APPELLATE CASE LAW UPDATE

Summaries of Appellate Court Decisions in Juvenile Court Cases

August 2011 to August 2012

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Jurisdictional Proceedings

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DELINQUENCY PROCEEDINGS

DEPENDENCY
Jurisdictional Proceedings

1. *Dept. of Human Services v. M.K..* --- Or App ---, --- P3d --- (July 25, 2012) (affirming order denying DHS motion to "unseal" records in a previous dependency proceeding concerning mother when she was a dependent child)

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (DHS) appeals from an order of the juvenile court that denied its motion to unseal mother's DHS records in a previous juvenile dependency case in which mother was a dependent child. Held: Because the court did not "seal" the records in the previous juvenile dependency case, the court did not err in denying the agency's motion to "unseal" those records.

2. *Dept. of Human Services v. L.G.* --- Or App ---, --- P3d --- (July 5, 2012) (reversing judgment finding child to be within the jurisdiction of the juvenile court because jurisdictional bases no longer existed)

THE COURT OF APPEALS' SUMMARY:

The juvenile court found mother's child L to be within the jurisdiction of the court based on conditions and circumstances that endangered her welfare. Mother appeals, contending that the bases for jurisdiction alleged in the petition and on which the juvenile court determined that it had jurisdiction no longer exist. Held: The bases for jurisdiction alleged in the petition and on which the juvenile court determined that it had jurisdiction were primarily the risk of harm to L from father, who no longer has relationship with mother or L. Accordingly, there is no current threat of harm to L and the judgment of jurisdiction is reversed.

3. *Dept. of Human Services v. L.G.,* 250 Or App 290, --- P3d --- (May 31, 2012) (reversing dispositional judgment requiring father to engage in "random drug testing" because that requirement was not rationally related to the bases for jurisdiction)

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this dependency case, father appeals from a dispositional judgment that, among other things, required him to submit to random drug testing. He contends that the juvenile court erred in ordering him to submit to random urinalysis because that requirement bears no rational relationship to the jurisdictional finding that brought the child within the court's jurisdiction and is,

therefore, improper pursuant to ORS 419B.343. *See State ex rel Juv. Dept. v. G. L.*, 220 Or App 216, 223, 185 P3d 483, *rev den*, 345 Or 158 (2008) ("[T]he requirement of ORS 419B.343 that DHS ensure that its case planning bears a rational relationship to the jurisdictional findings must also be understood to require that the court's specification of a particular type of service that DHS provides bears a rational relationship to the jurisdictional findings."). The state concedes that the dispositional judgment imposes a condition that is not rationally related to the factual basis on which jurisdiction was found and that the case must, therefore, be reversed and remanded. We agree and accept the state's concession.

4. *Dept. of Human Services v. R.S.*, 249 Or App 607, 278 P3d 93 (2012) (proof that father left the child with the child's paternal grandmother without telling DHS and that father was not willing to work or communicate with DHS, without more, was insufficient to establish juvenile court jurisdiction under ORS 419B.100(1)(c))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Father appeals a judgment finding his eight-year-old child within the jurisdiction of the juvenile court under ORS 419B.100(1)(c). Jurisdiction was based on allegations that father had left the child with his paternal grandmother without communicating with the Department of Human Services (DHS)--which had "temporary custody" of the child--and that he was unwilling to work or communicate with DHS. Father argues, *inter alia*, that the court erred in asserting jurisdiction because the state failed to prove that the child was endangered as a result of those conditions or circumstances. The state concedes the error. We agree and accept the state's concession. ORS 419B.100(1)(c) (authorizing jurisdiction where the juvenile's "condition or circumstances are such as to endanger the welfare of the [juvenile] or of others").

5. *Dept. of Human Services v. B.W.*, 249 Or App 123, 275 P3d 989 (2012) (the juvenile court did not err in concluding that a psychological evaluation to determine the appropriate services necessary to ensure that father can establish a safe relationship with the child is rationally related to the bases for jurisdiction)

THE COURT OF APPEALS' SUMMARY:

Father in this dependency case appeals from a judgment of the juvenile court ordering that he undergo an psychological evaluation in order to evaluate whether father is a safe placement or visiting resource for the child, contending that such an evaluation does not bear a rational relationship to the bases for the juvenile court's jurisdiction. Held: A "rational relationship" is a minimal threshold of justification. Father stipulated to jurisdiction based on allegations that, due to his incarceration, he did not have a relationship with the child and was unavailable to parent. Although the bases for jurisdiction as alleged in the petition do not on their face disclose any reason why father might pose a safety risk to the child, the trial court's

finding that father posed a risk to the child is supported by the record and met the minimum threshold of justification for a psychological evaluation for the purpose of determining whether father is a safe placement or visiting resource for the child.

EXCERPT FROM OPINION:

> The juvenile court decided to order the psychological evaluation, based on the fact that the record reflected that father's incarceration was for riot and assault—two offenses involving violence. The court found that DHS needed a psychological evaluation to develop an appropriate case plan to address the safety risk presented by father's circumstances. The court explained, "it's only reasonable that DHS would have some information about the gentleman and * * * his mental health status, regarding whether there's going to be unsupervised visits or anything like that. * * * [T]hey'd be remiss in not requesting it." The court concluded that there was a rational basis for requiring the evaluation. The court noted further that a report in the record indicated that father had been disciplined while incarcerated due to negative behaviors, and found that that was another reason to require the psychological evaluation.
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> Father appeals, contending that, after taking jurisdiction of the child, the juvenile court was authorized under ORS 419B.337(2) and ORS 419B.343 to make *only* those orders for services that bear a rational relationship to the jurisdictional findings that brought the child into the court's jurisdiction. Father relies on *State ex rel Juv. Dept. v. G. L.*, 220 Or App 216, 223, 185 P3d 483, *rev den*, 345 Or 158 (2008), where this court held that ORS 419B.343 requires a rational connection between the service to be provided and the basis for jurisdiction. In father's view, the requirement that father undergo a psychological evaluation does not bear any relationship, let alone a rational relationship, to the factual bases for jurisdiction. Father focuses on the fact that the stipulated bases for jurisdiction were (1) father's lack of a relationship with the child and (2) his unavailability due to incarceration. He contends that a psychological evaluation is not related to either one of those factual bases for jurisdiction, because there is no evidence that father's lack of relationship with the child, incarceration, or unavailability are circumstances that would pose a safety risk to the child when he is released, and having a psychological evaluation will not assist father in establishing a relationship with the child. Father contends, further, that, to the extent that the juvenile court concluded that a psychological evaluation was rationally related to the underlying conduct that had resulted in father's incarceration, it was incorrect, because the state did not present any evidence in support of its argument that father had been convicted of assault and riot.
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> The state responds that the bases for father's incarceration are in the record and are also a matter of public record. The state is correct. The state further contends that the ordered psychological evaluation is rationally related to the reason for father's unavailability--his conviction and incarceration for crimes involving violence.
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> ***We agree with the state. Father is correct that the ordered services must bear a rational relationship to the bases for the finding of jurisdiction; however, a "rational relationship" is a minimal threshold of justification. It is true that the bare allegations that formed the bases for jurisdiction do not disclose in and of themselves any reason why father might pose a risk to the child; but the court was not required to turn a blind eye to the record before it. That record discloses that father was incarcerated—a stipulated allegation--as well as the cause of that incarceration. The court found that the reasons for***

father's lack of relationship with the child, unavailability, and imprisonment were his convictions for assault and riot. The court further found that father posed a risk to the child. The court's findings are supported by the record and we are bound by them. C. Z., 236 Or App at 442. DHS put on evidence that a psychological evaluation would aid DHS in assessing father's safety risk and determining what services DHS should provide. The court concluded that "a psychological evaluation would be rationally related in this case to determine whether he's going to be safe around the child."

Further, even if the court's expressed reason for ordering a psychological evaluation was somehow inadequately related to the stipulated allegations--which, we repeat, it was not--the order was correct for another, equally valid, reason: Due to the fact that father has never met the child and has no relationship with her, he will benefit from services to help him establish a relationship with her, and the psychological evaluation will help DHS decide what services are best suited to that need.

We conclude that the juvenile court did not err in concluding that a psychological evaluation to determine the appropriate services necessary to ensure that father can establish a safe relationship with the child is rationally related to the bases for jurisdiction, viewed in the context of the record as a whole.

249 Or App at 126-29 (Emphasis in bold italics added).

6. ***Dept. of Human Services v. S.P.*, 249 Or App 76, 275 P3d 979 (2012) (reversing judgment finding the child within the jurisdiction of the juvenile court and leaving unresolved questions about the correct legal standard for juvenile court jurisdiction under ORS 419B.100(1)(c))**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a juvenile court judgment asserting jurisdiction over her newborn child. The court found the child within the jurisdiction of the court under ORS 419B.100(1)(c) based on allegations that (1) mother was unable to meet the child's basic needs due to her developmental delays and medications and (2) father was not a parenting resource and has mental health concerns and anger control issues. Held: The sufficiency of the allegations pertaining to mother and father are necessarily intertwined; therefore, although father does not appeal, mother may challenge all of the jurisdictional findings on appeal, including those that pertain to father. The record does not support the court's findings as to father. There is evidence to support some of the court's findings as to mother; however, the court's finding that mother is unable to meet the child's needs is not supported by the record and the evidence is insufficient, as a matter of law, to support the court's ultimate conclusion that, in the totality of the circumstances, the child's "condition or circumstances are such as to endanger [her] welfare." ORS 419B.100(1)(c).

EXCERPTS FROM OPINION:

We begin with a discussion of the relevant statutory provisions. ORS 419B.100 governs the juvenile court's subject matter jurisdiction in dependency cases. In particular, as relevant in this case, ORS 419B.100(1)(c) establishes exclusive original jurisdiction in the juvenile court "in any case involving a person who is under 18 years of age and * * * [w]hose condition or circumstances are such as to endanger the welfare of the person or of others[.]" ***The requirements of ORS 419B.100(1)(c) are satisfied if, "under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child." State ex rel Juv. Dept. v. Vanbuskirk, 202 Or App 401, 405, 122 P3d 116 (2005) (citing State ex rel Juv. Dept. v. Smith, 316 Or 646, 652-53, 853 P2d 282 (1993)). To endanger the child's welfare, the condition or circumstances must create a current "threat of serious loss or injury to the child" and "there must be a reasonable likelihood that the threat will be realized."*** *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011); *Dept. of Human Services v. D. M.*, 248 Or App 683, ___, ___ P3d ___ (2012) (slip op at 3) (formulations in *Smith* and *A. F.* "complement each other and correctly state the standard" for juvenile court jurisdiction under ORS 419B.100(1)(c)). The burden is on the state to prove facts sufficient to warrant jurisdiction. *Dept. of Human Services v. B. L. J.*, 246 Or App 767, 773, 268 P3d 696 (2011).

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* * * [T]he question before the juvenile court was whether the allegations regarding mother and father *together* were sufficient to prove that, in the totality of the circumstances, K's welfare was endangered. *See, e.g.*, *B. L. J.*, 246 Or App at 773 ("[T]here is no legal requirement that a parent be able to care for his or her children independently."). Accordingly, the juvenile court properly considered parents as a unit in determining that jurisdiction under ORS 419B.100 (1)(c) was warranted. As a result, on appeal, the sufficiency of the allegations as to mother are necessarily intertwined with the sufficiency of the allegations with respect to father. That is so because mother's ability to safely parent K must be evaluated in light of all of the circumstances, *Smith*, 316 Or at 652-53 (court must consider the totality of the circumstances in determining whether a child is endangered), and those circumstances necessarily include the participation of father in caring for K. And that, in turn, compels consideration on appeal of the sufficiency of the court's findings pertaining to father.

* * * * *

* * * [W]e reject mother's categorical assertion that, if the factual allegations "as to" father are legally insufficient, jurisdiction necessarily fails regardless of any deficiencies that mother may have. As explained above, juvenile court jurisdiction under ORS 419B.100(1)(c) is predicated on the *risk* of harm to the child. *Vanbuskirk*, 202 Or App at 405 (jurisdiction under ORS 419B.100(1)(c) is warranted if "there is a reasonable likelihood of harm" to the child). Thus, even if the allegations as to father are unfounded, it does not necessarily follow that K could not still be at risk of harm—and thus under the court's jurisdiction--due to mother's condition or circumstances.

* * * * *

Thus, the bulk of the state's evidence that mother lacks, and is unable to learn, the necessary parenting skills to safely parent a newborn consists of behavior observed by Anderson eight hours after mother had given birth to K and while she was taking medication for pain.

Anderson testified that mother had difficulty learning how to wrap K in a blanket, change her diapers, and feed her, and that mother needed "a lot" of coaching in performing some of those tasks. Significantly, however, there is no evidence in the record that mother's difficulties with those skills persisted even into the next day, let alone at the time of the jurisdictional hearing several weeks later. The same is true of the state's evidence that, the day after K was born, mother and father needed coaching in how to safely secure K in a car seat. *See A. F.*, 243 Or App at 386 (reversing ground for jurisdiction based on the father's possession of pornography where the state failed to present evidence that there was a current risk of the children being exposed to pornography at the time of the hearing); *State ex rel Dept. of Human Services v. D. T. C.*, 231 Or App 544, 554-55, 219 P3d 610 (2009) (reversing judgment of jurisdiction where there was insufficient evidence that the father's alcohol abuse problem created a reasonable likelihood of harm to the children at the time of the dependency hearing).

According to Anderson, parents had had some "coaching" concerning parenting before K was born; however, without further details as to the nature and extent of that interaction, it would be speculative to infer from that evidence that mother lacks the mental capacity to learn those skills.

Of greater concern is the evidence that mother failed to properly support K's head and neck while holding her. Unlike with mother's other perceived deficiencies, there is evidence that that behavior persisted--at least to some extent--after mother left the hospital. Anderson testified that, during her initial observation of mother on the day that K was born, mother needed reminders "numerous times while she was holding the baby" about how important it was to support the baby's head. Corey, who observed mother interact with K after K was placed in foster care, also testified that on one of the first visits, they had to "work with the family a lot with that." The difficulty with that evidence is that it lacks essential context. For example, with regard to Anderson's testimony, we cannot tell from the record if mother was holding the baby the entire visit, which lasted approximately two hours, or whether she was holding the baby only for a few minutes. Obviously if it were the latter, then the need for "numerous" reminders would be more of a concern. Corey's testimony indicates that the deficiency was observed at only one visit--indeed, only at one of the *first* visits parents had with K after leaving the hospital--and the record does not disclose how many days elapsed between mother's instruction at the hospital and that visit. We also emphasize that there is no evidence that the problem continued at the time of the hearing almost two months later. Our point is that, without those details--particularly when combined with the lack of evidence regarding mother's cognitive abilities generally--it is impossible to determine that mother lacks the capacity to learn the necessary skills without "special assistance," which is the theory upon which jurisdiction was based.

Moreover, the evidence is undisputed that mother is eligible for 100 hours per month in adult developmental disability services and that those services can be used to help mother "learn the skills or * * * access services to be able to get those skills from somebody else." The record further discloses that mother is "very able to access services and tell people when she needs support." Mother also has the assistance of father who, on this record, we have determined is not incapable of safely parenting K. We are not unmindful of K's particular vulnerability due to her extremely young age; however, considering all of the above circumstances, we conclude that the evidence is legally insufficient to support the trial court's finding that mother is "not able to meet the basic needs of the child, due [to] her delays and medications."

In sum, we conclude that the evidence is insufficient, as a matter of law, to support the trial court's ultimate conclusion that K's "condition or circumstances are such as to endanger [her] welfare." ORS 419B.100(1)(c). As we have recently emphasized, "the burden is on the state to show that harm is, in fact, present[,]" *C. Z.*, 236 Or App at 443, and the state failed to meet that burden here.

249 Or App at 84, 87, 90-92 (Emphasis in bold italics added).

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

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

* * * * *

[A]s to the allegation in paragraph 2.C, the court found that the children were in danger because (1) father had a history of inappropriate sexual contact with minors; and (2) his inappropriate sexual contact with minors was "unremediated," in other words, uncorrected or ongoing. DHS must prove a current risk of harm, so the evidence of father's past--inappropriate

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

248 Or App at 722-23.

8. ***Dept. of Human Services v. D.M.*, 248 Or App 683, 275 P3d 971 (2012) (reversing review hearing judgment continuing wardship and leaving unresolved questions about the correct legal standard for juvenile court jurisdiction under ORS 419B.100(1)(c))**

THE COURT OF APPEALS' SUMMARY:

Mother appeals the juvenile court's decision to continue to exercise jurisdiction over her two children, I and A. When jurisdiction was first established, mother stipulated to the allegation that she had, at times, failed to provide adequate supervision of the children. At a subsequent review hearing, the court concluded, over mother's assertion to the contrary, that the condition underlying the stipulated allegation persisted. Held: At the time of the review hearing, there was no evidence underlying the decision to maintain wardship over A, and the evidence regarding mother's supervision of I--exposure to mother's unconventional but not unlawful lifestyle, receipt of lavish gifts from an adult male known as Uncle Woody, and an unspecified amount of unsupervised access to the Internet--cannot support the conclusion that mother exposed I to "a reasonable likelihood of harm," much less a current threat of serious loss or injury.

EXCERPTS FROM OPINION:

> Mother appeals the juvenile court's decision to continue to exercise jurisdiction over her two children, I and A. When jurisdiction was first established, mother stipulated to the allegation that she had, at times, failed to provide adequate supervision of the children. At a subsequent review hearing, the court concluded, over mother's assertion to the contrary, that the condition underlying the stipulated allegation persisted. We reverse.
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> ***The parties appear to disagree on one point. Mother argues that wardship must be dismissed unless DHS proves that the alleged jurisdictional bases continue to pose a current threat of serious loss or injury, citing Dept. of Human Services v. A. F., 243 Or App 379, 386, 259 P3d 957 (2011). According to DHS, the correct standard was set by the***

Supreme Court in State ex rel Juv. Dept. v. Smith, 316 Or 646, 653, 853 P2d 282 (1993): the court must continue wardship if "there is a reasonable likelihood of harm to the welfare of the child." DHS maintains that, in A. F., we "[did] not cite" Smith and that we are "bound by" it. DHS is correct that we did not cite Smith in A. F.; however, in the same paragraph where we explained that the court can maintain wardship only if there is a current threat of serious loss or injury, we also quoted the precise language from Smith.

> ***"Under ORS 419B.100(1)(c), the juvenile court has 'exclusive original jurisdiction' over any case involving a child 'whose condition or circumstances are such as to endanger the welfare' of the child. 'Endanger connotes exposure to "danger," which generally involves "the state of being threatened with serious loss or injury[.]"' State ex rel Dept. of Human Services v. Shugars, 202 Or App 302, 321, 121 P3d 702 (2005) (quoting Webster's Third New Int'l Dictionary 573 (unabridged ed 2002)). Thus, for the juvenile court to have jurisdiction over a child pursuant to ORS 419B.100(1)(c), the child's condition or circumstances must give rise to a threat of serious loss or injury to the child. The threat must be current. State v. S. T. S., 236 Or App 646, 654, 238 P3d 53 (2010) (the state must prove 'that there is a current risk of harm and not simply that the child's welfare was endangered at some point in the past' (emphasis in original)). And, there must be a reasonable likelihood that the threat will be realized. State ex rel Juv. Dept. v. Vanbuskirk, 202 Or App 401, 405, 122 P3d 116 (2005) (reasoning that the 'key inquiry in determining whether "condition[s] or circumstances" warrant jurisdiction is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child')."***

A. F., 243 Or App at 385-86 (first emphasis in original; second emphasis added). The two formulations complement each other and correctly state the standard. But even if we were to conclude that the Smith standard is significantly less demanding than the A. F. standard, we would nonetheless conclude that DHS failed to meet either.

In March 2010, DHS filed a dependency petition regarding I, then nine years old, and A, then three. After a shelter hearing, the juvenile court granted legal custody to DHS and ordered placement in mother's care. Shortly thereafter, the court took jurisdiction over the children based on mother's stipulations to two allegations: that mother had, at times, failed to provide adequate supervision of her children while the children were in her care, and that mother's substance abuse, if left untreated, impaired her judgment and ability to provide safe, consistent, and appropriate care of the children. A review hearing before a referee occurred approximately 14 months later, in July 2011. Mother moved to terminate the wardship; the referee denied the motion. At a subsequent hearing before a judge, the referee's decision was affirmed. This appeal ensued.

DHS presented no evidence that mother's substance abuse continued, nor does the department rely on that allegation here; the decision rested entirely on the conclusion that the conditions underlying mother's failure to provide adequate supervision persisted. That conclusion, in turn, rested on the following facts: (1) Mother had a telephone conversation in the presence of I (and a court appointed special advocate (CASA)) in which she discussed aspects of her former activities as a professional "escort" (although there is nothing in the record to indicate that mother ever engaged in unlawful activity); (2) Mother discussed her work as a dancer in front of I, but, when informed that such information was not appropriate, promised to "make [an] effort to make

sure that she didn't talk about it anymore in front of" I; (3) Mother allowed I to receive expensive gifts from an adult male known only as Uncle Woody (although there is nothing in the record to indicate that this man was not, in fact, I's (or mother's) uncle); (4) Mother did not adequately monitor I's Internet use, although she warned I about the dangers of Internet predators and instructed her never to provide personal information over the Internet; (5) A appeared "healthy, happy, well-cared for"; (6) Mother completed substance abuse treatment and completed a Family Skill Builder program of parenting classes, achieving what the instructor termed a "minimally adequate" level of parenting skill (although the instructor also recommended further training); (7) I hugged her male therapist the first time she met him, but "stopped immediately" when the therapist expressed concerns.

Based on these facts, a DHS caseworker who, six days before the review hearing, had recommended that wardship be terminated due to a lack of "a basis for continued involvement," nonetheless observed that mother's judgment continued to be questionable" and that mother could "benefit from continued supervision"; the case worker testified at the hearing that she had "concerns about the supervision that the kids are getting." DHS, as well as the children's attorneys and CASAs agreed, expressing particular concerns over I's potential vulnerability based on "poor boundaries with men" as demonstrated by her hugging her therapist and her receipt of gifts from the man known as Uncle Woody.

It is possible that the juvenile court's conclusions regarding mother's supervision derived from mother's affect at the hearing or from some *in camera* discussions --apparently, in one such discussion, somebody referred to mother taking I on a "stripper run," but there is no testimony as to whether that actually occurred or what a "stripper run" involves. Our review, however, is limited to the record before us. ***On this record, we conclude that, although mother may or may not have been an ideal parent, at the time of the review hearing, there is no evidence underlying the decision to maintain wardship over A, and the evidence regarding mother's supervision of I cannot support the conclusion that she exposed the girl to "a reasonable likelihood of harm," much less a current threat of serious loss or injury.*** Exposure to a parent's unconventional but not unlawful lifestyle, receipt of lavish gifts from a parent's friends or relatives, and an unspecified amount of unsupervised access to the Internet do not justify state intervention into a parent's fundamental right to the care, control, and custody of her children.

248 Or App at 685-88 (Emphasis in bold italics added).

9. *Dept. of Human Services v. J.H, Jr.*, 248 Or App 118, 273 P3d 203 (2012) (accepting state's concession that the evidence was legally insufficient to establish jurisdiction under ORS 419B.100(1)(c))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Father appeals a judgment in which the juvenile court took jurisdiction over his child. ORS 419B.100(1)(c) (providing generally that the juvenile court has exclusive jurisdiction over "a person who is under 18 years of age" and "[w]hose condition or circumstances are such as to endanger the welfare of the person or of others"). A detailed statement of the facts would not benefit the bench, the bar, or the public. As to mother, the trial court took jurisdiction over child based on mother's admission to an allegation in the dependency petition. As to father, the trial court took jurisdiction based on the fourth allegation in the dependency petition that he "has not presented himself as a parenting resource and needs the assistance of the Department of Human [Services (DHS)] to establish a meaningful relationship with the child."

On appeal, father contends, *inter alia*, that DHS "failed to prove any of the facts alleged as a basis for jurisdiction, much less that any of those 'facts' exposed child to a current threat of serious loss or injury that is likely to be realized." DHS concedes that "the juvenile court erred in finding that [the fourth allegation in the dependency petition concerning father] had been proven by a preponderance of the evidence." *See* ORS 419B.310(3) ("The facts alleged in the petition showing the child to be within the jurisdiction of the court as provided in ORS 419B.100(1), unless admitted, must be established by a preponderance of competent evidence."). We agree with DHS that the evidence is legally insufficient to support the court's exercise of jurisdiction as to father and accept DHS's concession.

10. *Dept. of Human Services v. J.B.*, 248 Or App 22, 273 P3d 196 (2012) (the juvenile court erred in dismissing the child's motion to set aside previous paternity determination on the ground that the motion was untimely)

THE COURT OF APPEALS' SUMMARY:

Child appeals a juvenile court order denying his motion for a judgment of nonpaternity as to C, a man who claims to be his biological father. ORS 419A.200(1); ORS 419A.205(1)(d). On appeal, child contends, inter alia, that, because C's paternity had not been previously established--the legal consequence of which was that child had no "legal father" pursuant to ORS 419A.004(16)--the juvenile court erred in denying his motion for a judgment of nonpaternity. Held: The Court of Appeals concluded that the juvenile court erred in determining that it had previously established C's paternity and, as a consequence, erred in treating child's motion as an untimely motion to set aside a prior paternity determination. Accordingly, the Court of Appeals reversed and remanded for the juvenile court to consider the merits of child's motion under ORS 419B.395, the statute authorizing the issuance of judgments of paternity and nonpaternity during the pendency of a juvenile proceeding, such as this one, where a child has no "legal father."

EXCERPTS FROM OPINION:

As framed by the parties' contentions, the striking point for our analysis is the legal propriety of the juvenile court's conclusion that C is child's "legal father" as defined by ORS 419A.004(16), which, in turn, was predicated on the juvenile court's determination that it had established C's paternity when it entered the June 2010 jurisdictional judgment. That is so because, if the juvenile court had previously established C's paternity such that C is child's "legal father," the court properly treated child's motion as one to set aside a previous paternity determination. However, if the court had not previously established C's paternity, so that child has no "legal father," the court erred in treating child's motion as one to set aside a previous paternity determination and the case must be remanded for the court to consider the merits of child's motion under ORS 419B.395(1)--the statute authorizing the issuance of judgments of paternity and nonpaternity during the pendency of juvenile proceedings where there is no "legal father."

As previously explained, ___ Or App at ___ (slip op at 1), a "legal father" is one "whose paternity has been established or declared under ORS 109.070 * * * or by a juvenile court[.]" ORS 419A.004(16)(a). As pertinent to this case, in order for C to be child's legal father" his paternity must have been established or declared in one of three ways--*viz.*, (1) C's paternity must have been established by the filing of a proper voluntary acknowledgment of paternity, as provided in ORS 109.070(1)(e); (2) C's paternity must have been "established or declared by other provision of law," as provided in ORS 109.070(1)(g); or (3) C's paternity must have been established or declared by the juvenile court, as provided in ORS 419A.004(16)(a). None of those requirements has been satisfied under the circumstances of this case.

Here, it is undisputed that C attempted to establish his paternity in only one way--that is, he attempted to establish his paternity through a voluntary acknowledgment as described in ORS 109.070(1)(e). As noted, his attempt failed because a proper voluntary acknowledgment of paternity was never filed. DHS was aware that C's paternity had not been legally established pursuant to ORS 109.070(1)(e). However, the court was not so aware. Thus, at the time that the juvenile court entered the June 10 jurisdictional judgment, it was operating under the mistaken assumption that C's paternity had been previously established through a voluntary acknowledgment, as provided in ORS 109.070(1)(e). At no point did the juvenile court seek to establish C's paternity under any other provision of law, as provided in ORS 109.070(1)(g), nor did the court seek to independently establish or declare C's paternity, as provided in ORS 419A.004(16)(a).

Accordingly, the juvenile court erred in determining that C's paternity had been established and, for that reason, that C was child's "legal father." That legal error, in turn, led to the juvenile court's erroneous treatment of child's motion as a motion to set aside a prior paternity determination--and yet again, in turn, to the court's denial of child's motion as untimely. Because of those errors, the court failed to evaluate child's motion under the operative statute--ORS 419B.395, which by its terms authorizes the juvenile court to determine paternity during the pendency of a juvenile proceeding such as this one when child has no "legal father." For that reason, we must remand the case to the juvenile court to determine the merits of child's motion under ORS 419B.395.

248 Or App at 32-34.

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

> The relevant facts are few and undisputed. In January 2011, the Department of Human Services (DHS) filed dependency petitions on behalf of N and A. Both petitions alleged that mother has cognitive limitations "which impair her ability to care for the child." At the time of the filings, N had recently been surrendered to DHS by his paternal aunt, who had been caring for him, and was in community foster care. A, who was born in late December 2010, was living with mother.
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> * * * * *
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> On appeal, mother argues, as she did below, that "the juvenile code does not require that a parent be able to *personally* provide all care for her children, so long as the inability to provide care does not endanger them, *i.e.*, another adult is present and capable of caring for the children." (Emphasis in original.) She also argues that the possibility "that [she] might choose to leave her supportive environment *at some point in the future* does not establish a *current* threat of serious loss or injury." (Emphasis in original.)
>
> In response, DHS argues that "mother's cognitive limitations and inability to parent independently in a safe manner represent a current threat of harm to the children." DHS further argues that, even though mother and A were living with Bingham at the time of the jurisdictional hearing, "the threat of harm to the children's welfare was still current" for two reasons. First, according to DHS, "it is questionable whether Bingham could provide the level of parenting supervision and support that mother and both children need[.]" Second, because of the voluntary nature of mother's living arrangement with Bingham, "mother is free to leave at any time."
>
> With the arguments thus framed, we turn to the relevant law. As we explained in *State v. S. T. S.*, 236 Or App 646, 654, 238 P3d 53 (2010):

> "Under Oregon's juvenile code, a juvenile court has 'exclusive original jurisdiction' in a case involving a child '[w]hose condition or circumstances are such as to endanger the welfare of the person or of others,' ORS 419B.100(1)(c), or whose parents '[f]ailed to provide the person with the care, guidance and protection necessary for the physical, mental or emotional well-being of the person,' ORS 419B.100(1)(e)(D). Our cases have established that a child's 'condition or circumstances' warrant the protection of juvenile court jurisdiction when, 'under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child.' *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005) (citing *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652-53, 853 P2d 282 (1993))."

(Brackets in *S. T. S.*) ***The focus of the jurisdictional inquiry is the child's condition or circumstances. S. T. S., 236 Or App at 654. In order for the child's condition or circumstances to justify juvenile court jurisdiction, they must give rise to a current "threat of serious loss or injury to the child." Dept. of Human Services v. A. F., 243 Or App 379, 386, 259 P3d 957 (2011).***

DHS bears the burden of proving facts sufficient to justify jurisdiction. *C. Z.*, 236 Or App at 443. Thus, in this case, DHS had to prove that, under the totality of the circumstances, there was a reasonable likelihood of harm to the children's welfare.

It failed to do so. As mentioned, DHS's argument at the jurisdictional hearing was that the juvenile court could take jurisdiction over the children because mother could not parent them independently. But, as mother correctly argued at the hearing, there is no legal requirement that a parent be able to care for his or her children independently. See State ex rel Dept. of Human Services v. Smith, 338 Or 58, 86, 106 P3d 627 (2005) (observing that "there is no statutory requirement that parent be able to care for the child 'independently.' All that [the juvenile code] requires is that the parent's inability to parent the child independently not work to the detriment of the child.").

Perhaps because DHS believed that the only question in the case was whether mother could parent independently, it failed to present evidence to establish that, "under the totality of the circumstances, there [was] a reasonable likelihood of harm to the welfare of the child[ren]." Vanbuskirk, 202 Or App at 405 (emphasis added). As described, at the time of the jurisdictional hearing, Bingham and her husband were willing to have mother and N and A live with them and to support mother in her parenting. DHS failed to carry its burden of proving that there was a "reasonable likelihood of harm," *id.*, to the children in such an environment. In other words, DHS failed to prove that the children would be at risk of "serious loss or injury," *A. F.*, 243 Or App at 386, while living with mother in Bingham's house.

As mentioned, DHS argues that, even if the children will not be at risk in Bingham's house, mother might leave Bingham's house. That is true, but DHS must prove that there is a *current* risk of harm. *S. T. S.*, 236 Or App at 654. Although there may be cases in which a parent's past conduct provides a basis for concluding that it is reasonably likely that the parent will change his or her children's circumstances to their detriment, this is not such a case. The record provides no basis for concluding that it is reasonably likely that mother will leave her current supportive environment.

246 Or App at 770, 772-74 (Emphasis in bold italics added).

12. *Dept. of Human Services v. D.S.F.*, 246 Or App 302, 266 P3d 116 (2011) (evidence insufficient to establish jurisdiction under ORS 419B.100(1)(c))

THE COURT OF APPEALS' SUMMARY:

The juvenile court entered a judgment taking jurisdiction over father and mother's children pursuant to ORS 419B.100(1)(c) on the ground that the children were endangered by their circumstances. One of the bases for the court's judgment was its conclusion that father would endanger the children by allowing them to have contact with mother, who has a long history of substance abuse problems. Father appeals, arguing that the juvenile court's conclusion that he would endanger the children is not supported by the record. Mother does not appeal. Held: The juvenile court erred in taking jurisdiction over the children based on father's conduct because there was insufficient evidence that father's conduct was reasonably likely to harm the welfare of the children.

13. *Dept. of Human Services v. G.E.*, 246 Or App 136, 265 P3d 53 (2011) (juvenile court erred in denying motion to dismiss wardship where no basis existed for continuing jurisdiction under the jurisdictional judgment)

THE COURT OF APPEALS' SUMMARY:

Mother petitions for reconsideration of the court's decision remanding for reconsideration an order continuing the juvenile court's jurisdiction over mother's child, N. Held: The court allowed reconsideration and determined that there is no longer any basis for a continuation of jurisdiction based on the original jurisdictional judgment and that the juvenile court therefore erred in denying mother's motion to dismiss.

14. *Dept. of Human Services v. G.D.W.*, 246 Or App 66, 264 P3d 205 2011, *rev allowed* 351 Or 678 (2012) (juvenile court did not err in admitting the out-of-court statements of the child pursuant to OEC 801(4)(b)(A))

THE COURT OF APPEALS' SUMMARY:

Father appeals judgments finding his daughters, V and C, to be within the jurisdiction of the juvenile court as to him and concluding, based on a finding that father had subjected V to sexual abuse, that aggravated circumstances excused the Department of Human Services from making reasonable efforts to reunify the children with father. On appeal, father contends that the juvenile court erred in admitting the out-of-court statements of V, in finding that he had sexually abused V and that, therefore, aggravated circumstances existed, and in finding jurisdiction based on his history of cocaine and alcohol abuse. Held: The juvenile court properly admitted the out-of-court statements of the child pursuant to OEC 801(4)(b)(A). Furthermore, on review for any evidence, there is evidence in the record to support the court's finding that father sexually abused V and that finding, in turn, supports the court's jurisdiction and its aggravated circumstances determinations. Finally, in light of all the circumstances presented in this case,

the juvenile court did not err in including father's history of alcohol and cocaine abuse among its bases for jurisdiction.

EXCERPT FROM OPINION:

> In his first assignment of error, father contends that the "juvenile court erred in admitting the out-of-court statements of the child." The court admitted the statements in question based on this court's decision in *State ex rel Juv. Dept. v. Cowens*, 143 Or App 68, 922 P2d 1258, *rev den*, 324 Or 395 (1996), which we later reaffirmed in *State ex rel Dept. of Human Services v. Meyers*, 207 Or App 271, 140 P3d 1181, *rev den*, 341 Or 450 (2006).
>
> Specifically, in *Cowens*, this court considered whether out-of-court statements of a child could be admitted in a dependency proceeding and held that such statements were admissible as nonhearsay pursuant to OEC 801(4)(b)(A). In reaching that conclusion, we observed that a child over whom jurisdiction is sought is a party to the jurisdictional proceeding pursuant to ORS 419B.115. 143 Or App at 70. Furthermore, we reasoned that minor children have an interest in maintaining a familial relationship with their parents." *Id*. at 71. Thus, "when the state seeks to interfere with the parent-child relationship -- either permanently in a termination proceeding or temporarily in a dependency proceeding--the child has interests adverse to the state. As such, the state's evidence is offered not only against the parent, but also against the child." *Id*. at 72. For those reasons, a child's out-of-court statement qualifies as nonhearsay.
>
> We later reaffirmed that holding in *Meyers*. In that case, the juvenile court admitted out-of-court statements of a child in a termination of parental rights proceeding. The mother contended that *Cowens* was not applicable to the circumstances presented there "because the interests of the children and the state completely" coincided. *Meyers*, 207 Or App at 280. We disagreed, stating that "children have dual interests in a case such as this. They continue to also have an interest in the right to maintain and enjoy the relationship of parent and child." *Id*. at 280-81. Accordingly, we concluded that the trial court properly admitted the child's out-of-court statements "as a statement of a party opponent." *Id.* at 281.
>
> Father acknowledges our holding in *Cowens*, but contends that the case was wrongly decided. We decline father's invitation to overrule that case and, instead, adhere to its holding that a child's out-of-court statements in a dependency case are admissible as statements of a party opponent. Accordingly, we conclude that the court in this case properly admitted the child's out-of-court statements under OEC 801(4)(b)(A).
>
> _____
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> [NOTE 3]: We also observed that, "[a]lthough a child in a particular case may share an interest with the state in being protected from [an abusive] home environment, it simply cannot be said that the state represents *all* the child's interests." *Cowens*, 143 Or App at 72 (emphasis in original). We also noted that "it would be inappropriate to allow the perceptions of a child to determine * * * a fundamental evidentiary question." *Id.* Thus, we determined that the admissibility of a child's out-of-court statements does not depend on whether the child views his or her interests as adverse to or aligned with the state.

246 Or App at 69-70.

THE SUPREME COURT'S SUMMARY:

Petitioner G.D.W. (father) seeks review of a Court of Appeals decision that affirmed a juvenile court judgment finding his two daughters to be within the jurisdiction of the juvenile court, based upon a finding that he had subjected one of his daughters to sexual abuse.

On review, the issue is: Under OEC 801(4)(b), may the out-of-court statements of a non-testifying child, which allege abuse or neglect by the parent, be admitted against the parent in a juvenile dependency or termination of parental rights case?

DEPENDENCY
Permanency Proceedings

15. *Dept. of Human Services v. T.C.A.* --- Or App ---, --- P3d --- (July 25, 2012) (affirming judgment changing permanent plan for the child from adoption to APPLA and rejecting mother's argument that, notwithstanding that adoption was the permanent plan in effect at the time of the permanency hearing, the juvenile court was required to determine whether DHS had made reasonable efforts to reunite the child with her)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment that changed the permanency plan for child from adoption to another planned permanent living arrangement (APPLA). Prior to the permanency hearing and judgment that is on appeal, the Court of Appeals had reversed a judgment of the juvenile court that had terminated mother's parental rights to child. *Dept. of Human Services v. T. C. A.*, 240 Or App 769, 248 P3d 24 (2011). After the case was remanded, the juvenile court held a permanency hearing at which mother requested a change in plan to reunification and the Department of Human Services (DHS) requested a change to APPLA. The court changed the plan to APPLA after determining that, pursuant to ORS 419B.476(2)(b), DHS had made reasonable efforts to place child in accordance with the existing plan of adoption, and, pursuant to ORS 419B.476(5), that there were compelling reasons why it would not be in the best interests of child to be returned to mother, placed for adoption, placed with a legal guardian, or placed with a fit and willing relative. Mother appealed, arguing that DHS was required to make reasonable efforts to reunite mother and child and that DHS violated the applicable administrative rules that govern DHS's approval and implementation of APPLA as a permanency plan. Held: The juvenile court did not err in changing the permanency plan from adoption to APPLA. The court's determination under ORS 419B.476(2)(b) that DHS made reasonable efforts to place child in accordance with the plan at the time of the hearing was not

legally erroneous. Further, the court did not abuse its discretion when it determined that there were compelling reasons why it would not be in the best interests of child to be returned home or placed in another more preferred permanency plan. Mother lacked safe and stable housing, violated her treatment program's prohibition on alcohol consumption, and exhibited other dishonest and unstable behavior. In addition, the other more preferred permanency plans were not available to child. As to mother's challenge to DHS's compliance with APPLA's implementing administrative rules, DHS complied with those rules.

EXCERPTS FROM OPINION:

> * * * DHS asserts that ORS 419B.476(2)(b) applies because the case plan at the time of the permanency hearing was adoption. That statutory provision states that, at a permanency hearing, the court shall,
>
> > "[*i*]*f the case plan at the time of the hearing is something other than to reunify the family*, determine whether the department has made reasonable efforts to place the ward in a timely manner in accordance with the plan, including, if appropriate, reasonable efforts to place the ward through an interstate placement, and to complete the steps necessary to finalize the permanent placement."
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> ORS 419B.476(2)(b) (emphasis added).
>
> In contrast, mother's first argument on appeal is that DHS failed to make reasonable efforts to reunite mother and AA and that DHS failed to prove that mother's progress was insufficient to allow AA to be safely placed in her care. Those standards are located in ORS 419B.476(2)(a), which states that the court shall,
>
> > "[*i*]*f the case plan at the time of the hearing is to reunify the family*, determine whether the [d]epartment * * * has made reasonable efforts * * * to make it possible for the ward to safely return home and whether the parent has made sufficient progress to make it possible for the ward to safely return home. In making its determination, the court shall consider the ward's health and safety the paramount concerns."
>
> In her appellate brief, mother does not dispute that the permanency plan at the time of the hearing was adoption, not reunification, and she does not explain why she believes that the "reasonable efforts" and "sufficient progress" standards in ORS 419B.476(2)(a) should nevertheless apply in a case where reunification was not the plan at the time of the hearing. However, she argued before the trial court and again on appeal that a "necessary implication" of our opinion reversing the termination of mother's parental rights in *T. C. A.* was that DHS was required to make reasonable efforts to reunify mother and AA.
>
> *** * *** Nothing in our decision in *T. C. A.* explicitly or implicitly changed the permanency plan to reunification nor did it otherwise make ORS 419B.476(2)(a) applicable where the permanency plan was something other than reunification. Mother provides no other cogent reason, and we are aware of none, for importing ORS 419B.476(2)(a) into this case. Accordingly, ORS 419B.476(2)(b) governed the juvenile court's review of DHS's efforts.

> ***Nevertheless, even in a case such as this, where the permanency plan at the time of the hearing is something other than reunification and DHS is seeking a change in plan to APPLA, the juvenile court must examine whether it would be in the best interests of the child to be returned home or be placed in a more preferred permanency plan and, if it is not, offer a compelling reason for that decision. ORS 419B.476(5)(a) and (f) require the court, after a permanency hearing, to enter an order that includes its determination under ORS 419B.476(2)(b) and, if it determines that the plan for the ward should be APPLA, "the court's determination of a compelling reason, that must be documented by the department, why it would not be in the best interests of the ward to be returned home, placed for adoption, placed with a legal guardian or placed with a fit and willing relative[.]" We also note that ORS 419B.476(4)(c) authorizes the court during any permanency hearing to determine that further efforts will make it possible for the ward to safely return home within a reasonable time and, in such cases, to "order that the parents participate in specific services for a specific period of time and make specific progress within that period of time[.]***"
>
> Accordingly, the juvenile court was required to examine DHS's efforts under ORS 419B.476(2) and also determine if there was a compelling reason why it would not be in the best interests of the ward to be returned home or placed in accordance with a preferred permanency plan. * * *.

Slip Opinion at 6-8 (Emphasis in bold italics added).

16. *Dept. of Human Services v. T.R.* --- Or App ---, --- P3d --- (July 5, 2012) (affirming permanency judgment changing case plan from reunification to adoption because the record supported the juvenile court's determination that DHS reunification efforts were reasonable and the child could not be returned home safely; the juvenile court's failure to make the findings required by ORS 419B.476(5)(b)(B) – *i.e.,* when the termination petition will be filed and when the child will be placed for adoption -- did not constitute reversible error)

THE COURT OF APPEALS' SUMMARY:

Parents separately appeal from a judgment of the juvenile court changing the permanency plan for the child from reunification to adoption. They contend that the juvenile court erred in determining that DHS provided reasonable services to both parents and that the parents had not made sufficient progress to allow the child to safely return home, because the juvenile court gave undue weight to the fact that the parents had not provided specific information about or directly acknowledged responsibility for the child's injuries. They further contend that the judgment is defective because it does not contain the findings required by ORS 419B.476(5)(b)(B). Held: The evidence in the record supports the juvenile court's determination that DHS provided reasonable services to both parents and that the parents had not made sufficient progress to allow the child to safely return home. The juvenile court's failure to make the findings required by ORS 476B.476(5)(b)(B) is not a defect that is fatal to the judgment and reversible error per se.

EXCERPTS FROM OPINION:

> As noted, the juvenile court found that the parents either caused, or knew or should have known of, the child's injuries, and that finding is not challenged by the parents. A primary concern of DHS and the trial court is that, despite the parents' cooperation and participation in the provided services, the parents' categorical denial of any knowledge concerning the source of the child's injuries has been the major obstacle to DHS's efforts. In the absence of such information, DHS has taken the position that it is not possible to know whether the provided services have addressed the underlying cause of the child's injuries; thus, it could not be determined whether the child would still be at risk if returned home or if the parents had made sufficient progress to allow reunification. There is evidence in support of that concern, which was essentially adopted by the juvenile court. The court found that, despite the parents' participation in services, in the absence of an acknowledgment of wrongdoing by the parents, the court was not convinced that the parents were rehabilitated or that those services were likely to prevent future abuse of the child. Thus, the court implicitly concluded that the parents had not made sufficient progress to make it possible for the child to return home. The evidence supports that determination by the trial court.
>
> Finally, mother contends that the juvenile court committed reversible error in failing to establish a deadline for DHS to file a petition to terminate parental rights and to place the child for adoption, as required by ORS 419B.476(5)(b)(B). We have held in a number of opinions that a failure to make determinations under ORS 419B.476 is reversible error. * * *
>
> We have never addressed whether the juvenile court's failure to make the findings required by ORS 476B.476(5)(b)(B) is similarly fatal, and we conclude here, based on the different nature of the findings and language in this particular judgment, that it is not. Unlike the findings required by ORS 419B.476(2)(b) and (c) and ORS 419B.476(5)(a), (d), and (f), which go to the heart of the decision to change the permanency plan to adoption, the juvenile court's findings under ORS 476B.476(5)(b)(B) as to when the ward will be placed for adoption and when a petition for termination rights will be filed does not reflect on the substance of the juvenile court's permanency determination. Unlike the determination required by ORS 419B.476(5)(d) whether any of the circumstances in ORS 419B.498(2) are applicable, the setting of a date for the filing of a petition for termination and placing the child for adoption does not go to the heart of the permanency determination as a reflection of the bases for the court's reasoning or ultimate decision.

Slip Opinion at 10-13.

17. *Dept. of Human Services v. S.A.*, 250 Or App 720, --- P3d --- (2012) (reversing order establishing guardianship because the juvenile court erred in failing to decide whether the permanent plan should be changed from guardianship to reunification, as father had urged)

THE COURT OF APPEALS' SUMMARY:

In this dependency case, the juvenile court adopted a permanency plan for father's child, C, that referred C for guardianship under ORS 419B.476. Sometime later, father sought to change the permanency plan to provide for the return of C to him. At the same time, the Department of Human Services (DHS) moved to establish a particular guardian for C under ORS 419B.366. After a hearing, the juvenile court entered an order establishing the guardianship. Father appeals from that order, contending, among other things, that the court erred in failing to include in that order the permanency determinations required by ORS 419B.476(5) and that there is no evidence to support the court's determination, under ORS 419B.366(5)(c), that the "proposed guardian is suitable to meet the needs of the ward and is willing to accept the duties and authority of a guardian." Held: There was evidence in the record--affidavit testimony by counsel for DHS--to support the court's determination that the guardian was suitable and willing. Accordingly, the court did not err by making that determination. However, the court did err in failing to decide one of the issues before it--whether the permanency plan for C should remain guardianship or be changed to reunification--as required by ORS 419B.476(5)(b). Affirmed in part, reversed in part, and remanded for further proceedings.

EXCERPTS FROM OPINION:

> In this dependency case, the juvenile court adopted a permanency plan for father's child, C, that referred C for guardianship under ORS 419B.476. ***Sometime later, father sought to change the permanency plan to provide for the return of C to him***. At the same time, the Department of Human Services (DHS) moved to establish a particular guardian for C under ORS 419B.366. After a hearing, the juvenile court entered an order establishing the guardianship. * * *.
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> * * * * *
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> * * * ***That order did not include any of the permanency determinations required by ORS 419B.476(5), including a determination of the permanency plan under ORS 419B.476(5)(b). In father's first assignment of error, he contends that the juvenile court erred in entering an order after the September 30 hearing that did not comply with the requirements of ORS 419B.476(5). As noted, that statute requires a court to enter a written order within 20 days after a permanency hearing that includes a determination regarding the permanency plan for the ward and predicate findings supporting that determination***.
>
> * * * * *
>
> * * * [W]e conclude that the September 30 hearing was a permanency hearing and that father did not abandon his request for a permanency plan determination regarding C. Father's

> counsel explained to the court that the "matter was continued as a permanency hearing as to [T] as well as [C]." Then, father's counsel explicitly withdrew "the request that today be a permanency hearing as to [T]." That withdrawal as to T cannot be understood as a simultaneous withdrawal of father's request for a permanency hearing as to C. In fact, read together, father's counsel's statements to the court are an explicit indication of father's continued desire for a permanency plan determination regarding C. Moreover, the court's own statement at the conclusion of the hearing that "this was simply a question of whether we could have a return to father plan for C" illustrates that the court understood that father was still seeking a permanency plan determination. Finally, the hearing was scheduled as the yearly permanency hearing for C required by ORS 419B.470(6); accordingly, even if father had explicitly withdrawn his request for a permanency hearing, the court was obligated by statute to conduct a permanency hearing and make a permanency plan determination regarding C.
>
> Given all of that, we conclude that the court erred in failing to decide the issue before it--whether the permanency plan for C should remain guardianship or be changed to reunification--as required by ORS 419B.476(5)(b). Again, that statute requires the court to enter a written order within 20 days after a permanency hearing that includes, among other things, the "court's determination of the permanency plan for the ward." Here, the court entered an order within 20 days of the September 30 permanency hearing that did not contain an express determination of the permanency plan for C. Accordingly, the court erred under *M. A.*

250 Or App at 722, 727-29 (Footnote omitted; emphasis in bold italics added).

18. *Dept. of Human Services v. S.N.*, 250 Or App 708, --- P3d --- (2012) (affirming permanency judgment changing case plan from reunification to placement with a fit and willing relative and concluding that the record supported the juvenile court's findings that DHS had made "reasonable efforts" and that father had not made sufficient progress to permit the child's safe return home within a "reasonable time")

THE COURT OF APPEALS' SUMMARY:

Father appeals a permanency judgment that changed the permanency plan for his daughter, L, from reunification to placement with a fit and willing relative through establishment of a permanent guardianship. In the judgment, the juvenile court determined that the Department of Human Services (DHS) had made reasonable efforts to reunify L with father and that father had not made sufficient progress to make it possible for L to return home within a reasonable time. Father contends the court erred in changing the permanency plan. Held: The juvenile court did not err as a matter of law in determining that DHS made reasonable efforts and that father had not made sufficient progress to allow the child to return home within a reasonable time.

EXCERPT FROM OPINION:

> At a permanency hearing,
>
> "[if] the case plan at the time of the hearing is to reunify the family,[the juvenile court must] determine whether [DHS] has made reasonable efforts * * * to make it possible for the ward to safely return home and whether the parent has made sufficient progress to make it possible for the ward to safely return home. In making its determination, the court shall consider the ward's health and safety the paramount concerns."

ORS 419B.476(2)(a). ***Thus, in order to change the permanency plan, the juvenile court must determine that (1) DHS has made reasonable efforts to make it possible for the child to return safely home and (2) despite those efforts, the parent has not made sufficient progress to allow the child to return safely home.***

"The particular circumstances of each case dictate the type and sufficiency of efforts that the state is required to make and whether the types of actions it requires parents to make are reasonable[.]" *N. S.*, 246 Or at 349-50 * * *. In view of that standard, we agree with the juvenile court that, under the particular circumstances presented in this case, DHS made reasonable efforts. Father's mental health was one of the paramount concerns in this case. Accordingly, DHS referred father for a psychological evaluation to determine what services might provide a benefit to him. Indeed, as the juvenile court noted in its judgment, DHS provided father with "3 different referrals for psychological evaluations with three different psychologists" and "offered transportation and lodging arrangements for the out of area evaluations." After the psychologist who evaluated father opined that father's personality disorder could not be effectively treated and that mental health treatment was not recommended because father would not respond well and such treatment would "invariably be low yield," DHS nonetheless provided father with a 10-week parenting class that the psychologist noted might provide some benefit. In addition, DHS provided weekly supervised visits with L and offered father gas vouchers in the event that he needed them to allow him to attend visits. Although the caseworker consulted with Morrell to determine whether there were any additional services that might be useful to father, no such services could be identified. Given all the circumstances, and especially in view of the psychologist's assessment of father's mental health issues, prognosis, and the likely effectiveness of any services, we cannot say that the trial court committed legal error in determining DHS's efforts were reasonable.

* * * [W]e next address the juvenile court's determination that father had failed to make sufficient progress to make it possible for L to safely return home within a reasonable time. "***As we have previously explained, a parent's mere participation in services * * * is not sufficient to establish adequate progress toward reunification***. Rather, ORS 419B.476(2)(a) requires us to focus on the child's health and safety." *N. S.*, 246 Or App at 351 (internal quotation marks, brackets, and citation omitted).

Here, father eventually completed a psychological evaluation. In addition, he successfully completed a parenting class and faithfully attended visits with L, where, for the most part, he acted appropriately and did well with L. However, completion of those services does not mean that he made sufficient progress to make it possible for L to return home. Indeed, regardless of those services, Morrell opined that, as a result of his mental health issues, father is paranoid and angry, projects blame, feels threatened by the world around him, and can be threatening. When

> father is angry, he becomes "irate" and yells and, on occasion, even makes violent threats. Furthermore, father has shown significant poor judgment. Given that father's personality disorder is untreatable, along with the effect of father's other mental health issues, Morrell did not believe that L could be placed with him and, further, did not believe that any services could make father a suitable placement for L. Morrell's assessment appears to be borne out by father's conduct in acting in angry and threatening ways toward workers involved in this case, his conduct in conversations with Dysart in which he became angry, irate, and threatening, and father's own affirmation that, when he is angry and frustrated, he yells and "vents."
>
> ***At the same time, L's history of physical abuse and resultant PTSD make her hyper-vigilant to sound. Accordingly, an atmosphere in which there was screaming and yelling, even if that yelling were not directed at L, would be extremely threatening and detrimental to L. Given that reality, even in view of father's positive visits with L and his good performance in the parenting class, the juvenile court did not err as a matter of law in determining that father failed to make sufficient progress to allow L to be returned to him within any reasonable period of time.***

250 Or App at 716-18 (Emphasis in bold italics added).

19. *Dept. of Human Services v. A.R.S.*, 249 Or App 603, 278 P3d 91 (2012) (reversing permanency judgment ordering return of the child to father's custody, because the juvenile court based its determination that mother had not made sufficient progress to permit the child's placement with her on the erroneous premise that the mother was required to show that she could parent the child "independently")

THE COURT OF APPEALS' *PER CURIAM* OPINION:

This is a consolidated dependency case in which mother and child separately appeal permanency judgments of the juvenile court. In those judgments, the court determined that mother had not made sufficient progress toward reunification to enable child to be returned to her within a reasonable period. *See* ORS 419B.476(2). The court also determined that father *had* made sufficient progress and, therefore, that the permanency plan for child would remain return to parent and, pending completion of certain conditions, child would be returned to father's care in Mexico not later than September 2011. *See* ORS 419B.476(5)(b)(A).

The parties raise various challenges to the court's judgments; among other issues, mother and child argue that the court erred in determining that mother had not made sufficient progress to allow for reunification within a reasonable time because the court based that determination on the legally erroneous premise that mother was required to demonstrate that she was able to parent child independently. A detailed discussion of the facts of this case would be of little benefit to the bench, bar, or public. It suffices to say that we have reviewed the record, and it appears that the juvenile court was indeed operating under a misapprehension that mother must be able to parent child independently--that is, without the assistance of child's maternal grandmother, who was child's foster placement and with whom mother (with

grandmother's approval and encouragement) wanted to live--in order to demonstrate sufficient progress under the statute. We agree that that was legal error. *See State ex rel Dept. of Human Services v. Smith*, 338 Or 58, 86, 106 P3d 627 (2005) (ability to parent independently is not a legal requirement for parental fitness; rather, all that is required is that "the parent's inability to parent the child independently not work to the detriment of the child"). In *Dept. of Human Services v. B. L. J.*, 246 Or App 767, 773-74, 268 P3d 696 (2011), we held, relying on *Smith*, that the mother's inability to parent her children without the assistance of a couple with whom the mother was living and who were willing to support the mother in her parenting did not demonstrate a reasonable likelihood of harm to the welfare of the children sufficient to warrant juvenile court jurisdiction. It necessarily follows that the determination of a parent's progress toward reunification following the establishment of jurisdiction also may not be based on that requirement.

Here, the juvenile court repeatedly referred to mother's inability to independently care for child in explaining the reasons for its decision. And, contrary to the state's suggestion, there is no indication in the record that, at the time of the permanency hearing, the court was concerned that grandmother was not, *in fact*, a reliable and safe resource for assisting mother in caring for child. Accordingly, we reverse the judgments and remand for the juvenile court to reconsider in light of the correct legal principles.

20. *Dept. of Human Services v. E.D.H.*, 249 Or App 609, 278 P3d 93 (2012) (accepting state's concession of error and reversing permanency judgments changing plan for the two children from reunification to adoption because the juvenile court failed to make the findings required by ORS 419B.476(5)(a) -- *i.e.,* the judgments did not include, among other things, "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")

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this dependency case, mother appeals judgments of the juvenile court changing the permanency plans for her children, L and E, from reunification to adoption. Mother raises two issues, one of which is that the court erred in not allowing her to testify by telephone at the permanency hearing. We reject that argument without discussion. *See* ORS 45.400(2) (motion to testify by telephone requires written notice to other parties to the proceeding). Mother also contends that the court erred in failing to include in the judgments the determinations required under ORS 419B.476(5)(a), including a description of the efforts of the Department of Human Services toward implementing the plan of reunification. The state concedes that error, and we agree. *State ex rel DHS v. M.A. (A139693)*, 227 Or App 172, 205 P3d 36 (2009). Accordingly, we accept the state's concession and reverse and remand the judgments for the juvenile court to remedy those defects.

21. *Dept. of Human Services v. L.B.T.*, 249 Or App 525, 276 P3d 284, *vacated as moot* 249 Or App 695 (2012) (accepting state's concession of error and reversing permanency judgment changing plan from reunification to adoption because the juvenile court failed to make the findings required by ORS 419B.476(5)(d))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this dependency case, mother appeals a judgment changing the permanency plan for her child from reunification to adoption. She contends that the juvenile court erred in failing to "include on the face of the judgment its determination of whether there was any reason under ORS 419B.498(2) to defer the filing of a petition to terminate mother's parental rights, as required by ORS 419B.476(5)(d)." The state concedes that the permanency judgment does not include the findings required pursuant to ORS 419B.476(5)(d) and that the case must, therefore, be reversed and remanded. *See State ex rel Juv. Dept. v. J. F. B.*, 230 Or App 106, 115, 214 P3d 827 (2009) (permanency judgments that failed to include statutorily required findings were defective on their face); *State ex rel DHS v. M. A.*, 227 Or App 172, 181-82, 205 P3d 36 (2009) (reversing and remanding permanency judgments that did not include required findings). We agree and accept the state's concession.

22. *Dept. of Human Services v. O.W.*, 248 Or App 477, 273 P3d 334 (2012) (accepting state's concession of error and reversing permanency judgments changing plan from reunification to guardianship because the juvenile court failed to make the findings required by ORS 419B.476(5)(e))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Mother appeals a permanency judgment changing the case plan for her child from reunification to guardianship. She argues that the juvenile court erred in failing to make and include in the judgment the statutorily required findings. ORS 419B.476(5)[(e)]. The Department of Human Services concedes that the judgment is deficient and should be remanded in order for the juvenile court to comply with ORS 419B.476(5)[(e)]. *See State ex rel Juv. Dept. v. J. F. B.*, 230 Or App 106, 114-15, 214 P3d 827 (2009) (remanding for juvenile court to enter judgments that comply with ORS 419B.476). We agree and accept the concession.

23. *Dept. of Human Services v. A.J.M.*, 248 Or App 323, 273 P3d 278 (2012) (accepting state's concession of error and reversing permanency judgments changing plan from reunification to adoption because the juvenile court failed to make the findings required by ORS 419B.476(5)(d))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

In this dependency case, mother appeals from a judgment changing the permanency plan for her child from reunification to adoption. She contends that the "juvenile court erred in failing to make and include in the permanency judgment a 'compelling reasons' determination, as required by ORS 419B.476(5)(d)." The state concedes that the permanency judgment failed to include the findings required pursuant to ORS 419B.476(5)(d) and that the case must, therefore, be reversed and remanded. *See State ex rel Juv. Dept. v. J. F. B.*, 230 Or App 106, 114-15, 214 P3d 827 (2009) (permanency judgment that failed to include statutorily required findings was defective on its face); *State ex rel DHS v. M. A.*, 227 Or App 172, 183-84, 205 P3d 36 (2009) (where permanency judgments fail to comply with statutory requirements, they must be reversed and remanded). We agree and accept the state's concession.

[Footnote:] Because we accept the state's concession and reverse and remand with respect to mother's second assignment of error, we do not address her first assignment of error [-- *i.e.,* the failure of the judgment to include the findings required by ORS 419B.476(5)(a)].

24. *Dept. of Human Services v. N. T.*, 247 Or App706, 271 P3d 143 (2012) (reversing permanency judgment changing plan from reunification to adoption because the juvenile court relied on facts extrinsic to the bases for jurisdiction in assessing parents' progress)

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal from juvenile court judgments changing the permanency plans for their two children from reunification to adoption. They contend, inter alia, that the juvenile court erred in relying on facts outside the scope of the jurisdictional judgment--specifically, facts relating to the alleged sexual abuse of one of the children by father--in assessing whether the change was warranted under ORS 419B.476(2)(a). Held: In making its decision to change the plans, the court relied on the alleged sexual abuse, identifying it as a barrier to father's reunification with the children and, because the parents "presented as a couple," also attributing that barrier to mother. Because the judgment establishing jurisdiction over the children did not explicitly or implicitly encompass those allegations, it was error for the court to do so under *Dept. of Human Services v. G. E.*, 243 Or App 471, 260 P3d 516, *adh'd to as modified on recons*, 246 Or App 136, 265 P3d 53 (2011), and *Dept. of Human Services v. N. M. S.,* 246 Or App 284, ___ P3d ___ (2011). Because it is unclear whether the juvenile court would have reached the same conclusions in the absence of the sexual abuse allegations, the error was not harmless.

EXCERPT FROM OPINION:

* * * [The]parents contend, *inter alia*, that the juvenile court erred in relying on "facts extrinsic to the jurisdictional judgment"--specifically, the facts relating to Mu's alleged sexual abuse--to change the permanency plans for the children to adoption. They argue that they had no opportunity to contest those allegations, nor were they provided with remedial services to ameliorate the concerns raised by the allegations, if true. Consequently, parents assert, their substantial rights have been affected and, therefore, under our recent opinions in *Dept. of Human Services v. G. E.*, 243 Or App 471, 260 P3d 516, *adh'd to as modified on recons*, 246 Or App 136, 265 P3d 53 (2011), and *Dept. of Human Services v. N. M. S.*, 246 Or App 284, ___ P3d ___ (2011), they are entitled to reversal of the permanency judgments. We agree.

When a child is in substitute care, the juvenile court is required to hold periodic permanency hearings, including one "no later than 12 months after the ward was found within the jurisdiction of the court under ORS 419B.100 or 14 months after the child or ward was placed in substitute care, whichever is the earlier." ORS 419B.470(2). If, at the time of the hearing, the case plan is to reunify the family, the court must determine whether DHS has made "reasonable efforts" and whether the parent has made "sufficient progress" to make it possible for the child to safely return home. ORS 419B.476(2)(a). "Thus, to obtain a change in the permanency plan from return to parent to adoption, DHS must prove that, despite its reasonable efforts to effect reunification, the parents did not make sufficient progress to allow the child's safe return to the home." *State ex rel Juv. Dept. v. C. D. J.*, 229 Or App 160, 164-65, 211 P3d 289 (2009).

The particular issues of parental unfitness established in the jurisdictional judgment provide the framework for the court's analysis of each question--that is, both DHS's efforts and a parent's progress are evaluated by reference to the facts that formed the bases for juvenile court jurisdiction. *State ex rel Juv. Dept. v. K. D.*, 228 Or App 506, 515, 209 P3d 810 (2009). Reliance on other facts can affect a parent's right to both notice of what conditions or circumstances the parent must remediate and a reasonable opportunity--through access to services--to remediate them. *See G. E.*, 243 Or App at 479-81 (holding that a court may not continue dependency jurisdiction over a child based on facts not alleged in or inferable from the jurisdictional petition, where reliance on those facts "affect[s] the substantial rights of the parent" (internal quotation mark omitted)); *see also N. M. S.*, 246 Or App at 297-98 (applying the reasoning of *G. E.* to a permanency judgment). ***Thus, if a court, in making its determination under ORS 419B.476(2)(a), relies on facts other than those explicitly stated or fairly implied by the jurisdictional judgment, and doing so affects the substantial rights of a parent, the determination cannot be sustained.***

* * * DHS does not contend that the threat of harm from sexual abuse was a condition or circumstance encompassed in the court's jurisdictional judgments.

* * * * *

* * * [T]he [juvenile] court's decision to change the children's plans from reunification to adoption was based on three factors: (1) "the barriers" to father's reunification with the children; (2) Mu's special needs; and (3) the fact that parents "present as a couple." Taken in context, it is inescapable that the "barriers" to which the court refers include the alleged sexual abuse of Mu and resulting discontinuation of father's visits with her. Notably, the court explains that, although

there are barriers to father reunifying with Me, there are "even more substantial barriers" preventing father from reunifying with Mu. The latter can only refer to the sexual abuse allegations and resulting consequences. If the court was relying on father's continued drug abuse and mental health issues only--and not on the facts surrounding the sexual abuse of Mu--as DHS contends, the barriers to father's reunification with respect to both children would necessarily be the same. Moreover, the third factor--that parents "present as a couple"--indicates that the court attributed father's barriers to mother, including the barrier created by the allegations of sexual abuse, and relied on those barriers to conclude that mother would be unable to adequately parent the children within a reasonable time. Under *G. E.* and *N. M. S.*, it was error for the court to do so.

DHS argues, however, that, even if the juvenile court improperly considered the sexual abuse allegations, the error was harmless, because "both parents have made insufficient progress in ameliorating the parental deficiencies that served as the bases for jurisdiction." The problem with that argument is that we cannot tell whether the court would have reached the same conclusions--that is, that DHS had made reasonable efforts, yet mother and father had failed to make sufficient progress to make it possible for the children to return home--in the absence of the sexual abuse allegations, on which the court was clearly focused. In other words, because the court did not indicate that mother's and father's lack of progress in addressing their substance abuse, mental health, and housing issues--despite reasonable efforts by DHS to address those issues--was independently sufficient to warrant changing the plans for the children to adoption, we cannot say that the error was harmless.

247 Or App at 714-18 (Footnotes omitted; emphasis in bold italics added).

25. ***Dept. of Human Services v. C.L.*, 247 Or App 351, 268 P3d 801 (2011) (accepting state's concession of error and reversing permanency judgments changing plan from reunification to adoption because the juvenile court failed to make the findings required by ORS 419B.476(5)(d))**

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Father appeals a permanency judgment changing the case plan from reunification to adoption. He argues, among other contentions, that the juvenile court erred in failing to make and include in the judgment the statutorily required findings. ORS 419B.476(5)(d). The Department of Human Services concedes that the judgment is deficient and should be remanded in order for the juvenile court to comply with ORS 419B.476(5). *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 concession. Given our remand, we do not reach the other issues father 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.").

26. *Department of Human Services v. F.J.M.*, 246 Or App 569, 266 P3d 178 (2011) (accepting state's concession of error and reversing permanency judgments changing plan from reunification to adoption because the juvenile court failed to make the findings required by ORS 419B.476(5))

THE COURT OF APPEALS' *PER CURIAM* OPINION:

After a contested permanency hearing, the Clackamas County Circuit Court entered permanency judgments in these two cases changing the permanency plans for father's two children from reunification with him to adoption. On appeal, father argues that (1) the court failed to make findings required by ORS 419B.476(5); (2) the court erred in changing the permanency plans from reunification to adoption because the Department of Human Services (DHS) failed to make reasonable efforts toward reunification and because DHS failed to demonstrate that adoption of the children is likely achievable; and (3) the court erred in ordering DHS to file a petition to terminate father's parental rights. The state concedes that the court failed to make the findings required by ORS 419B.476(5). We agree. Because the state's concession is dispositive and the case must be reversed on that ground, we need not and do not reach the remaining issues raised in father's appeal.

27. *Department of Human Services v. N. S.*, 246 Or App 341, 265 P3d 792 (2011) , *rev den* 351 Or 586 (2012) (affirming permanency judgment changing plan from reunification to guardianship)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment that changed the permanency plan for child from reunification to guardianship after the juvenile court determined that despite reasonable efforts by the Department of Human Services (DHS), mother failed to make sufficient progress to allow child to return safely home because she had not gained insight or developed a protective capacity to address the risks posed by return of child to her care. Mother challenges both of the juvenile court's determinations, contending that DHS failed to make reasonable efforts and that she had made sufficient progress to allow child to return to her home. Held: DHS made reasonable efforts by offering multiple services to mother and child. Further, evidence in the record supports the juvenile court's findings as to continued risk to child, mother's inability to appreciate risks to child, mother's insufficient progress in developing parenting skills, and harm to child if removed from the care of her guardians. As a matter of law, those facts provide a basis for the court's determination that mother failed to make sufficient progress to allow child to return home.

28. *Department of Human Services v. N. M. S.*, 246 Or App 284, 266 P3d 107 (2011) (reversing permanency judgments changing plan from reunification to adoption because, in assessing mother's progress, the juvenile court considered circumstances extrinsic to the bases for jurisdiction)

THE COURT OF APPEALS' SUMMARY:

In this dependency case, mother appeals a judgment approving a change in the permanency plans for her three children, F, R, and T, from reunification with mother to adoption. F's father also appeals the change in the permanency plan for F. Parents argue that, under the reasoning of *Dept. of Human Services v. G. E.*, 243 Or App 471, 260 P3d 516, *adh'd to as modified on recons*, 246 Or App 136, __ P3d ___ (2011), the juvenile court erred in relying on facts extrinsic to the jurisdictional judgment in determining whether the Department of Human Services had made "reasonable efforts" toward reunification of children with mother, and whether mother had made "'sufficient progress" toward reunification, as required under ORS 419B.476(2)(a). The sole fact upon which the jurisdictional judgment relied was mother's admission that one of the children "presented with unexplained physical injuries deemed by medical professionals to have been non-accidental." Held: The court erred in determining that its jurisdiction encompassed any unsafe or detrimental conduct that affected the best interests of the children and in basing its permanency decision on concerns outside the scope of the jurisdictional judgment.

EXCERPT FROM OPINION:

> * * * In *G. E.*, as noted, we concluded that "[s]ome of the statutory 'factual' grounds for the assertion of jurisdiction," in particular, ORS 419B.100(1)(c) (condition or circumstances are such as to endanger the welfare of the child), are "so elastic or formless" that they are insufficient to provide a parent with constitutionally adequate notice as to what he or she needs to do to eliminate the need for jurisdiction. *G. E.*, 243 Or App at 480. We do not consider the circumstances of this case to be analogous. First, among the "statutory 'factual' grounds" for jurisdiction, that the child was subjected to "unexplained physical injury" is unique in that it is, by its very nature, incapable of further precision. An unexplained injury is just that--*unexplained*. Notwithstanding that imprecision, however, the legislature has seen fit to establish it as an independent and sufficient basis for jurisdiction. In this case, moreover, we have additional content: mother's admission that the unexplained injury was deemed to be nonaccidental.
>
> ***Based on those considerations, we conclude that, in this context--that is, where the jurisdictional judgment is based on an unexplained, nonaccidental injury—the basis for jurisdiction includes those "conditions or characteristics" potentially demonstrated by the specific facts alleged. In other words, it properly encompasses those conditions or characteristics that could have caused the nonaccidental injury. See G. E., 243 Or App at 479. That universe is admittedly broad--it may, for example, point to physical abuse, substance abuse, mental health issues, domestic violence, failure to protect, or other conditions. The universe, however, will narrow as DHS identifies possible explanations for the injury and develops a case plan based on that knowledge. See K. D., 228 Or App at***

516 (a parent's progress is assessed with reference to the "barrier to reunification * * * identified in the dependency petition and the applicable case plan").

However, if the parental condition or characteristic is *not* one that fairly can be implied from the facts found in the jurisdictional judgment, then it is outside the scope of the court's jurisdiction, and that deficit cannot be remedied by claims of "actual notice" through case plans or, as the state suggests in this case, letters of expectation. That is so because, as we held in *G. E.*, a petition or jurisdictional judgment must provide a parent with reasonable notice of the deficiencies that he or she must address in order to prevent continued jurisdiction; if it does not, it affects a "substantial right" of the parent--*viz.*, the right to constitutionally adequate notice--and the petition or judgment must be amended before the court can rely on such "extrinsic facts" in its permanency decision.

The juvenile court here determined that its jurisdiction encompassed any "unsafe and detrimental conduct" that affected the best interests of the children and based its permanency decision on concerns about mother's hygiene, parenting skills, and overall poor judgment. The court also relied on mother's mental health problems, which, the court found, affected her ability to carry out her "parental responsibilities." Although the latter characteristics and conditions--poor judgment and mental health problems—*may* conceivably be implicated in an allegation of unexplained, nonaccidental injury, concerns about hygiene and general parenting skills are not. Thus, although mother was on notice from the jurisdictional judgment that she needed to address any condition that *could have caused the risk of nonaccidental injury* to her children, such conditions would not, in any event, include general parenting skills or poor housekeeping.

Because the court's analysis that DHS had made reasonable efforts to reunify the family and that mother's progress toward that goal was insufficient was based, at least in part, on an erroneous understanding of the scope of the jurisdictional judgment, we reverse and remand.

246 Or App at 299-301 (Footnote omitted; emphasis in bold italics added).

29. ***Department of Human Services v. L. B.,*** 246 Or App 169, --- P3d --- (2011) (reversing permanency judgments changing plan from reunification to adoption because the juvenile court failed to make the findings required by ORS 419B.476(5)(d))

THE COURT OF APPEALS' SUMMARY:

Mother appeals judgments changing the permanency plan for her children, who are in the state's custody, from reunification with her to adoption. She argues that the juvenile court erred in entering the judgments because they do not contain the finding required as to whether "[t]here is a compelling reason * * * for determining that filing such a petition [to terminate parental rights] would not be in the best interests of the child or ward." ORS 419B.498(2)(a) (cross-referenced in ORS 419B.476(5)(d)). Mother concedes that she did not raise that issue below, and the Department of Human Services contends that, as a result, we should affirm the judgments. Held: Even if ordinary preservation principles were to apply under the

circumstances, the Court of Appeals would nonetheless exercise its discretion to correct the plainly erroneous judgments. The confusing form of the judgments made it unsurprising that neither the parties nor the court discovered the error, and the legislature has provided a clear mandate that the court expressly include the missing finding in its written order.

EXCERPTS FROM OPINION:

> Mother appeals judgments changing the permanency plan for her children, who are in the state's custody, from reunification with her to adoption. She argues that the juvenile court erred in entering the judgments because they do not include the finding required by ORS 419B.476(5)(d)--namely, a finding as to whether "[t]here is a compelling reason * * * for determining that filing such a petition [to terminate parental rights] would not be in the best interests of the child or ward." ORS 419B.498(2)(b) (cross-referenced in ORS 419B.476(5)(d)). Mother concedes that she did not raise that issue below, and the Department of Human Services (DHS) contends that, as a result, we should affirm the judgments. We exercise our discretion to review the claimed error and reverse the judgments.
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> * * * * *
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> * * * Apparently, after the permanency hearing, DHS provided mother with "check the box" forms of judgment. The form used for both judgments, frankly, is confusing--at least with respect to the findings required by ORS 419B.476(5) and ORS 419B.498(2)(b). The form has a section entitled "Compelling Reasons" that includes an option to check a box that "DHS has demonstrated compelling reasons why filing a Petition to Terminate Parental Rights would not be in the child(ren)'s best interests at this time," as well as boxes that, if checked, reflect particular reasons (such as that the parents are "successfully working to complete a plan and improve protective capacities"). The "Compelling Reasons" section later includes a box for a finding that "DHS has failed to demonstrate compelling reasons why filing a Petition to Terminate Parental Rights would not be in the child(ren)'s best interest at this time." [Footnote 1: Adding to the confusion, the form phrases the relevant findings in terms of what DHS "has demonstrated" or "failed to demonstrate," whereas ORS 419B.498(2)(b) is simply phrased in terms of whether the circumstance exists--*i.e.*, whether "there is a compelling reason * * *."] However, the structure of the form does not make clear that the later finding--"DHS has failed to demonstrate compelling reasons"-- is an *alternative* to the earlier box stating that "DHS has demonstrated compelling reasons * * *." Indeed, the alternative findings are separated by yet another box stating, "DHS has not provided the child(ren)'s parents with the services the agency deemed necessary for the safe return of the child(ren), within the time frame the agency established in the case plan, if reasonable efforts to make it possible for the child(ren) to safely return home are required." [Footnote 2: Whether the agency has or has not provided services is a relevant "circumstance" under ORS 419B.498(2)(c), but it is not, technically speaking, one of the "compelling reasons" for not moving toward termination listed in paragraph (2)(b) of the statute. In that sense, the "Compelling Reasons" title within the form is somewhat inaccurate; that section of the form more accurately pertains to the "circumstances in ORS 419B.498(2)," and "compelling reasons" are among those circumstances.]
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> ***None of the boxes within the "Compelling Reasons" section of the judgments were checked in this case, and, given the forms, it is unsurprising that neither the parties nor the court discovered that error. Based on the judgments, we can only infer, from the***

court's ultimate conclusion to change the plan as to each child, that it actually made the specific, predicate finding for a change of plan set out in ORS 419B.476(5)(d)--namely, that there are not compelling reasons for determining that filing a petition to terminate parental rights would not be in the best interests of the child or ward.

The statute, however, demands more than inferences from a permanency judgment. As we explained in M. A., ORS 419B.476(5) expresses the legislature's intent that "the trial court carefully evaluate DHS's decision to change a permanency plan for a child in order to ensure that the decision is one that is most likely to lead to a positive outcome for the child." 227 Or App at 183. Indeed, the matter is of such import that the legislature has required not only that the findings be made, but that they be expressly included in the court's written order. In other words, the legislature has manifested its intent that a juvenile court expressly connect all of the dots along the way to a change in the permanency plan. The court did not do so in this case and, given the clear legislative mandate and interests at stake, as well as the confusing form of judgment, we consider this an appropriate case in which to exercise our discretion to correct the errors in the permanency judgments.
246 Or App at 172-75 (Footnote omitted; emphasis in bold italics added).

DEPENDENCY
Termination-of-Parental-Rights Proceedings

30. *Dept. of Human Services v. K.M.P.*, --- Or App ---, --- P3d --- (July 18, 2012) (under *State ex rel Dept. of Human Services v. G. R.*, 224 Or 5 App 133, 135, 197 P3d 61 (2008), the juvenile court abused its discretion in denying mother's motion to set aside a "default" judgment terminating her parental rights because the good faith mistake that resulted in her failure to appear for the hearing constituted "excusable neglect" under ORS 419B.923(1)(b) as a matter of law)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a default termination judgment, contending that the juvenile court erred in denying her motion to set aside the judgment because her nonappearance at a 9 a.m. pretrial hearing was the result of excusable neglect. The record shows that mother did not appear because she had mistakenly written down the incorrect time of 2:30 p.m. for the hearing, and when, on the day of the hearing, she learned of the correct time, she was unable to find a ride to the courthouse. The Department of Human Services presented a prima facie case for termination and sought a default judgment, which the juvenile court granted. Held: Mother's uncontroverted evidence that her failure to appear at the hearing was due to her having written down the time of the hearing incorrectly establishes a reasonable, good faith mistake that constitutes excusable neglect as a matter of law and that, under the totality of the

circumstances, requires the conclusion that the juvenile court abused its discretion in denying mother's motion to set aside the termination judgment.

31. *Dept. of Human Services v. C.M.M.*, 250 Or App 67, 279 P3d 306 (2012) (affirming judgment terminating mother's parental rights on grounds of unfitness under ORS 419B.504 because the evidence established, among other things, that "mother showed no inclination to separate from father or to keep [the child] safe from father and her mental condition made it unlikely that she would do so")

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights to child, contending, among other things, that the Department of Human Services (DHS) failed to prove that she was unfit at the time of the termination trial and that it was in child's best interest to terminate mother's parental rights. Held: Although mother's interactions with child in most ways indicated that she was a minimally adequate parent, her failure to effect a lasting adjustment to recognize the risk that father posed to child and to place child's needs above her own places child at risk of harm and is seriously detrimental. Further, mother's mental condition caused her inability to recognize father as a safety risk and made it unlikely that mother's conduct or condition will change to allow child's reintegration into her home within a reasonable time.

EXCERPT FROM OPINION:

> * * * E's wellness at the time of trial, almost two years after he was removed from mother's care, does not preclude a determination of serious detriment. ***We have consistently held that a parent's "unwavering allegiance" to another unfit parent and failure to keep a child away from the unfit parent, even when that decision means that a child will be taken from the parent's care, is seriously detrimental to the child.*** *State ex rel Dept. of Human Services v. J. A. C.*, 216 Or App 268, 279, 172 P3d 295 (2007); *State ex rel Dept. of Human Services v. V. G. B. R.*, 216 Or App 282, 297, 172 P3d 286 (2007), *rev den*, 344 Or 280 (2008); *State ex rel DHS v. Payne*, 192 Or App 470, 482, 86 P3d 87, *rev den*, 337 Or 160 (2004). Here, father abused B and T and poses a serious potential risk to E. Mother has demonstrated an "unwavering allegiance" to father and has not shown a willingness to keep E away from him, even though failing to do so means E will remain out of her care.
>
> ***We also conclude that father's imprisonment at the time of trial does not alter our conclusion that mother's conduct or condition is seriously detrimental to E. It is well established that conduct or a condition can be seriously detrimental based on the potential for harm. Payne, 192 Or App at 483; see also Dept. of Human Services v. A. M. C., 245 Or App 81, 89, 260 P3d 821 (2011). That is, we do not need to await the harmful event to conclude that harm is imminent enough to justify termination.***

250 Or App at 78-79 (Footnote omitted; emphasis in bold italics added).

32. *Dept. of Human Services v. B.L.P.*, 248 Or App 744, 273 P3d 375, *rev den* 352 Or 33 (2012) (affirming judgment terminating mother's parental rights on grounds of unfitness under ORS 419B.504)

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Mother appeals a judgment terminating her parental rights in her two children on the grounds of unfitness, ORS 419B.504, and extreme conduct, ORS 419B.502. A discussion of the facts would not benefit the bench, the bar, or the public. We reject without discussion mother's challenges to the termination of her parental rights on the ground of unfitness. Accordingly, we affirm the juvenile court's judgment.

Given our disposition, we need not address, and imply no view as to the correctness of, the juvenile court's termination of parental rights on the alternative ground of extreme conduct pursuant to ORS 419B.502. *See Dept. of Human Services v. B. J. B.*, 242 Or App 534, 537, 256 P3d 167 (2011) (holding that, in a case such as this one, "if a party specifies on appeal the collateral consequences that could result from a disposition that was based on some but not all of the allegations in a petition for termination of parental rights, we will, if appropriate, specify any allegations that play no part in our disposition").

33. *Dept. of Human Services v. W. S. C., III,* 248 Or App374, 273 P3d 313 (2012) (denying motion to file late notice of appeal)

THE COURT OF APPEALS' SUMMARY:

Father asks the Court of Appeals to allow his untimely appeal from the judgments terminating his parental rights with respect to five of his children. He argues that the Court of Appeals should create a judicial remedy for inadequate assistance of appellate counsel and, alternatively, that the Due Process Clause of the United States Constitution requires that the Court of Appeals allow his late appeal. Held: Because ORS 419A.200 provides a remedy for late appeals by represented parties, the Court of Appeals is not authorized to fashion its own, more extensive remedy. Moreover, ORS 419A.200 satisfies due process requirements in the generality of cases, and, in any event, even considering father's particular circumstances, the Court of Appeals was satisfied that the termination proceedings were fundamentally fair. Motion to allow late notices of appeal denied; motion to dismiss appeals granted; appeals dismissed.

34. *Dept. of Human Services v. T. M. M.*, 248 Or App 352, 273 P3d 322 (2012) (affirming judgments terminating mother's parental rights under ORS 419B.504 and discussing in detail the evidence required to prove that the children could not be reunified with mother "within a reasonable time")

THE COURT OF APPEALS' SUMMARY:

Mother appeals judgments terminating her parental rights with respect to five of her children. She argues that, whatever her history of opiate dependence and resulting neglect, she was not unfit to parent as of the time of the termination hearing. She further argues that the Department of Human Services failed to present child-specific evidence that her children could not be reintegrated into her home within a reasonable time. Held: Mother's opiate abuse and dependence rendered her unfit to parent as of the time of the termination hearing. At the earliest (assuming no further relapses), mother could be considered as a parenting resource for her children seven months after the hearing. That time frame, however, was not a reasonable one for the children, considering their specific and immediate needs for permanency and their abilities to form lasting attachments.

35. *Dept. of Human Services v. C.L.C.*, 247 Or App 445, 268 P3d 808 (2012) (affirming judgment terminating mother's parental rights on grounds of unfitness under ORS 419B.504, based on mother's mental condition, without analyzing "reasonable time" element)

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment terminating her parental rights to her three children on the grounds of unfitness. The juvenile court found mother to be dishonest at the termination trial and discredited her testimony. In light of mother's lack of credibility, the children's special needs, and evidence from mother's mental health evaluations, the court entered judgment terminating mother's parental rights. Mother contends that her conduct or condition was not seriously detrimental to the children at the time of trial, that any untruthfulness by her was simply a coping mechanism, and that on balance she is a fit parent. DHS argues that, at the time of trial, mother still suffered from mental health problems, including antisocial personality traits, that interfere with her ability to safely parent the children; thus, her condition is seriously detrimental to the children. Held: There is clear and convincing evidence that mother's mental condition negatively affects her ability to meet the children's physical and emotional needs for extended periods of time, particularly in light of the special needs of the children.

36. *Department of Human Services v. A. M. C.*, 245 Or App 81, 260 P3d 821 (2011) (reversing judgment terminating mother's parental rights on grounds of unfitness under ORS 419B.504 because the state failed to prove serious detriment and that the child could not be reintegrated into the mother's home "within a reasonable time")

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights to her daughter, H. The trial court found that, at the time of the termination trial, mother was not fit to assume the responsibilities involved in parenting H and that mother's unfitness was seriously detrimental to H. Mother challenges the latter finding on appeal. Held: DHS did not adduce clear and convincing evidence that mother's unfitness is or would be seriously detrimental to H, that it would persist so as to make integration into mother's home within a reasonable period of time improbable, or that termination was in H's best interest.

EXCERPT FROM OPINION:

> We agree that the evidence supports the finding that mother (1) "has engaged in some conduct" that could, and in many instances would, (2) be "seriously detrimental" to a child. We are less certain about mother's "condition," that is, her alleged personality disorder; although Ewell twice made that diagnosis, he also testified that the condition might be tied to drug use and not psychopathology. In any event, however, we are unable on this record to agree that clear and convincing evidence supports the remaining criteria. Regarding the question whether mother's conduct or condition has been "seriously detrimental" to H, the trial court explained its finding as follows:
>
> > "[H] was born September 10, 2007, and was placed in substitute care on March 5, 2009, with her maternal grandparents, * * * the adoptive parents of her sister, [S]. *The evidence at trial did not focus on [H]; therefore, the conditions of her childhood while in the care of Mother are largely unknown.* [H's grandmother] did testify that Mother had 'used more (drugs) than she should during [H's] pregnancy; however, she had a 'healthy pregnancy' and [H] was a 'happy, healthy baby.' Apparently, at least for a time, Mother and [H] resided in a trailer on the maternal grandparents' property, and according to [a] DHS caseworker, [H] spent a significant amount of time with the [grandparents] prior to the placement in March of 2009. Although there is less evidence concerning Mother's drug use in 2007, it is clear that, by [I's] birth in February of 2009, Mother's drug use was out of control. Therefore, it is reasonable to conclude that in March of 2009, when [H] was placed in substitute care, Mother could not adequately care for herself--much less [H] and her newborn brother. *The serious detriment to the children speaks for itself.*"
>
> (Emphasis added.) With respect, we disagree. ***The court in Stillman makes it clear a parent's condition, even if reprehensible or pathological, does not justify termination of parental rights unless the conduct or condition is seriously detrimental to the child. The conduct or condition, in other words, does not speak for itself. In the present case, there is no evidence, much less clear and convincing evidence, that mother's conduct or condition has been, or will be, seriously detrimental to H. H was born healthy, and remains happy and healthy.*** DHS itself, in its brief on appeal, recognizes this fact:
>
> > "DHS acknowledges that the record indicates that [H] is 'doing well,' and the evidence does not establish that she currently has any emotional or physical difficulties or other special needs. Nevertheless, the requirement of serious detriment 'does not specify that the serious detriment must already have occurred as a prerequisite to termination. A condition or conduct can be "detrimental" based on potential harm even before that harm comes to pass.' * * *

"Here, [H] likely has suffered serious detriment due to mother's drug use, criminal conduct, and resulting absence from a large part of her life."

DHS correctly understands that termination can be based on a parent's conduct or condition that is only potentially detrimental, but the potential must be proven by clear and convincing evidence. Unspecified detriment that we can only discern because the evidence of conduct or condition "speaks for itself," is a far cry from actual, clear, and convincing evidence that proves serious detriment.

We also conclude that DHS has failed to prove, by clear and convincing evidence, that H's integration into mother's home was improbable within a "reasonable time." As for what the record shows concerning the length of time anticipated for success, by mother's own testimony, assuming that she is able to stay sober, it will be at least a year before she is able to parent. Mother's current living situation is only temporary. She is unemployed. She needs time to focus on her recovery and could relapse. She lacks parenting experience--indeed, she has never parented her children in a "clean and sober" state. ***There is evidence that addressing mother's mental health treatment needs could consume up to 18 months. The state contends that that is too long and that mother's track record makes it improbable that she will continue in her recovery.*** However, despite a very poor history, which mother acknowledges, in light of mother's genuine, indeed dramatic, shift in attitude and conduct and her expressed desire and motivation to continue her recovery, we decline to determine at this time that mother's problems are intractable.

Under ORS 419B.504, 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 what the particular child requires. *Stillman*, 333 Or at 146. Whether the child can be integrated into the parent's home within a reasonable time is measured by the child's needs. H has been in foster care with her grandparents for at least half of her life, and they were her primary care providers before that. She is well bonded to them and well cared for, healthy and happy, and her mother is still in her life. This is hardly a situation where the child is "languish[ing] in foster care," as the state contends. The grandparents have adopted S and are interested in adopting H if mother's parental rights are terminated. Ewell testified in general about the consequences to a child of temporary and substitute care, and that it "often causes children to develop senses of insecurity, of anxiety, confusion." However, ***there is no evidence specifically addressing H's need for permanency or whether it would be reasonable for her to wait a year to 18 months pending determination of mother's ability to sustain her recovery.*** Especially in light of the facts that H is living with her grandparents and siblings and the grandparents have indicated that they want to adopt her should mother's parental rights be terminated, and given the lack of specific evidence regarding H's needs, we conclude that the record falls short of the clear and convincing evidence that must be adduced before we will terminate a person's parental rights.

245 Or App at 87-90 (Emphasis in bold italics added).

37. *Dept. of Human Services v. H.L.R.*, 244 Or App 651, 260 P3d 787, *rev den* 351 Or 254 (2011) (reversing judgments terminating the parents' parental

rights under ORS 419B.504 because "the state did not prove by clear and convincing evidence that the conditions and conduct of mother and father were seriously detrimental to their children at the time of trial")

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal from judgments terminating their parental rights to their three children on the basis of unfitness. Both parents argue that the Department of Human Services (DHS) failed to prove that they were unfit at the time of trial based on conduct or conditions that were seriously detrimental to the children. Having an antisocial personality disorder does not make a parent automatically unfit, and DHS admits that all three children were doing reasonably well at the time of the termination trial. Held: DHS did not prove by clear and convincing evidence that parents' conduct or conditions were seriously detrimental to the children.

EXCERPTS FROM OPINION:

> ***We must focus on the detrimental effect of the parent's conduct or condition on the child, not the seriousness of the parent's conduct or condition in the abstract. Stillman, 333 Or at 146. Thus, the state must prove that some combination of the parent's conduct or conditions is seriously detrimental to that particular child. State ex rel Dept. of Human Services v. Rodgers, 204 Or App 198, 217-18, 129 P3d 243 (2006) (citing State ex rel SOSCF v. Mellor, 181 Or App 468, 476, 47 P3d 19 (2002), rev den, 335 Or 217, 65 P3d 1108 (2003)). In other words, the inquiry is "child-specific" and calls for "testimony in psychological and developmental terms regarding the particular child's requirements." State ex rel Dept. of Human Services v. Huston, 203 Or App 640, 657, 126 P3d 710 (2006). Further, clear and convincing evidence of unfitness must exist at the time of the termination hearing; past unfitness is insufficient. Id. at 654. After satisfaction of the above test, the court must also find that termination of the parental rights is in the best interests of the child. ORS 419B.500.***
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> * * * * *
>
> C. *No serious detriment to the children*
>
> DHS admits that all three children were doing "reasonably well" at the time of the termination trial and that the risk of father sexually abusing the children was low. However, DHS contends that the combination of mother's and father's personality disorders places the children at risk and that it is "highly likely that they will end up back in foster care." Further, DHS argues that mother's dishonesty regarding father's paternity and her relationship with him and father's failure to become involved with DHS until 2009 is detrimental to the children. Under the totality of the circumstances, DHS argues, both mother and father are presently unfit. *See State ex rel Dept. of Human Services v. J. A. C.*, 216 Or App 268, 277, 172 P3d 295 (2007) ("All proven conduct or conditions will be viewed in combination in determining whether a parent is unfit."). We do not find clear and convincing evidence of serious detriment to the children as a result of parents' conduct and conditions.

With regard to mother's antisocial personality disorder diagnosis, such a condition does not make a parent automatically unfit. A parent can be "inflexible, over controlled, self-centered, and overly desirous of appearing in a positive light," but the state must still provide clear and convincing evidence that the disorder had a seriously detrimental effect on the child at the time of the hearing. *State ex rel Dept. of Human Services v. Simmons*, 342 Or 76, 100, 149 P3d 1124 (2006). Basham, one of the psychologists, also acknowledged that people with personality disorders can parent. In this case, there was no evidence that mother harmed her children, and Sorensen noted that he believed she would not harm the children. Rather, the focus was on mother's exposure of the children to their father.

The psychologists appeared to consider mother's judgment that father was not a threat to the children to be both a sign and a symptom of mother's personality disorder. In 2009, DHS completed an evaluation of father that proved mother's judgment to be correct. Assuming mother's antisocial personality disorder caused mother to disagree with DHS, as opposed to crediting mother with the means and ability to assess the risk father posed, mother's disagreement with DHS is insufficient to prove that her condition caused serious detriment to the children and rendered her unfit. Because DHS's belief that father posed a serious danger of sexually abusing the children was proven false, Basham testified that mother's reduced ability to protect them based on her diagnosis "is much less relevant" or is "not a relevant issue." And, as Basham testified, individuals with personality orders can and do change, particularly with age and maturity.

DHS also contends that mother's lying and antagonism towards DHS was seriously detrimental to the children because it "prevented them from settling into a permanent home." Boiled down, however, DHS's argument is that because mother lied to and defied DHS, DHS determined that the children should remain in the state's protective custody--not that mother had harmed the children. That argument is undercut by the Supreme Court's previous determination that hostility and untruthfulness toward DHS, without more, is not sufficient evidence of a conduct or condition detrimental to the children. *Smith*, 338 Or at 85-87 (in absence of clear and convincing evidence that mother's tendency to lie and tell outrageous stories is seriously detrimental to child, mother's untruthfulness not grounds for termination). Upon examination, we find that mother's conduct or condition has had the direct effect of allowing the children to form a bond with their father, against DHS instructions, but that the state failed to establish that she had harmed the children. We do not find that DHS's concerns about mother's parenting abilities rise to the level of "extraordinary persuasiveness" that mother's condition or conduct is seriously detrimental to the children. Thus, the state failed to prove that mother was unfit at the time of trial.

As for father, the state failed to provide clear and convincing evidence that his personality disorder had a direct detrimental effect on any of the children. The evidence suggests the contrary. The state admits that father has been involved with the children in a parental relationship, contrary to DHS's efforts to keep the children away from father, and evidence establishes that the children are all bonded with father. Although the evaluators predict that father's personality disorder will have a seriously detrimental effect on the children if he were to assume a parental relationship, especially with mother, father did parent the children, with mother's assistance, and the record contains no evidence that he had injured the children or that they had suffered harm due to his relationship with them. Instead, the evidence suggests that all three children are bonded with both father and mother, and third parties have observed positive interactions among them all. Father is not unfit without clear and convincing evidence that his conduct or condition is detrimental to the children. *L. S.*, 211 Or App at 242-43 (parent behaved

appropriately with child and no evidence that child was affected by parent's emotional problems). Even though Colistro predicted that father, with his personality disorder, would impulsively harm the children, other psychologists testified that people with personality disorders can parent and that predictions of future behavior, to a reasonable medical certainty, based on a diagnosis of a personality disorder cannot be done. The most significant actual detriment to the children that we can find was directly related to DHS's removal of the children, but the children currently appear to be doing well.

In response to the trial court's finding that father poses a risk to the children, father also argues that the state did not establish by clear and convincing evidence that his 1999 attempted sex abuse conviction created a detrimental risk to the children. On appeal, in light of Colistro's opinion, the state appears to abandon the argument that father's sex offender status presents a risk of harm to the children. That position is well taken. In the absence of "some nexus between the nature of the offender's prior offense and a risk to the child at issue," father's status as a sex offender does not constitute conduct or a condition severely detrimental to his children. *State ex rel Dept. of Human Services v. N. S.*, 229 Or App 151, 158, 211 P3d 293 (2009) (contact with an untreated sex offender is not *per se* dangerous to children; additional evidence must establish a risk to the particular child at issue); *accord State ex rel SOSCF v. Burke*, 164 Or App 178, 181-84, 188, 990 P2d 922 (1999), *rev den*, 330 Or 138, 6 P3d 1098 (2000). Accordingly, we do not agree that DHS should continue to restrict contact between mother and father and the children simply because that is what they had instructed "throughout the history of the case." DHS's own evaluation of father established that he was not a sexual threat to the children, thereby eliminating the original reason DHS put the restriction into place.

The Supreme Court has repeatedly noted that ORS 419B.504 contains a legislative assumption that parents can change their conduct, and that if change is genuine and lasting, the state may not terminate their parental rights. Simmons, 342 Or at 103 n 13; Rardin, 430 Or at 447. We conclude that the state did not provide clear and convincing evidence that the conditions and conduct of mother and father were seriously detrimental to their children at the time of trial. Accordingly, the state failed to show by clear and convincing evidence that they are unfit under ORS 419B.504. The trial court's judgments terminating the parental rights of mother and of father were therefore error.

244 Or App at 666, 670-74 (Emphasis in bold italics added).

DELINQUENCY PROCEEDINGS

38. ***State v. J.L.C.*** **, 249 Or App 559, 277 P3d 625 (2012) (affirming judgment of jurisdiction under ORS 419C.005(1), based on proof that the youth engaged in conduct, which, if committed by an adult, would constitute the crime of harassment)**

THE COURT OF APPEALS' SUMMARY:

In this juvenile delinquency proceeding, youth appeals from a judgment finding her within the jurisdiction of the juvenile court based on conduct that, if committed by an adult, would constitute the crime of harassment, ORS 166.065. Youth argues that the juvenile court's determination that she had committed harassment when she pushed her mother was erroneous because the state had failed to establish the culpable mental state required by ORS 166.065, namely, that youth had intended to harass or annoy mother. Youth argues that she pushed mother in order to escape physical punishment, and, thus, did not act with the requisite culpable mental state. Held: The evidence in the record was sufficient to support both a finding that youth intended to harass or annoy mother and a finding that youth intended to resist mother's punishment. The juvenile court, in taking jurisdiction of youth on the ground that she had engaged in conduct constituting harassment, necessarily found that that evidence proved youth's intent to harass or annoy mother.

EXCERPTS FROM OPINION:

> Our review is governed by ORS 19.415(3)(b), which provides that "the Court of Appeals, acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record." Youth has not requested *de novo* review, and we decline to conduct such a review. Accordingly, we review the juvenile court's legal conclusions for errors of law, but we are bound by its findings of historical fact unless there is no evidence to support those findings. *Ball v. Gladden*, 250 Or 485, 487-88, 443 P2d 621 (1968); *Dept. of Human Services v. C. Z.*, 236 Or App 436, 442, 236 P3d 791 (2010). Where findings on disputed issues of fact are not made but there is evidence supporting more than one possible factual finding, we presume that the juvenile court decided the facts consistently with its ultimate legal conclusion. *C. Z.*, 236 Or App at 442. We state the facts consistently with that standard.
>
> * * * * *
>
> [T]he evidence in the record is sufficient to support *both* a finding that youth intended to harass or annoy mother *and* a finding that youth intended to resist mother's punishment. The juvenile court, in taking jurisdiction of youth on the ground that she had engaged in conduct constituting harassment, necessarily found that that evidence proved youth's intent to harass or annoy mother. Regardless of whether that same evidence might also demonstrate some other intent on the part of youth, we must "presume that the juvenile court decided the facts consistently with its ultimate legal conclusion." *C. Z.*, 236 Or App at 442.

249 Or App at 561, 565.

39. ***State v. N.R.L.*** **, 249 Or App 321, 277 P3d 564 (2012) (rejecting youth's argument that a restitution proceeding under ORS 419C.450 is "quasi-civil" in nature, and, for that reason, he was entitled to a jury trial under Article I, section 17 of the Oregon Constitution)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals the juvenile court's judgment that he pay restitution in the amount of $114,071.13. Youth argues that the juvenile court erred in denying his motion to empanel a jury

because Article I, section 17, of the Oregon Constitution entitled him to a jury trial on the issue of restitution. Youth contends that the amendments to the restitution statute, ORS 419C.450, removed the "distinctive earmarks of penal sanctions" that were the basis of the holding in State v. Hval, 174 Or App 164, 25 P3d 958, rev den, 332, Or 559 (2001), and have transformed the restitution statute into a "quasi-civil" recovery device, which therefore requires compliance with Article I, section 17. Held: A youth offender's obligation to pay restitution to a victim remains penal in nature, despite statutory amendments; restitution is not a quasi-civil recovery device.

40. ***State ex rel Juv. Dept. v. S. J. P.*** **, 247 Or App 698, 271 P3d 124 (2012) (vacating portion of judgment imposing compensatory fine to cover airline expenses to attend trial)**

THE COURT OF APPEALS' SUMMARY:

Youth was found to be in the jurisdiction of the juvenile court for an act that, if committed by an adult, would constitute assault in the fourth degree. ORS 163.160. As part of its jurisdictional judgment, the juvenile court ordered youth to pay a compensatory fine to the victim of the assault for the airfare expenses she incurred to testify at the hearing on the assault. On appeal, youth argues that the juvenile court's imposition of the compensatory fine was error because a court can impose a compensatory fine only for losses that a victim could recover from a youth offender in a civil action, and the victim could not recover the airfare expenses in a civil action against him. Held: The prerequisites for imposition of a compensatory fine are: (1) criminal activities, (2) economic damages, and (3) a causal relationship between the two. Proof that a person has suffered "economic damages" as a result of a crime requires more than evidence of a "but for" connection between an objectively verifiable monetary loss and the crime; it requires evidence that the loss could be recovered against the defendant in a civil action. The state has not established that the airfare expenses the victim voluntarily incurred to testify against youth are economic damages; it has not identified any theory of civil liability under which the victim could recover the expenses from youth.

41. ***State v. M.W.H.,*** **246 Or App 421, 267 P3d 165 (2011) (juvenile court did not err in denying youth's motion to suppress because youth consented to the search)**

THE COURT OF APPEALS' SUMMARY:

Youth was adjudicated in a juvenile delinquency proceeding for committing an act that, if committed by an adult, would constitute possession of a concealed weapon (a small dagger) at school. *See* ORS 166.240. He appeals, assigning error to the denial of his motion to suppress evidence, including the dagger, which was discovered after a school official asked him to empty

his pockets. Youth argues that he did not consent to the search. Held: The juvenile court did not err in determining that youth emptied his pockets consensually and, thus, did not err in denying the motion to suppress.

42. ***State v. B.A.H.,*** **245 Or App 203, 263 P3d 1046 (2011) (juvenile court erred in granting youth's motion to suppress evidence seized during a search on school grounds)**

THE COURT OF APPEALS' SUMMARY:

The juvenile court granted youth's pretrial motion to suppress evidence seized from him during a warrantless search at his high school. The state appeals, contending that the search was lawful because it fell within the exception to the warrant requirement created by the Supreme Court in *State ex rel Juv. Dept. v. M. A. D.*, 348 Or 381, 233 P3d 437 (2010). Held: The juvenile court erred in suppressing the evidence, because the search fell within the exception to the warrant requirement created by the Supreme Court in *M. A. D..*

EXCERPT FROM OPINION:

> Warrantless searches of students without probable cause or some other exception to the warrant requirement such as consent, then, appear to be permissible when a school official reasonably suspects, based on specific and articulable facts, that the student is in possession of something that poses an immediate threat to the student or others, including illegal drugs such as marijuana. Such a search is not permissible based on generalizations about drug use or on stale information. Under these standards, the search of youth in this case did not violate his rights under Article I, section 9, as construed by the Supreme Court in *M. A. D.* The official who searched him, Murdoch, knew that youth was apprehended in a bathroom with a cigarette lighter. Murdoch also knew that youth had a history of drug and tobacco use. The association between possessing a lighter and possessing either marijuana or tobacco is not speculative or a generalization. Youth was caught with the lighter within minutes of the search. Murdoch, then, had reasonable suspicion of a threat to safety that was at least as immediate and compelling as the suspicion in *M. A. D.* Under that case, the search was lawful, and the evidence should not have been suppressed.

245 Or App at 210.