court's jurisdiction. Father's argument, for the first time on appeal, that the court's order does not comport with constitutional limitations on state power, ORS 419B.090(4), is not preserved. Accordingly, the Court of Appeals did not reach that argument on appeal.

8. ***Dept. of Human Services v. N.L.,*** **243 Or App 596, --- P3d --- (2011) (reversing permanency judgment because underlying jurisdictional judgment had been reversed on appeal and the amended jurisdictional judgment entered while appeal was pending was ineffective)**

THE COURT OF APPEALS' SUMMARY:

In this dependency case, mother and father appeal from a dispositional judgment determining that the permanency plan for the couple's six children is adoption. Held: The dispositional judgment from which the appeal is taken is ineffective, because it is predicated on a jurisdictional judgment that was reversed by this court. Dispositional judgment reversed.

EXCERPTS FROM OPINION:

> In this dependency case, mother and father appeal from a dispositional judgment determining that the permanency plan for the couple's six children is adoption. We conclude that the judgment from which this appeal is taken is void. In an earlier opinion involving this case, *State v. N.L.*, 237 Or App 133, 239 P3d 255 (2010), we invalidated the jurisdictional judgment that was the predicate on which the dispositional judgment was based, thereby rendering the dispositional judgment ineffective as well. ORS 419A.205(2). For that reason, we reverse.
>
> * * * * *
>
> [In *State v. N.L.*,] [w]e began our discussion by taking up father's fifth assignment of error, and we concluded that father's counsel had, indeed, been inadequate in advising the juvenile court that it did not have to apply ICWA. We concluded further that, as to the jurisdictional bases of educational and dental neglect, the outcome would have been different had counsel asserted that ICWA applied, and that, as to the additional evidence and findings required by ORS 419B.340(7), the result would also have been different. As for medical neglect, however, we concluded that the evidence was sufficient to justify jurisdiction even under the "clear and convincing" standard. We also explained, citing *State ex rel Juv. Dept. v. Cooke*, 88 Or App 176, 744 P2d 596 (1987), that in cases involving an Indian child, the court must comply with ICWA before addressing jurisdiction. *N. A.*, 237 Or App at 143. Thus, we concluded, "[A]lthough educational and dental neglect are not proper bases for jurisdiction in this case, medical neglect may be a proper basis for jurisdiction *if, on remand, the requirements of ORS 419.340(7) are satisfied*." *Id.* at 144 (emphasis added). Our remand, in other words, required the court to make the necessary ICWA findings before addressing jurisdiction. * * *.
>
> Our decision, then, reversed the judgment in its entirety. It is not apparent on this record that--apart from the June 1, 2010, jurisdictional judgment that we held was ineffective--the juvenile court has subsequently addressed the jurisdictional defect identified in this court's opinion. Contrary to the state's contention, our disposition did not limit the reversal and remand to the dispositional portion of the judgment. To the contrary, read in its entirety, the unambiguous import of our opinion is that, although father was not entitled to a new trial on every asserted ground for jurisdiction and the ground of medical neglect would be sufficient to support jurisdiction even under a clear and convincing standard, the failure of the juvenile court to address ORS 419B.340(7) and the requirements of ICWA at the 2009 jurisdictional hearing meant that the *jurisdiction* of the juvenile court had not been perfected. Also contrary to the state's contention, the reversal was not limited to mother. The judgment was reversed in its

entirety. ***Thus, our first opinion clearly negated the jurisdictional component of the October 2009 judgment and also determined that the June 1, 2010, amended judgment correcting the jurisdictional defect was "ineffective" because it was entered while the case was on appeal.***

The current appeal is from the permanency judgment entered August 9, 2010, following a hearing on June 1, 2010, and July 13, 2010, while the first appeal was pending. * * * Although the juvenile court had jurisdiction pending appeal to address dispositional issues and to hold the permanency hearing of June 1, 2010, and July 13, 2010, ORS 419A.205(2), when this court reversed the jurisdictional judgment of October 2009 and declared that the June 1, 2010, jurisdictional judgment was ineffective, no jurisdictional judgment remained. Pursuant to ORS 419A.205(4)(a), our reversal of the October 2009 jurisdictional judgment had the effect of reversing the juvenile court's intervening disposition of the matter, which was pending on appeal at the time of our decision. Thus, at this time, the juvenile court has not effectively taken jurisdiction over the children. * * *.

(Footnote omitted; emphasis in bold italics added).

9. ***Dept. of Human Services v. H. R.,*** 241 Or App 370, 250 P3d 427 (2011) (adoption and placement with a fit and willing relative are separate and distinct permanent plans)

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

* * * [M]other contends that the juvenile court erred in its determination that there was no reason, under ORS 419B.498(2), to defer filing a petition to terminate her parental rights. *See* ORS 419B.476(5)(d) (requiring, when the court determines that the permanency plan should be adoption, that the court determine "whether one of the circumstances in ORS 419B.498(2) is applicable"). In mother's view, this case falls within the circumstances described in ORS 419B.498(2)(a), which provides an exception to the requirement to file a petition when "[t]he child or ward is being cared for by a relative and that placement is intended to be permanent." Mother contends that, because R was placed with his maternal grandmother, whom DHS had identified as the adoptive resource, R was being cared for by a relative in a placement that is

intended to be permanent. DHS responds that ORS 419B.498(2)(a) refers to a permanent placement with a relative other than an adoption. We conclude that DHS is correct.

* * * * *

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

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

(Emphasis in bold italics added).

10. ***Dept. of Human Services v. K.A.S.,*** 240 Or App 811, 247 P3d 1279 (2011) (reversing permanency judgment changing case plan to adoption because judgment did not include the findings required by ORS 419B.476(5)(d))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Mother appeals a permanency judgment entered on August 9, 2010. In one of mother's assignments of error on appeal, she contends that the "permanency judgment [is] ineffective, as a matter of law," because "under ORS 419B.476(5)(d) a permanency judgment that changes the plan to adoption must include the court's determination of whether one of the reasons to defer filing a termination petition under ORS 419B.498(2) is applicable" and "the judgment [here] fails to include those required findings." A discussion of the facts would be of no benefit to the bench, the bar, or the public. The state concedes that the trial court erred in that regard. We agree and accept the state's concession. *See State ex rel Juv. Dept. v. J.F.B.,* 230 Or App 106, 115, 214 P3d 827 (2009) (holding that "[t]he judgments' failure to find that none of the circumstances enumerated in ORS 419B.498(2) is applicable is fatal" and concluding that,

"[b]ecause those judgments do not comply with the above statutes, they must be reversed and remanded"). Accordingly, we reverse and remand without addressing mother's other assignments of error.

(Footnote omitted).

11. ***Dept. of Human Services v. W.F.,*** **240 Or App 443, 247 P3d 329 (2011) (case plan in effect at time of hearing was adoption, and judgment did not include findings required by ORS 419B.476(2)(b) and (c))**

EXCERPT FROM OPINION:

> * * * Under ORS 419B.476(5), the court must, within 20 days after a permanency hearing, enter an order, detailing, among other things, "[t]he 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." In this case, as the parties agree, the plan in effect at the time of the hearing was adoption. ***Thus, the court was required to include in the permanency judgment its determinations as to (1) "whether the department has made reasonable efforts to place the ward in a timely manner in accordance with the plan, including, if appropriate, reasonable efforts to place the ward through an interstate placement, and to complete the steps necessary to finalize the permanent placement," ORS 419B.476(2)(b), and (2) "whether the department has considered permanent placement options for the ward, including, if appropriate, whether the department has considered both in-state placement options and permanent interstate placement options for the ward," ORS 419B.476(2)(c).***
>
> Father contends that the judgment fails to satisfy those requirements. In response, ***the state first argues that father's argument is unpreserved and not reviewable as plain error. That argument is foreclosed by State ex rel DHS v. M.A., 227 Or App 172, 181-82, 205 P3d 36 (2009) (preservation principles inapposite where judgment failed to comply with ORS 419B.476(5) because the issue did not arise until the court entered the judgment).*** On the merits, the state does not argue--nor could it--that the judgment explicitly contains the required determinations. Rather, the state's sole contention is that "the court's incorporation of the Permanency Court Report into the judgment constitutes the proper statutory findings." However, the judgment plainly refers to and incorporates that report only insofar as it relates to DHS's "active efforts to make it possible for the ward to safely return home." (Formatting omitted.) Thus, it cannot and does not satisfy the statute's requirement that the judgment describe DHS's reasonable efforts to implement the plan of adoption. ORS 419B.476(2)(b), (c), (5).

(Emphasis in bold italics added).

12. ***Dept. of Human Services v. S.T.,*** 240 Or App 193, 248 P3d 427 (2010) (is "open adoption" a permanency plan?)

THE COURT OF APPEALS' SUMMARY:

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

EXCERPT FROM OPINION:

> * * * [Mother] contends that the juvenile court erred in two respects: (1) by approving a plan of adoption that was contingent on the adoption being "open" and (2) by changing the plan to adoption when a guardianship would better protect child's health and safety needs. Under ORS 419B.476, mother argues, "open adoption" is not an available permanency plan. Mother also contends that, because an open adoption is contingent on approval by a third party--namely, the as-yet-undetermined adoptive parents--a plan of adoption cannot ensure that child will have continuing contact with his birth parents, and thus the court cannot ensure that the plan is in child's best interests. Mother further argues that, because a permanency plan of adoption cannot ensure continuing contact with her, a permanent guardianship, pursuant to ORS 419B.365, would better meet child's needs.
>
> DHS responds that the juvenile court properly ordered a permanency plan of adoption. Although DHS agrees with mother that a juvenile court cannot order a permanency plan of open adoption, DHS takes the position that the court did not do so; in its view, any condition that the adoption be open should be treated as a recommendation.
>
> ***We conclude, first, that the juvenile court did not order a plan of open adoption, which it explicitly stated it "cannot mandate"; rather, it ordered a plan of adoption. Accordingly, mother's argument that the court approved a plan not contemplated by the permanency statute is not well taken.*** No one disputes that "adoption" is among the permanency plans identified in ORS 419B.476(5)(b). The Juvenile Code also provides for court review of DHS's development of placement plans, including adoption. At a permanency hearing, the court may review DHS's efforts to develop a concurrent plan, including, if adoption is the concurrent plan, "identification and selection of a suitable adoptive placement for the ward," ORS 419B.476(4)(e); may order DHS to develop or expand the case plan or concurrent permanent plan, ORS 419B.476(4)(f); and may order DHS "to modify the care, placement and supervision of the ward," ORS 419B.476(4)(g). *See also* ORS 419B.449(5) (the court shall consider efforts to develop a concurrent plan, including "identification of appropriate permanent placement options for the child or ward both inside and outside this state and, if adoption is the concurrent case plan, identification and selection of a suitable adoptive placement for the child or ward").
>
> ***Although the juvenile court determined that the permanency plan should be "adoption," we reject DHS's contention that the juvenile court did no more than recommend an open adoption. Rather, the court found that an open adoption would best meet child's needs and decided that, if circumstances changed and an open adoption became impossible, a reexamination of the permanency plan would be***

required. ***Doing so was within the court's authority.*** Unless there is good cause not to hold a permanency hearing, a court's decision to conduct a permanency hearing, including a hearing on the court's own motion, is consistent with ORS 419B.470(5). At a permanency hearing, a court makes findings based on a preponderance of the evidence before it; those findings may include a determination of the likelihood of an open adoption and whether an open adoption is in the child's best interests. The court also has authority to order another permanency hearing on its own motion; unless there is good cause not to hold a hearing, it may choose to do so where circumstances relating to the child's likely placement change.

We turn to mother's argument that the court should not have approved a plan of adoption, because the plan does not "ensure" or "guarantee[ ]" ongoing contact between child and mother and, therefore, another plan would better meet child's needs. Evidence in the record supports the juvenile court's finding that an open adoption would best meet child's needs for permanency and continuing contact with his birth family. In addition, evidence supports the court's finding that it was very likely that child's current foster parents would adopt child and would agree to continuing contact. ***Any time a court approves a permanency plan, it necessarily makes predictions, based on a preponderance of the evidence before it, about the availability and capacity of potential caregivers--a birth parent, adoptive parent, guardian, or foster parent--to meet the child's needs. Finding that an open adoption is likely and will best meet a child's needs, as the court did here, is a predictive finding of a similar type. Based on its findings, the juvenile court did not err in changing the permanency plan to adoption.***

(Footnotes omitted; emphasis in bold italics added).

13. ***Dept. of Human Services v. J.S.,*** 239 Or App 594, 244 P3d 923 (2010) (state conceded error where permanency judgment did not include findings required by ORS 419B.476(5))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this juvenile dependency case, mother appeals a judgment changing the permanency plan for her two children from reunification to guardianship. She contends that the juvenile court erred in entering the permanency judgment because the judgment does not include the findings required by ORS 419B.476(5). The Department of Human Services concedes that the juvenile court erred in failing to include statutorily required findings in the judgment and that the case should be reversed and remanded. *See, e.g.*, *Dept. of Human Services v. L.P.H.,* 235 Or App 69, 70-71, 230 P3d 75 (2010) (reversing and remanding entry of permanency judgment that did not include required findings). Mother objects to a remand, arguing that, because ORS 419B.476(5) requires the entry of a permanency judgment within 20 days of the permanency hearing, allowing the juvenile court to make findings on remand would allow it to enter judgment well after the deadline. We reject mother's argument. It is undisputed that the permanency judgment in this case was entered within the 20-day period. The timeliness of the judgment therefore is not at issue in this appeal.

14. ***Dept. of Human Services v. J.G.,*** 239 Or App 261, 244 P3d 385 (2010) (appeal from review hearing judgment continuing children in substitute care rendered moot by subsequent entry of a permanency judgment; because the juvenile court in a permanency hearing must consider not only the continuation of substitute care, as required under ORS 419B.449, but also make the determinations required by ORS 419B.476, a permanency judgment does not merely continue the status quo)

EXCERPT FROM OPINION:

> * * * A case is moot when the court's decision will not have a practical effect on the parties' rights. [Citation omitted.] For example, in *State v. M.A.H.*, 233 Or App 467, 469, 226 P3d 59 (2010), the Department of Human Services (DHS) appealed from judgments denying a change in a permanency plan on the basis that adoptive placements had not been identified. Adoptive placements were subsequently identified and approved, and we concluded that appellate review would have no practical effect, because DHS already could obtain in the juvenile court the only relief that it could obtain on appeal, namely, reconsideration of the permanency plan in light of the changed circumstances. Here, similarly, J. G. asks us to consider whether, at the time of the review hearing, the juvenile court erred in concluding that J. G.'s siblings should remain in substitute care. ***Because the juvenile court has since entered a permanency judgment and was, at the time of the permanency hearing, required to determine again whether the siblings should remain in substitute care, our decision regarding the determination at the review hearing would have no practical effect on the rights of the parties.***
>
> We note that the situation is different when a party appeals from a permanency judgment and a subsequent review hearing is held. In *State ex rel Juv. Dept. v. L.V.*, 219 Or App 207, 215, 182 P3d 866 (2008), the father appealed from a permanency judgment, arguing that the juvenile court should have returned the child to the father and should not have designated a concurrent plan of guardianship. We rejected an argument that a subsequent review hearing, which continued the status quo by again declining to place the child with the father, rendered the father's appeal moot: ***"Because the dependency statutes contemplate multiple hearings before permanency is achieved, subsequent review hearings in a juvenile dependency case do not necessarily render an appeal from a permanency hearing judgment moot."*** Id. at 216. ***In L. V., the permanency judgment and the choice of permanent plan continued to have a practical effect on whether and under what circumstances the father could parent the child, despite a subsequent review order that simply continued the status quo by again declining to place the child with the father.*** *Id.* at 216-17.
>
> ***Here, the order of events is reversed. J. G. appeals from a review order continuing his siblings in substitute care, but a subsequent permanency hearing was held. The findings required at a permanency hearing are more extensive than the findings required at a review hearing.*** Among other things, after a permanency hearing, the court must make a determination of the permanency plan and findings supporting that plan. ORS 419B.476(5)(b) - (f). If the plan is return to a parent, the court must determine the services required for the parent and the progress that the parent is required to make in a specified time. ORS 419B.476(5)(c). If the plan is adoption, the court must determine whether a compelling reason exists not to file a termination of parental rights petition. ORS 419B.476(5)(d); ORS

419B.498(2)(b). Such reasons include a circumstance in which "[a]nother 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)(B). If the plan is guardianship, placement with a relative, or another planned permanent living arrangement, the court must explain why the plan is not placement with the parent or adoption. ORS 419B.476(5(e), (f). ***Because the juvenile court in a permanency hearing must consider not only the continuation of substitute care, as required under ORS 419B.449, but also make the determinations required by ORS 419B.476, a permanency judgment does not merely continue the status quo; the determinations made in a permanency judgment subsume the findings from the earlier review hearing and add findings that bear on the need for substitute care. Accordingly, in light of the subsequent entry of a permanency judgment, J. G.'s appeal from the review hearing is moot.***

(Emphasis in bold italics added).

15. ***Dept. of Human Services v. A.E.*, 238 Or App 752, 243 P3d 138 (2010) (state conceded error where judgment failed to make findings required by ORS 419B.476(2) and (5))**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Mother appeals a permanency judgment changing the case plan from reunification to adoption. She argues, among other contentions, that the juvenile court erred in failing to make and include in the judgment the statutorily required findings. ORS 419B.449(2); ORS 419B.476(2), (5). The state concedes that the judgment is deficient and should be remanded in order for the juvenile court to include the required findings and determinations. *See State ex rel Juv. Dept. v. J.F.B.,* 230 Or App 106, 115, 214 P3d 827 (2009) (remanding for juvenile court to enter judgments that comply with ORS 419B.476). We agree with and accept the state's concession. Given our remand, we do not reach the other issues mother raises on appeal. *See J. F. B.*, 230 Or App at 118 ("The other issues raised by mother on appeal are premature at this time.").

16. ***Dept. Of Human Services v. E.L.*, 237 Or App 206, 238 P3d 438 (2010) (state conceded error where permanency judgment was not entered within 20 days of the hearing, as required by ORS 419B.476(5))**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this juvenile dependency case, following a contested permanency hearing held on October 1, 2009, the trial court entered judgment changing the children's permanency plans to adoption. The judgment was entered on February 9, 2010. Father appeals, advancing a number of assignments of error, including that the trial court's delayed entry of judgment

violated ORS 419B.476(5), which requires the court to enter its judgment within 20 days of the permanency hearing. The Department of Human Services concedes that error. We agree and accept the concession. In light of that, we need not address father's other assignments of error.

17. ***Dept. of Human Services v. Three Affiliated Tribes of Fort Berthold Reservation ,*** **236 Or App 535, 238 P3d 40 (2010) (that serious and lasting harm would result from the removal of two Indian children from their current home constituted "good cause" for departing from the placement preferences established by the ICWA)**

THE COURT OF APPEALS' SUMMARY:

The Three Affiliated Tribes of Fort Berthold Reservation (the tribes) appeal a judgment in which the trial court concluded that "good cause" under the Indian Child Welfare Act (ICWA) existed to designate the adoptive placement for two Indian children as the home of their current foster parents rather than the home designated by the tribes. On appeal, the legal issue is whether "good cause" exists to depart from ICWA's placement preferences. 25 USC § 1915(a). *Held:* (1) The Court of Appeals was bound by the trial court's findings of fact, because they were supported by evidence in the record, but independently assessed whether those findings were sufficient to support the trial court's legal conclusion that "good cause" existed under the circumstances of this case. (2) The trial court explicitly accepted as credible and persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." That finding, substantiated by evidence in the record, was legally sufficient to establish "good cause" for purposes of 25 USC section 1915(a).

EXCERPTS FROM OPINION:

> The parties' competing contentions present two issues of first impression in Oregon that we must resolve: (1) What considerations properly bear on a court's determination of the existence of "good cause" for purposes of 25 USC section 1915(a)? (2) What is the proper appellate standard of review of a trial court's "good cause" determination? The resolution of those two questions determines our disposition here.
>
> Before addressing those two questions in detail, we begin with a general overview of the ICWA provisions and policies that inform our inquiry. ICWA embodies a congressional policy
>
> "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture * * *."

25 USC § 1902. To further that policy, ICWA establishes preferences for the adoptive placements of Indian children. ***Specifically, 25 USC section 1915(a) provides:***

"In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."

Section 1915(a) embodies the federal policy that, "where possible, an Indian child should remain in the Indian community" and is "[t]he most important substantive requirement imposed on state courts." *Mississippi Choctaw Indian Band v. Holyfield*, 490 US 30, 36-37, 109 S Ct 1597, 104 L Ed 2d 29 (1989). ***In practical terms, section 1915(a) establishes a presumption that an adoptive placement in accordance with the preference criteria is in an Indian child's best interests.*** [Citation omitted.]

Although that presumption may be rebutted if the court determines that "good cause" exists, ICWA does not define the term "good cause" as used in section 1915(a) and does not identify the considerations on which a good cause determination may be predicated.* * *

* * * * *

* * * ***[W]e conclude that "good cause" as used in the placement preferences of section 1915(a) is a legal standard and that, consequently, we review a trial court's "good cause" determination for errors of law.*** More particularly, that means that we must determine whether the facts, as found by the trial court and as supported by evidence in the record, are legally sufficient to establish "good cause" to depart from ICWA's placement preferences.

* * * In this case, * * * we need not identify the universe or totality of considerations that might bear on "good cause." That is so, because, regardless of whether, as an abstract proposition, in a different case or on a different record other considerations might properly pertain to a "good cause" determination, the trial court's "good cause" determination in this case was ultimately predicated on a consideration that is legally sufficient by itself to establish "good cause" and that is supported by evidence in this record.

Here, as noted, the trial court emphasized in its findings that "the harm to [K] and [I] will be serious and lasting, if they are moved from [foster parents'] home" and that, in grandparents' home, "[K] and [I] will be exposed to biological family, a circumstance which Ms. Strickland credibly testified will damage [K]." Given those findings, which were based substantially on the trial court's assessment of expert testimony, the court concluded that "the harm to these children in removing them from their home outweighs any other consideration by a degree of magnitude***." Thus, the court's reasoning demonstrates that its "good cause" determination was fundamentally predicated on two considerations: (1) the serious and lasting harm that will result from the removal of the children from their current home and (2) the significant potential that the preferred caretakers will engage in conduct or conditions will exist in their home that would be seriously detrimental to the children.***

We agree with the trial court that both of those considerations are pertinent in determining whether good cause exists to depart from ICWA's placement

preferences. We further conclude that, regardless of the trial court's assessment of the latter, the former is conclusive.

We fully appreciate the fundamental and compelling policies that underlie ICWA. We are also mindful of the tribes' expressed concerns that those policies can be subverted or eroded through judicial decision-making that partakes of cultural biases, either implicit or explicit, especially with respect to "good cause" determinations. Further, we are fully cognizant from our extensive experience in juvenile dependency matters that in virtually every case involving a change of custody from a well-established placement, the affected child or children will suffer some degree of emotional distress and dislocation. The nature, severity, and durability of that harm can vary greatly from case to case.

We are mindful of all of those things--and of our sworn obligation to apply ICWA consistently with that statute's mandates. But ICWA does not mandate effectuation of its placement preferences in every case. Rather, the statute explicitly provides that, notwithstanding a strong presumption of deference to the placement preferences, the presumption can, in special cases, be overcome by a showing of "good cause." ***"Good cause" properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change of placement. Here, as noted, the trial court explicitly accepted as credible and persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." That finding, substantiated by evidence in this record, is legally sufficient to establish "good cause" for purposes of 25 USC section 1915(a)***

(Footnotes omitted; emphasis in bold italics added).

DEPENDENCY
Termination-of-Parental-Rights Proceedings

18. *Dept. of Human Services v. K.K.M.*, --- Or App ---, --- P3d --- (July 20, 2011) (affirming judgment terminating mother's parental rights under ORS 419B.504)

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment terminating her parental rights to her twins, a son and a daughter. She argues that the Department of Health and Human Services (DHS) failed to prove that she was unfit at the time of trial based on conduct or conditions that were seriously detrimental to the twins, and that integration into her home was improbable within a reasonable time because her conduct or conditions were unlikely to change. Held: DHS demonstrated, by clear and convincing evidence, that mother, an alcoholic with untreated

mental health problems, was unfit at the time of trial based on conduct or conditions seriously detrimental to her children, and integration of the children into her home was improbable within a reasonable time.

19. *Dept. of Human Services v. C.M.P. ,* --- Or App ---, --- P3d --- (July 13, 2011) (reversing judgment terminating mother's parental rights, because state failed to prove, by clear and convincing evidence, that mother was unfit by reason of conduct or condition seriously detrimental to her children)

EXCERPTS FROM OPINION:

> Mother appeals judgments terminating her parental rights to her two young daughters, HL and CP, entered two years after she, at the age of 19, killed the children's father during a domestic dispute. The Department of Human Services (DHS) took custody of HL shortly after the incident and of CP shortly after her birth several months later. Mother ultimately pleaded guilty to criminally negligent homicide and was sentenced to sixty months' imprisonment. The children were initially placed in the care of mother's sister (DP), but after 13 months DHS elected to move them to live with their paternal grandmother in Washington State.
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> * * * * *
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> ***The trial court found mother to be unfit because she "repeatedly exposed [HL] to the physical danger and emotional abuse of domestic violence" resulting from mother's failure to address both her substance abuse issues and the "cycle of violence behaviors within the home of her family of origin and her home with [father]." The court noted that mother's condition "led to the criminal episode where she deprived the children of their father by killing him and their mother because she was sentenced to serve 60 months of incarceration." The court further found that CP had "never known" mother and that HL had not seen mother in the 26 months preceding the termination trial and that mother will be unavailable to parent the children for at least an additional 34 months. Given that the children are bonded with grandmother and "[o]nly the stability of a safe and nurturing environment will allow the children to develop positive bond[s] and appropriate behavior norms[,]" the court concluded that to disrupt their placement would "have an adverse impact on the children."***
>
> On appeal, mother argues that DHS failed to prove that she was unfit because the agency failed to prove that she is characterized by any seriously detrimental conduct or condition that persisted at the time of trial. She frames the heart of DHS's case as follows: One domestic violence incident led to mother's incarceration, which made her unavailable to parent for such an extended period that it was likely to be seriously detrimental. In response, mother asserts that her expert evaluation indicated that she is free of personality disorders associated with domestic violence, that she does not require drug and alcohol treatment, and that she is likely to be capable of safely and adequately parenting her children upon her release. Further, mother contends that the psychological evidence of HL's behavior problems did not definitively establish that mother's conduct or condition caused those problems. That is, HL's behavior problems were related to the transition from DP's home to grandmother's home, and the only evidence that mother's incarceration was detrimental was an observation that HL had trouble adjusting to the

move to grandmother's home. Mother also notes that there is no evidence that CP exhibited troubling behaviors.

The state counters that mother's five-year incarceration, her unresolved domestic violence history, and her untreated alcohol dependence render her unfit to parent the children. Further, the state contends that because of her incarceration, mother will be unavailable to parent her children during their primary attachment years, and that because HL already suffers from an "attachment disorder" caused by mother's incarceration and both children need permanency as quickly as possible, mother's conduct or condition is seriously detrimental to the children. [Note 2: The record does not support DHS's references to an "attachment disorder." Au diagnosed HL with an "adjustment disorder," and HL has not received any other diagnosis.] Moreover, because mother has three years remaining on her sentence from the time of the termination trial, integration is improbable within a reasonable time. The state contends that even if mother's unresolved alcohol dependency and domestic violence issues are not enough standing alone to render her unfit, she is unfit when those issues are combined with her five-year incarceration.

Initially, we emphasize that unfitness is assessed at the time of trial. Based on the evidence adduced at trial, we agree with mother that the state failed to prove that she was unfit due to her untreated" alcohol dependence and "unresolved domestic violence history." Sebastian's evaluation of mother revealed self-awareness about the problems that alcohol and domestic violence have caused her and her children and mother's credible intention to engage in services to prevent a recurrence of those problems. Services were unavailable to her during her lengthy incarceration in the Jefferson County Jail, but since her transfer to Coffee Creek, mother has attended Alcoholics Anonymous meetings and has sought individual counseling. Sebastian saw every reason to believe that mother would continue to benefit from services and increase her self-awareness. Mother has not been diagnosed with any personality disorders that would tend to precipitate a pattern of domestic violence, and she has had no incidents of aggression or acting out in prison. Although the record shows past incidents of domestic violence and substance abuse by mother during her teenage years, there is little to no evidence, let alone clear and convincing evidence, that mother's past problems with those issues persisted at the time of the termination trial.

That leads us to the only remaining basis for the trial court's finding of unfitness: mother's incarceration. In *Stillman*, the Supreme Court concluded that, although incarceration does not constitute "criminal conduct" under ORS 419B.504(6),incarceration and its consequences for children are within the "purview of the court." 333 Or at 147-48. That is, incarceration is a "condition" that, "if it were seriously detrimental to the children, would be sufficient to warrant a finding of unfitness[.]" *Id.* at 149 (emphasis omitted). * * * [H]ere, the question we must answer is whether mother's incarceration for 34 months following the termination trial causes the type of detriment to HL and CP that the legislature contemplated as providing the basis for a conclusion that she is unfit. * * * Although we are mindful that, in a general sense, prolonged incarceration could be seriously detrimental to children, we do not find the evidence here to establish clearly and convincingly that mother's incarceration for an additional 34 months is seriously detrimental to HL and CP.

The focus of the evidence of detriment to the children is two-fold. First, HL suffered from behavior issues "outside the norm" for her age when she was moved from DP's home to grandmother's home. As a result, the child's therapist diagnosed her with an adjustment disorder. There is no similar evidence as to CP. Second, there was general testimony that the

first five years of a child's life are the "primary attachment years" and that moving HL and CP to another primary caregiver at the end of mother's incarceration could cause HL to regress and could cause CP confusion.

We agree with mother that the evidence relating to HL's problems transitioning from DP's home to grandmother's home is not clear and convincing evidence of serious detriment. In finding that the anxiety the children in *Stillman* were experiencing was not sufficient to justify termination, the Supreme Court noted that such anxiety is not extraordinary in the juvenile system. *Id*. at 152. ***Likewise here, difficulty adjusting to a placement move is not extraordinary in the juvenile system--or, indeed, for many other children (including those whose parents are engaged in military service abroad). Moreover, here, the most recent placement move was not the result of mother's conduct but rather of DHS's decision to move the children from a placement that was, by all accounts, stable***.

Further, while the record is replete with general statements about the risks of uprooting these children during their primary attachment years, we do not find here clear and convincing evidence that such a change would be seriously detrimental. By all accounts, the children are in a stable placement and are doing well. Sebastian noted that children can attach to more than one primary caregiver, but that it is unclear how many attachments children can form after one or two primary caretakers. The record in this case does not connect HL's "adjustment disorder" with any future potential placement changes. Rather, the evidence is much more equivocal, and although we acknowledge reason for concern about changing the children's placement in the future, we do not view the evidence of HL's adjustment issues and the general testimony about "primary attachment years" to rise to the level of clear and convincing evidence--that is, evidence that makes the existence of a fact "highly probable" or that is "of 'extraordinary persuasiveness,'" *A. M. P.*, 212 Or App at 104--of serious detriment caused by mother's incarceration.

Moreover, the Supreme Court has stated that "the reason for terminating parental rights ought to be related to the parent's conduct as a parent." *Stillman*, 333 Or at 152. And, ***although DHS must act under statutory timelines to achieve permanency, those actions contributed to the current situation in this case. Mother was immediately prohibited from seeing HL by DHS, and the move to Washington effectively eliminated any chance for mother to establish a relationship with CP. Moreover, one of the two changes in primary caregivers was a result of DHS's decision to move the children from a stable placement to a distant placement, yet DHS attributes to mother the issues caused by the move.*** *See State ex rel Dept. of Human Services v. Rardin,* 340 Or 436, 446, 134 P3d 940 (2006) (noting that DHS would not permit father to establish a relationship with the child when evaluating whether the father's conduct was seriously detrimental); *Stillman*, 333 Or at 151 (noting that the children's anxiety was caused in part by DHS prohibition against contact between the father and the children). ***DHS is responsible for making decisions regarding the welfare of children in its custody, but the consequences of those decisions should not necessarily be attributed to the parent in every instance***.

(Footnote omitted; emphasis in bold italics added).

20. *Dept. of Human Services v. L.E.G.,* --- Or App ---, --- P3d --- (June 29, 2011) (reversing judgment terminating father's parental rights, because state failed to prove, by clear and convincing evidence, that it was improbable that the child could be integrated into father's home within a reasonable time)

EXCERPT FROM OPINION:

> [W]hether a time period is "reasonable" is evaluated in light of "a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments." ORS 419A.004(20). The inquiry is "child-specific," *Stillman*, 333 Or at 146, "and focuses on the circumstances that exist at the time of the trial concerning termination," *R. T.*, 228 Or App at 654. "It calls for testimony in psychological and developmental terms regarding the particular child's requirements." *Stillman*, 333 Or at 146.
>
> ***In this case, even assuming that the juvenile court was correct in concluding that father is unfit--a conclusion that we think is far from clear on the facts presented here--termination was, in all events, improper because DHS failed to establish by clear and convincing evidence that integration of H into father's home was improbable within a reasonable time due to conduct or conditions unlikely to change***. *See Dept. of Human Services v. T.C.A.,* 240 Or App 769, 780, 248 P3d 24 (2011) (declining to decide whether the mother was unfit because, "in any event, DHS failed to prove that the children's integration into mother's home [was] improbable within a reasonable time").
>
> Here, the conduct or conditions at issue are father's lack of an appropriate living situation for H and his ongoing involvement with mother, whose unresolved drug, alcohol, and mental health issues pose a risk to H. However, on this record, it appears that those conditions could be ameliorated within a fairly short period of time. With respect to father's living situation, at the time of trial, father was going to have to move into a new residence. He and his roommate were being evicted and planned to move, but his roommate did not have a criminal or child welfare history, and father had money set aside to pay for the move. Although the caseworker indicated that father needed to demonstrate his stability by being in an appropriate home for a minimum of six months, it appears that father could resolve the issue regarding his living situation in a period of six months--by moving into an appropriate residence and showing stability for that period of time.
>
> With regard to father's involvement with mother, we first observe that the circumstances of this case changed a good deal during the course of the trial, given mother's positive drug test mid-trial and her later stipulation to termination of her rights. Nonetheless, it appears from the psychological evaluation that father's issues relating to mother could be resolved in a period of approximately six months. Specifically, the evaluator indicated that father's belief that children should remain with their mothers--a belief that father has often articulated and that apparently is related to his Cuban culture--could possibly be changed, but that such a change would take some time. She believed a minimum of six months of treatment would be required.[(2)]
>
> ***Furthermore, here, as in T. C. A., there is no evidence in the record regarding how such a delay in achieving permanency would affect H's "emotional and developmental needs or [her] ability to form and maintain lasting attachments." 240 Or App at 781. The record indicates that H is a happy, healthy, intelligent child who is***

bonded to both father and her foster family. She is strong-willed and is prone to frustration and tantrums, but does well with a consistent schedule and attentive parenting. The record does not reflect that H has specific emotional or developmental needs that would be negatively affected by a six-month delay in achieving permanency, nor that such a delay would be unreasonable in light of her specific needs. Thus, we cannot conclude, on this record, that it is improbable that H can be integrated into father's home within a reasonable time. Accordingly, the trial court erred in terminating father's parental rights.

(Emphasis in bold italics added).

21. *Dept. of Human Services v. A.L.M. and J.T.C.* , 242 Or App 625, --- P3d --- (2011) (affirming judgment terminating mother's parental rights; reversing judgment terminating father's parental rights, because state failed to prove, by clear and convincing evidence, that it was improbable that the two-year-old child could be reintegrated into father's home within a reasonable time)

EXCERPTS FROM OPINION:

The record concerning V's needs is scant and very general. According to Truhn, [the psychologist who evaluated the father,] if father were incarcerated and thus only inconsistently available for a child, the child could face problems with attachment: "[A]n unstable environment can in itself produce oppositional defiant behavior, anxiety for the child, those types of issues." Truhn also identified a risk of turmoil for a child in father's and mother's joint care. The only evidence in the record about V's specific needs came from her foster parent and [the DHS case worker,] Lane. The foster parent testified that V is doing well, was screened for early intervention services and was found not to need them, and seems capable of forming an attachment to an adoptive family. Similarly, Lane testified that V is adoptable and has an identified adoptive resource.

At the time of the termination hearing in December 2009, father was serving a 90-day jail term for violating probation in a contempt of court case, and he was scheduled to be released the following month. Father was awaiting trial on the charge of third-degree sex abuse involving M, [a 14-year-old girl,] but that charge was dismissed in the middle of the termination hearing.

* * * [T]he juvenile court concluded that father's parental rights should be terminated under ORS 419B.504. The court found as follows. Father engaged in domestic violence against mother, which was witnessed by mother's daughter A, and he threatened mother and [her attorney,] Vergamini. Although father has some concerns about mother, he is obsessed with her and continues to believe that she is an appropriate person to care for children. Father sexually abused M, and he would need a psychosexual evaluation and sex offender treatment before he could be a safe parent for V. His need for assessment and treatment, however, were stymied by his denial of any problems. Ultimately, father's behavior shows that "he is not a safe parent and that services rendered to him to date have been ineffective. * * * Father is not now, nor will he be within any timeframe which is reasonable for [V], a minimally adequate parent."

Father appeals. He contends that DHS failed to prove that he is unfit by reason of conduct or conditions seriously detrimental to V. In father's view, integration of V into his home was feasible because father expected to be released from jail shortly after the termination hearing, had made plans for a safe home for V, and was willing to participate in services***. DHS failed to offer any evidence of the time period for integration that would be reasonable in light of V's needs.***

DHS responds that, under the totality of the circumstances, father is unfit because of his obsession with mother, which he has pursued despite restraining orders and which would expose V to danger, and his sexual abuse of M, which caused him to be unavailable to parent V. ***DHS argues that integration is not possible within a reasonable time because father's unwillingness to admit to past conduct impedes the possibility of treatment.***

* * * * *

Under ORS 419B.504, we must decide, first, whether the parent is unfit--that is, whether the parent has engaged in conduct or is characterized by a condition that is seriously detrimental to the child--and, second, whether, given the parent's conduct or condition, it is improbable that the child may be integrated into the parent's home within a reasonable time. *State ex rel SOSCF v. Stillman,* 333 Or 135, 145-46, 36 P3d 490 (2001). ***A "reasonable time" is a period "that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments." ORS 419A.004(20). That definition requires a child-specific inquiry and "testimony in psychological and developmental terms regarding the particular child's requirements."*** *Stillman*, 333 Or at 146.

* * * * *

[W]e need not decide whether father was unfit, because we conclude that, in any event, DHS has failed to prove, by clear and convincing evidence, that V's integration into father's home was improbable within a reasonable time. The obstacles to father being a safe parent were (1) his relationship with mother and (2) his sexual abuse of 14-year-old M. As we read the record, however, the relationship between father and mother was over, and father was willing to participate in counseling to resolve his feelings for mother. Because of the incident of sexual abuse, father needed a psychosexual evaluation and might need sex offender treatment, but his potential need for treatment would not preclude his becoming a safe parent.

* * * * *

The dissent's assertion that we do not question the juvenile court's findings that father "would need a psychosexual evaluation and sex offender treatment, that his denial of wrongdoing had stymied treatment, and that services rendered to date have been ineffective," ___ Or App at ___ (Riggs, S. J., dissenting) (slip op at 5), is not entirely correct. We acknowledge that father needed an evaluation and treatment, but the record does not support the juvenile court's view that any such treatment had been stymied by father's denial of wrongdoing. Truhn's recommendation for a psychosexual evaluation and sex offender treatment arose from a psychological evaluation conducted on November 11, 2009, just under a month before the termination hearing began. Nothing in this record suggests that father's denials in any way stymied any treatment or that any treatment was ever offered, let alone provided and shown to be ineffective.

Under ORS 419B.504, DHS has the burden to prove that it is improbable that the child can be integrated into the parent's home within a reasonable time, as measured by the child's needs. This is not a case in which DHS made such a showing by offering evidence that the child has such pressing needs that little or no delay is reasonable; indeed, DHS offered no evidence about V's need to achieve permanency. This is not a case in which DHS showed that integration is improbable because the parent's problems are an intractable barrier to reunification. To the contrary, the record shows that father needed a psychosexual evaluation and, depending on the evaluator's recommendation, possible treatment. There is an absence of evidence that father could not or would not be successfully treated or that he could not or would not successfully complete treatment within a reasonable time.

The dissent states that, in light of Truhn's testimony and father's denial of abuse of M, the dissent is "unable to conclude that, even with 'successful' treatment, father probably will become a safe parent within *any* time. To require, in addition, that the state provide explicit evidence that a particular treatment cannot be successfully completed within a reasonable time asks too much * * *." ___ Or App at ___ (Riggs, S. J., dissenting) (slip op at 5-6). Truhn's testimony, however, contradicts the dissent's view. Truhn testified that, if the abuse occurred, father nevertheless might become a safe parent, and his ability to parent would depend on his response to treatment, which "could take months or years." Certainly, DHS need not prove the time required for treatment with mathematical exactitude. ***On this record, however, we see no principled way to conclude that integration is improbable in a possible timeframe of "months or years" and no way to determine whether that possible timeframe is two months or two years. Given the lack of evidence regarding V's needs, we do not know if waiting "months" would be unreasonable for her. In short, the record falls short of clear and convincing evidence that integration is improbable within a reasonable time due to conduct or conditions not likely to change.***

(Footnotes omitted; emphasis in bold italics added).

22. *Dept. of Human Services v. T.C.A.* , 240 Or App 769, 248 P3d 24 (2011) (reversing judgments terminating mother's parental rights to two children where state failed to prove by clear and convincing evidence that it was improbable that the children could be integrated into mother's home within a reasonable time)

EXCERPT FROM OPINION:

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

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

> "The rights of the parent or parents may be terminated as provided in ORS 419B.500 if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward and integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change. In determining such conduct and conditions, the court shall consider but is not limited to the following:
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> "* * * * *
>
> "(3) Addictive or habitual use of intoxicating liquors or controlled substances to the extent that parental ability has been substantially impaired."

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

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

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

(Emphasis in bold italics added).

23. ***Dept. of Human Services v. P.P.*** **, 240 Or App 559, 248 P3d 24 (2011) (affirming judgment terminating father's parental rights)**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Father appeals a judgment terminating his parental rights to his child. The juvenile court found that termination was proper under both ORS 419B.502 (involving "a single or recurrent incident of extreme conduct toward any child") and ORS 419B.504 (involving "conduct or condition seriously detrimental to the child or ward"). An extended discussion of this case would not benefit the bench or bar. We affirm the judgment of termination pursuant to ORS 419B.504 and therefore do not reach the issue whether termination was proper under ORS 419B.502.

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

EXCERPTS FROM OPINION:

> * * *Father appeals a judgment terminating his parental rights to his son. Among other grounds for termination, the juvenile court found that father was unfit under ORS 419B.504 because of criminal conduct, emphasizing that, under the conditions of father's post-prison supervision (PPS), "[f]ather is not authorized to have contact with his child." (Underscoring omitted.) We affirm because (1) father is characterized by a condition--having been convicted of first-degree encouraging child sexual abuse, ORS 163.684, and therefore being subject to a PPS condition that restricts any contact with minors--that is seriously detrimental to child; (2) as a result of his PPS condition, father was unlikely to be allowed to integrate child into his home for about two years, a period that is not a reasonable time for child to wait; and (3) termination is in child's best interests. Because we affirm on that basis, we do not consider whether the juvenile court erred by also terminating father's parental rights because of extreme conduct under ORS 419B.502.
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> * * * * *
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> Father was incarcerated from August 2007 to September 2008. Other components of his sentence continue to affect his ability to have contact with child. On seven counts, father was sentenced to 60 months of supervised probation, including a special condition that he "[h]ave no contact with minors except as authorized by DHS"; on the remaining count, he was sentenced to 18 months of imprisonment and 36 months of PPS. According to his parole officer, Michael, father will be on PPS until August 2012. Among his PPS conditions are requirements that he complete sex offender treatment, submit to polygraphs, and have no contact with minors. Thus, at the time of the termination hearing, father was not allowed to have any contact with child. Michael explained that contact "includes telephones, letters, going through a third party, anything of that nature."

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

* * * * *

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

* * * * * *

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

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

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

* * * * *

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

a reasonable time, and that termination is in child's best interests. We agree that each of the statutory requirements for termination under ORS 419B.504 was proved.

First, father is unfit because, at the time of the termination hearing, he was subject to a PPS condition that he have no contact with minors, and father's condition is seriously detrimental to child. That condition is not enumerated in ORS 419B.504, but it nevertheless may be considered in the unfitness analysis. *See Stillman*, 333 Or at 149 (concluding that the father's incarceration and residence in halfway house, which precluded him from personally caring for children or otherwise maintaining custodial parental role, could be considered a "condition" under ORS 419B.504); *State ex rel Dept. of Human Services v. Keeton,* 205 Or App 570, 582, 135 P3d 378 (2006) (considering "sequellae" of past criminal conduct in assessing the mother's conduct and its detriment to her children). Father's condition, in conjunction with his earlier incarceration, has prevented and will continue to prevent him from providing a stable home to child for a prolonged period that is seriously detrimental to child. According to treatment providers, child has made great progress while in his grandmother's care, but he still needs a stable environment to prevent him from developing full-blown RAD. Unlike the children in *Stillman*, who were generally well-adjusted and attached to the father and suffered only some anxiety about their future as a result of the father's incarceration, 333 Or at 150-53, child here has a significant need for stability to avoid regression and severe emotional harm. Father's condition leaves child without the stable home that child needs and thus is seriously detrimental to child.

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

In his dissent, Judge Wollheim takes a different view, contending that DHS can meet its burden to prove that integration of the child into the parent's home "is improbable within a reasonable time due to conduct or conditions not likely to change," ORS 419B.504, only "by showing that services have failed or will fail." __ Or App at __ (Wollheim, J., dissenting) (slip op at 14). Certainly, unless excused from doing so, ORS 419B.340(5), DHS is required to make reasonable efforts during dependency proceedings. The issue at this stage of the case, however, is whether "integration of the child or ward into the home of the parent or parents *is* improbable within a reasonable time due to conduct or conditions not likely to change." ORS 419B.504 (emphasis added). The legislature's use of the present tense requires the court to decide the improbability of integration due to conduct or conditions not likely to change *at the time of the termination hearing*, not to decide whether the parent's conduct or condition might have been susceptible to change at some point in the past. *See State ex rel Dept. of Human Services v.*

Rardin, 340 Or 436, 447, 134 P3d 940 (2006) (holding that use of present tense in "the parent or parents are unfit," ORS 419B.504, means that court must consider whether the parent is unfit at time of termination hearing, not whether the parent was unfit at some point in past). The legislature's choice of verb tense in ORS 419B.504 takes on particular force in the context of other provisions of the Juvenile Code that require, during proceedings that precede any termination hearing, a determination whether DHS "has made reasonable efforts." ORS 419B.185(1)(a), (c); ORS 419B.340(1); ORS 419B.476(2)(a); *see also* ORS 419B.337(1)(b) (requiring, in removal order or order continuing care, finding whether "[r]easonable efforts * * * have been made"); ORS 419B.498(2)(b)(C) (reason not to file termination petition where court or citizen review board determined that DHS "did not make reasonable efforts"). If the legislature had intended to require a finding regarding past reasonable efforts in every ORS 419B.504 case, it knew how to do so. It chose not to.

We hasten to add that, in some cases, DHS's failure to make reasonable efforts may be relevant to the determination regarding integration. In *Keeton*, for example, we concluded that the state had failed to prove that the children could not be integrated into the mother's home within a reasonable time due to conduct or conditions not likely to change. 205 Or App at 583. We assumed, without deciding, that the mother's "condition as an untreated sex offender" was seriously detrimental to her children, but concluded that the state had failed to prove that that condition was "'not likely to change'" or that integration was "'improbable within a reasonable time.'" *Id*. * * *.

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

(Footnotes omitted' emphasis in bold italics added).

DELINQUENCY Proceedings

25. ***State ex rel Juv. Dept. v. C. M. C.,*** **243 Or App 335, --- P3d --- (2011) (challenge to the admission of hearsay under OEC 803 (26), which applies to statements by a victim of domestic violence describing the violent incident)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals a judgment finding him within the jurisdiction of the juvenile court for an act that, if committed by an adult, would constitute harassment. Youth argues that the juvenile court erroneously admitted hearsay evidence--in the form of statements made by his mother, the alleged victim--under the domestic violence hearsay exception. OEC 803(26). That exception applies to certain statements by a victim of domestic violence that purport to describe

an incident of domestic violence. Domestic violence is defined as "abuse between family or household members." ORS 135.230(3). "Family or household members" is defined to include "[p]ersons cohabiting with each other." ORS 135.230(3), (4). The issue on appeal, therefore, was whether youth and mother were "[p]ersons cohabiting with each other." Held: "Cohabit" has a usual and accepted legal meaning--it refers to persons living in the same residence in a relationship akin to that of spouses. Had the legislature intended the domestic violence hearsay exception to apply to all persons living in a residence, the legislature could have included "persons residing in the same residence," as it has in other statutes, instead of including "[p]ersons cohabiting with each other."

26. ***State ex rel Juv. Dept. v. B.M.L.,*** **242 Or App 414, --- P3d --- (2011) (corroboration of accomplice testimony)**

THE COURT OF APPEALS' SUMMARY:

In this juvenile delinquency case, youth appeals judgments finding him within the jurisdiction of the juvenile court for acts that would constitute the crimes of recklessly endangering another person, ORS 163.195, and criminal mischief in the second degree, ORS 164.354, if committed by an adult. The issue on appeal is whether the testimony of an accomplice with whom youth was involved in the crimes was sufficiently corroborated under ORS 136.440 to support jurisdiction. Held: Even assuming that ORS 136.440 applies in juvenile delinquency proceedings--a question not answered by the opinion--the accomplice's testimony was sufficiently corroborated by other evidence in the record that tended to connect youth with the commission of the crimes. Based on that testimony and the other evidence in the record, youth is properly within the jurisdiction of the court for the acts alleged.

EXCERPT FROM OPINION:

> * * * In addition to evidence that the offenses were committed (*i.e.*, the victim's testimony and the rock), the victim's husband testified that he saw youth and his accomplice leaving a field very close to the scene of the crime approximately five minutes after it occurred. It was late at night, and it can reasonably be inferred from the victim's husband's testimony that no one else was around. Moreover, there was evidence that youth appeared nervous and began walking faster when he saw the victim's husband. In short, the corroboration in this case is not dependent on mere association between youth and Jackson-Grixgby, such that it is necessary to also show that the circumstances of their association were not likely to have occurred but for some criminal activity. In other words, the fact that youth and Jackson-Grixgby may have had other, noncriminal, reasons to be together at the time and place of the crime does not defeat the corroborative value of the evidence in these circumstances.
>
> We conclude that, even if ORS 136.440 applies, the corroboration evidence in this case "fairly and legitimately tend[s] to connect [youth] with the commission of the crime[.]" *State v.*

Brake, 99 Or 310, 314, 195 P 583 (1921); *accord Torres*, 207 Or App at 360; *see also Caldwell*, 241 Or at 361 (corroboration is sufficient "if there is some evidence, however slight, tending to connect the defendant with the crime"); *Walton*, 311 Or at 243 (corroboration evidence may be circumstantial and not every material fact required for conviction need be independently corroborated); *State v. Rose*, 45 Or App 879, 882, 609 P2d 875 (1980) (corroborating evidence need not be adequate in itself to support conviction if it fairly tends to connect the defendant with commission of the crime). Hence, the testimony of Jackson-Grixgby can properly be considered in this case. Moreover, the court necessarily found his testimony to be credible, a finding to which we defer. Based on Jackson-Grixgby's testimony and the other evidence in the record, we find that youth is within the jurisdiction of the court based on the offenses alleged in the petition.

(Footnote omitted).

27. ***State of Oregon v. E. V.*, 240 Or App 298, 246 P3d 78 (2010), *rev den* 350 Or 130 (2011) (holding that, under ORS 419C.450, insurance carriers and DOJ's "Criminal Injuries Compensation Account" are "victims" for purposes of restitution in a juvenile delinquency proceeding)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals from a supplemental judgment ordering him to pay restitution to an insurance carrier and the Criminal Injuries Compensation Account (the account). Youth argues that, although insurance carriers and the account are "victims" for the purpose of restitution in criminal cases, they are not "victims" for the purpose of restitution in juvenile delinquency cases. Held: The Juvenile Code expressly incorporates the Criminal Code's definition of "restitution," which, in turn, includes a special definition of "victim." That definition of victim, ORS 137.103(4), includes the account and insurance carriers, and it applies in this case. Accordingly, the trial court did not err in awarding restitution to the insurance carrier and the account in this case.

28. ***State ex rel Juv. Dept. v. N.L.D.*, 240 Or App 132, 246 P3d 54 (2010) (confirming that, under ORS 419C.450, DOJ's "Criminal Injuries Compensation Account" is a "victim" for purposes of restitution in a juvenile delinquency proceeding)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals the juvenile court's judgment ordering him to pay $853.59 in restitution to the Department of Justice, Criminal Injuries Compensation Account (account). Youth asserts that the court erred in imposing restitution because the account is not a "victim" within the

meaning of ORS 419C.450. Youth also contends that the Juvenile Code does not provide restitution to be ordered to the account because ORS chapter 147, which describes the procedure for paying restitution to the account, is not among the statutes that are incorporated into the Juvenile Code under ORS 419C.270. Youth asserts that the juvenile court committed plain error by ordering him to pay restitution to the account. Held: Consistent with State v. E. V., ___ Or App ___, ___, ___ P3d ___ (Dec 29, 2010) (slip op at 3-4), the account is a "victim" for purposes of restitution in a juvenile delinquency case under ORS 419C.450. Youth did not preserve his argument that ORS chapter 147 is not incorporated into the Juvenile Code. Youth failed to raise his plain error argument until his reply brief, and the alleged error is not "plain."

29. ***State ex rel Juvenile Department of Benton County v. Z. D. B.*, 238 Or App 377, 242 P3d 714 (2010) (ORS 419C.450 does not limit restitution to payment for injuries caused by a youth's "adjudicated" conduct)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals from the juvenile court's order requiring him to pay restitution to the victim, contending that the trial court lacked authority to impose restitution because he did not admit and was not adjudicated on the conduct that caused the victim's injuries. Held: It is not necessary for there to be a causal connection between the victim's injuries and the youth's adjudicated conduct. ORS 419C.450(1) authorizes restitution for injury that the youth offender caused, and that encompasses loss that resulted in a "but for" sense from the youth's conduct. The juvenile court found that but for youth's conduct, the victim would not have suffered his injuries, and that finding is supported by the evidence.

EXCERPTS FROM OPINION:

> In this juvenile delinquency proceeding, youth admitted to two counts that, if committed by an adult, would constitute harassment, ORS 166.065, based on two incidents in which youth participated in physical assaults. On the single count that is at issue in this appeal, the juvenile court ordered youth to pay $18,442.87 in restitution for injuries that the victim of the assault suffered. Youth appeals, arguing that, because he did not admit that he caused the injuries that form the basis for the restitution order, the juvenile court exceeded its authority in imposing restitution. The state responds that the juvenile court did not err, both because the record establishes a causal connection between youth's conduct and the victim's injuries and because, in any event, the juvenile court had discretion to order restitution to serve the broad purposes of the statutes. On *de novo* review, ORS 419A.200(6)(b) (2007), we agree with the state as to the first of its contentions and do not reach the second.
>
> * * * * *

In *Dickerson*, we addressed the scope of the juvenile court's authority to order restitution under the prior version of the statute, which then authorized the court to award restitution for "physical injury inflicted upon a person by the child or for property taken, damaged or destroyed by the child." *Former* ORS 419.507(1)(a) (1989). In that case, the victim's house was burglarized, and the victim reported that a door had been damaged and that jewelry had been stolen. *Dickerson*, 100 Or App at 97. The child admitted to participating in a burglary--*i.e.*, entering the victim's house with the intent to commit theft--and admitted taking some items, but she denied damaging the door or stealing jewelry. The juvenile court found the child to be within the jurisdiction of the court and ordered her to pay restitution for the door and the jewelry, because the damage to the door and the loss of the jewelry resulted from her criminal activities. The child appealed, arguing that the court erred in requiring her to pay restitution for the door or the jewelry, because the petition did not contain specific allegations of damage to the door or theft of the jewelry and there was no adjudication by the court on that issue.

This court affirmed, concluding that the statute required three things to authorize restitution: "(1) criminal activity, (2) pecuniary damages and (3) a causal relationship between the two." *Id.* In that case, the court concluded, the juvenile court "properly determined that the damage to the door and the loss of the jewelry resulted from child's criminal activities. *It is not necessary, as child contends, that the specific loss be alleged and adjudicated as part of the [juvenile court] proceedings to award restitution based on the child's acts*." *Id.* at 98 (emphasis added). All that is necessary, the court explained, is that the loss resulted in a "'but for'" sense from the child's conduct, as determined by the juvenile court in a separate evidentiary hearing. *Id.* (quoting *State v. Doty*, 60 Or App 297, 300-01, 653 P2d 276 (1982)).

Nothing in Dickerson holds, as youth suggests, that restitution may be ordered only if there is a causal connection between the victim's injury and the youth's adjudicated conduct. As we have noted, the court held the contrary to be the case.

The wording of the statute has been amended in a variety of respects since *Dickerson* was decided. But youth does not suggest that the amendments have undercut that decision in any way. To the contrary, the current version, which authorizes restitution for injury "which the youth offender caused," ORS 419C.450(1), is not materially different from the older version of the statute at issue in *Dickerson*, which authorized restitution for "physical injury inflicted upon a person by the child," ORS 419.507(1)(a) (1989).

Nor does our more recent decision in *Hal* alter the analysis. In that case, the juvenile court found the youth within its jurisdiction based on evidence that the youth had committed acts that, if committed by an adult, would constitute the crimes of unauthorized use of a vehicle and possession of a stolen vehicle. 168 Or App at 78. The evidence showed that the youth had been caught driving a stolen Jeep Wrangler and that, at the time that he was caught, the vehicle's interior had been stripped of its stereo equipment. *Id.* The juvenile court ordered the youth to pay $500 restitution for the damage to the vehicle. *Id.* On appeal, the youth complained that there was no evidence that his conduct was responsible in any way for the damage to the vehicle. *Id.* at 79. The state conceded the point, and we accepted the concession. *Id.* at 80. Nowhere in that decision did we hold, as youth in this case contends, that our reversal was predicated on a failure to connect the damage to the vehicle to the adjudicated conduct. We simply accepted a concession that there was no evidence of *any* causal connection between the youth's activities and the damage to the vehicle. *Id.*

Youth's reliance on criminal restitution cases is likewise unavailing. ORS 137.106 provides that, when a defendant "is convicted of criminal activities * * * which have resulted in pecuniary

damages," the court may order the defendant to "make restitution" to the victim. We have held that restitution under that statute requires proof that the victim's damages were caused either by the criminal activity for which the defendant was convicted or other conduct that the defendant admitted. *See, e.g.*, *State v. Sigman*, 141 Or App 479, 919 P2d 45 (1996). The holding, however, is based on statutory wording that specifically refers to pecuniary damages resulting from criminal activities for which a defendant has been convicted or to which a defendant admits. There is no such requirement in ORS 419C.450.

This case is clearly controlled by Dickerson. Under that decision, the juvenile court is authorized to order restitution if it finds that, but for the conduct of youth, the victim would not have suffered injury. The juvenile court in this case so found, and, given the statements of Noble to the court during the dispositional hearing, there is evidence to support that finding. The juvenile court did not err in ordering restitution.

(Emphasis in bold italics added).

30. *State ex rel Juv. Dept. v. H.S.,* 237 Or App 385, 239 P3d 999 (2010) (sufficiency of the evidence to prove second-degree theft)

THE COURT OF APPEALS' SUMMARY:

Youth appeals a juvenile court judgment finding him within the jurisdiction of the court for acts that, if committed by an adult, would constitute burglary in the first degree, theft in the first degree, theft in the second degree, theft in the third degree, and unlawful entry into a motor vehicle. The Court of Appeals only addresses youth's third assignment of error, which concerns the sufficiency of the evidence of one count of second-degree theft. Youth argues that the state failed to prove that he committed theft of property worth $50 or more. The only evidence of the value of the stolen property, a cell phone, is the testimony of the victim that the phone that replaced the stolen phone cost $50. *Held:* In this case, the victim's testimony that the stolen phone was replaced with one that cost $50 was legally insufficient to establish that the stolen phone itself was worth $50 because there was no evidence that the two phones were similar in ways relevant to their effectiveness or utility. Therefore, the state failed to prove that youth committed theft of property worth $50 or more, and the juvenile court erred in denying youth's motion for judgment of acquittal on second-degree theft.

31. ***State v. C.A.S.,*** **237 Or App 271, 239 P3d 283 (2010),** ***rev den*** **349 Or 602 (2011) (appeal from an order requiring the youth to pay restitution to the victim's insurance company)**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Youth drove a car without the owner's permission and then crashed it--acts that, if committed by an adult, would be crimes. A juvenile court referee ordered that youth pay restitution to the car's owner in the amount of $250.00, her insurance deductible for the cost of repairing the car. The referee also ordered that youth pay $4,315.26 to AFNI Insurance Services (AFNI), the victim's insurance carrier, for repair costs it paid. Youth sought review of that order by a juvenile court judge, arguing that the insurance company was not a "victim" for purposes of the juvenile delinquency restitution statute, ORS 419C.450. The juvenile court agreed with youth in that regard, but rather than eliminate the award of $4,315.26, it made the amount payable to the car's owner instead of AFNI. Youth now appeals that judgment, again arguing that an insurance company is not a "victim" for purposes of ORS 419C.450.

The problem with youth's argument is that the juvenile court did not award restitution to AFNI. Indeed, the court *agreed* with youth's contention that the "victim" was the owner of the damaged car, and the judgment makes restitution payable to the car's owner and not AFNI. Thus, the issue that youth frames on appeal--the meaning of the word "victim" in ORS 419C.450--has no direct bearing on the ultimate correctness of the restitution award.

The juvenile delinquency restitution statute contemplates an award of restitution in the "specific amount that equals the full amount of the victim's injury, loss or damage." 419C.450(1)(a)(A). Given the nature of the judgment in this case, the real question is what constitutes the "full amount of the victim's injury, loss or damage" in light of the fact that an insurance company paid for repairs to the victim's car. That statutory construction question, however, has not been briefed or argued on appeal, and we decline to address it. *See State v. Montez*, 309 Or 564, 604, 789 P2d 1352 (1990) (refusing to consider an argument that was not adequately developed on appeal).

32. ***State ex rel Juvenile Department v. M. A. D.,*** **348 Or 381, 233 P3d 347 (2010) (appeal from denial of motion to suppress drugs found in the youth's possession during a search of the youth by school officials on school property)**

THE SUPREME COURT'S SUMMARY:

Today, the Oregon Supreme Court held that, when school officials at a public high school have a reasonable suspicion, based on specific and articulable facts, that an individual student possesses illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by searching the student without first obtaining a warrant.

After school officials received a tip from a named student that youth had been attempting to sell drugs earlier that morning on school property, they grew concerned that youth might have sold or attempted to sell drugs to other students and might have drugs in his possession. As a result, the assistant principal called youth to his office, told youth that he had "reasonable cause" to search him, and then called youth's mother "as a courtesy" to inform her that they were planning to search youth. During that phone conversation, youth's mother expressed that she thought youth "probably was holding something." After youth spoke with his mother, he emptied several of his pockets. The assistant principal then noticed a bulge in the inner breast pocket of youth's jacket and asked youth to empty it. Youth refused, but he unzipped his jacket. Another school official then opened the jacket so that he could see inside the inner pocket, reached into that pocket, and removed marijuana and other contraband. The state filed a delinquency petition, alleging that youth had committed an act that, if committed by an adult, would constitute delivery of a controlled substance. In the delinquency proceeding, youth moved to suppress the marijuana that school officials had found on his person, arguing that the school officials had violated his rights under Article I, section 9, of the Oregon Constitution. The juvenile court denied youth's motion.

Youth appealed, and the Court of Appeals reversed in a divided opinion. The majority concluded that the search did not come within any exception to the warrant requirement and then rejected the state's alternative argument that the court should adopt an exception to the warrant requirement that would permit school authorities to conduct searches if they reasonably suspected that a student possessed illegal drugs, even if they could not establish probable cause. It therefore concluded that the juvenile court had erred in denying youth's motion to suppress. The dissent agreed that the search did not come within an established exception to the warrant requirement, but, in the dissent's view, the search was nonetheless "reasonable" under Article I, section 9, because the school officials had "reasonable suspicion" that a violation of laws or school rules on possession or distribution of drugs had occurred. The state sought review.

In a unanimous opinion by Justice Thomas A. Balmer, the Supreme Court reversed the decision of the Court of Appeals and affirmed the judgment of the trial court. The Court first concluded that the school officials' conduct constituted a search for purposes of Article I, section 9. The Court agreed with the state that the unique context of the school setting -- including the responsibility of protecting students from harm, maintaining order, and fulfilling the schools' educational mission -- distinguishes searches by school officials from searches conducted by law enforcement officers in other settings. The Court then determined that the concerns underlying the well-established "officer-safety exception" also apply to some searches conducted in public schools by school officials. The Court noted that the school context -- characterized by compulsory attendance and large numbers of students and educators present each day in a relatively confined area -- raises heightened safety concerns. The Court reasoned that, as persons responsible for maintaining a safe learning environment, when school officials perceive there to be an immediate threat to student or staff safety, they must be able to take prompt, reasonable steps to remove that threat. The Court thus held that, as with an officer-safety search, when a school official develops a "reasonable suspicion," based on specific and articulable facts, that a particular individual on school property either personally poses or is in the possession of some item that poses an immediate threat to the safety of the student, the

official, or others at the school, the school official may take reasonable steps, including a limited search, to respond to that threat. Finally, the Court concluded that the school officials here reasonably suspected that youth possessed illegal drugs at the time of the search and had sought to distribute those drugs on school grounds earlier that morning. It further concluded that the school officials reasonably could have concluded that youth's possession and alleged attempt to sell illegal drugs on school grounds created an immediate risk of harm to youth and to other students and that the steps that the school officials took were reasonable precautions in the circumstances and were not unreasonably intrusive. The Court therefore reversed the Court of Appeals and affirmed the judgment of the juvenile court.