APPELLATE UPDATE

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SECTION I

ORS 419A.253 – "Social File" Information and the Record on Appeal

Under *State ex rel Juv. Dept. v. Lewis,* 193 Or App 264, 89 P3d 1219 (2004), even though a juvenile court may have considered and relied upon specific "social file" information in framing the order or judgment in a dispositional hearing, review hearing, or permanency hearing, that information is NOT part of the evidentiary record UNLESS it is testified to, received as an exhibit, or judicially noticed. Oregon appellate courts cannot review a juvenile court's judgment for sufficiency of evidence or legal error based on information that is "outside the record."

ORS 419A.253 requires that, when a juvenile court judge *does* consider "social file" information in making a ruling, the judge must make the information part of the record, either by causing the document or report in which it appears to be made an exhibit or by taking judicial notice of the information, subject to any objections the parties might make. If the judge takes judicial notice of the information, he/she must cause a list to be made that reasonably identifies the information by reference to its source. **ORS 419A.253** further provides that, in the event of an appeal in which "the designation of record includes exhibits, the [juvenile] court or the trial court administrator shall cause the exhibits and any report or other materials containing judicially noticed information to be transmitted to the appellate court as part of the record on appeal."

SECTION II

Juvenile Court Authority While An Appeal Is Pending

As a general matter, the filing of an appeal does not suspend or stay the order or judgment from which the appeal is taken, "nor preclude the juvenile court," pending disposition of the appeal, "from entering such further orders relating to the [child's] or youth offender's custody * * * as it finds necessary by reason only of matters transpiring subsequent to the [entry of] the order or judgment appealed from." **ORS 419A.200(7)(a)**. However, the filing of an appeal "from a judgment finding a child or youth to be within the [juvenile court's] jurisdiction * * * does not deprive the juvenile court of jurisdiction to proceed with a disposition of the matter." **ORS 419A.205(2)**. And, "[n]otwithstanding the filing of an appeal from a jurisdictional or dispositional judgment or an order entered pursuant to **ORS 419B.449[(disposition review)]** or **419B.476[(permanency hearing)]**, the juvenile court may proceed with the adjudication of a petition seeking termination of parental rights of a parent of the [child] who is subject to the judgment from which the appeal is taken." **ORS 419A.200(7)(b).**

Under **ORS 419B.923(7)**, the juvenile court may hear and decide a motion to modify or set aside a judgment or order while an appeal from the judgment or order is pending, provided that the requirements of subsection (2) and Oregon Rule of Appellate Procedure 2.22 are satisfied.

SECTION III

Appellate Court Decisions

DEPENDENCY CASES

1. *State ex rel Juv. Dept. v. G. L., Appellant*, 220 Or App 216, 185 P3d 483 (2008) (juvenile court authority to order psychological evaluations)

In this case, the juvenile court found the children to be within the court's jurisdiction pursuant to ORS 419B.100 and, as part of the disposition, ordered the mother to undergo a psychological evaluation, because "it would be 'helpful'" in determining "how [she] could do a better job protecting her children from [the] father than she has done in the past." The record showed, among other things, that: (1) the mother and father "have a historically violent and tumultuous relationship"; (2) the mother "has obtained multiple restraining orders against [the] father, the first a few months before they married in 2000"; (3) when the mother left him two years later, she and the two children became homeless, and the children "were removed from her care"; (4) the juvenile court "ordered" her "to complete services, which she apparently did because the children were returned to her care in June 2004"; (5) between June 2004 and March 2007, despite DHS's continued involvement with the family and the mother's acknowledgement that the father was a danger to the children and her assurances that she was not having contact with him, she continued to see him and allow him to have contact with the children and did not follow though with voluntary services; and (6) in March 2007, the father was arrested after assaulting one of the children, the children reported that the father "had been in the home frequently," and the children were placed in protective custody.

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

> the state had proved that father physically assaulted one of the children, that mother and father have a demonstrated pattern of domestic conflict that threatens their children, that mother has failed to benefit from services designed to help her address the safety needs of her children, and that

> mother is unable or unwilling to provide for the safety and protection of her children because she continues to allow father to have contact with them.

220 Or App at 220.

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

> * * * DHS's planning and provision of remedial services must "bear[] a rational relationship to the jurisdictional findings that brought the ward within the court's jurisdiction." ORS 419B.343(1)(a). While "the actual planning and provision of such * * * services is the responsibility of [DHS]" "[t]he court may specify the particular type of * * * services to be provided by [DHS] * * * to the parents or guardians of the wards." ORS 419B.337(2).
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> * * * [T]he text of ORS 419B.337(2) must be read in the context of ORS 419B.343 * * *. ORS 419B.337(2) does not expressly limit the court's power to order that DHS provide a particular type of service. At the same time, the statute obligates DHS to incorporate such orders in its case plan. * * *. ***Thus, the requirement of ORS 419B.343 that DHS ensure that its case planning bears a rational relationship to the jurisdictional findings must also be understood to require that the court's specification of a particular type of service that DHS provides bears a rational relationship to the jurisdictional findings.***
>
> Having determined that the text and context of the juvenile statutes grant the juvenile court the authority to order DHS to provide a parent with a particular service ***only*** if the service is rationally related to its jurisdictional findings, we next consider whether it was within the court's authority to order mother to submit to a psychological evaluation. ***Contrary to mother's assertion, ORS 419B.343 does not limit the provision of psychological services to cases in which a parent's mental health condition is a basis for juvenile [court] jurisdiction. Rather, it requires only a rational connection between the service to be provided and the basis for jurisdiction.***
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> That requirement was met here. Jurisdiction was based, in part, on mother's unwillingness or inability to protect her children and her failure to benefit from past services designed to assist her in doing so. DHS requested a psychological evaluation to assess mother's service needs with respect to those jurisdictional findings. A caseworker involved with the family since 2005 explained that mother has repeatedly stated "that she understands [that father] is dangerous [and] she doesn't want anything to do with [him],

> [but then she gets] back together with him," and that DHS requires "insight as to if there is some underlying mental health diagnosis that may be leading to this" before the agency could properly assess mother's service needs. ***That evidence conclusively establishes that DHS is entitled to a psychological evaluation of mother in order to develop its case plan to include "[a]ppropriate reunification services to parents * * * to allow them the opportunity to adjust their circumstances, conduct or conditions to make it possible for the child to safely return home within a reasonable time," consistent with the legislative policy to strive for reunification expressed in ORS 419B.090(5).***

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

2. ***State ex rel Dept. of Human Services v. W.P.*, 216 App 555, 173 P3d 841 (2007) (affirming without opinion), *rev allowed* 344 Or 539 (2008) (whether the exclusionary rule for violations of Article I, section 9, of the Oregon Constitution, or of the Fourth Amendment to the United States Constitution, applies in juvenile dependency proceedings)**

THE SUPREME COURT'S SUMMARY:

A drug investigation conducted by the Oregon State Police, the Benton County Sheriff's Department, and the Corvallis Police Department came to focus, in part, on father's wife, N.L. Police obtained a warrant to search the residence that father shared with his wife. In the course of executing the warrant, police searched father's pants pocket and discovered cocaine. Father was arrested, and his child was removed from the home and placed in foster care.

Subsequently, the juvenile court conducted a jurisdictional and dispositional hearing. At the jurisdictional hearing, father moved to suppress evidence related to the search of the residence, on the basis that there were no facts in the affidavit in support of the search warrant indicating probable cause to believe that any controlled substances or illegal activity would be present at his wife's residence. Because of those alleged defects in the affidavit, father contended that the search violated Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution (both of which prohibit unreasonable searches or seizures), and that the evidence therefore should be excluded. The juvenile court declined to extend the exclusionary rule to juvenile dependency cases, and denied

the motion. The juvenile court thereafter entered a judgment of jurisdiction and disposition.

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

On review, the issue is: Does the exclusionary rule for constitutional violations of Article I, section 9, of the Oregon Constitution, or of the Fourth Amendment to the United States Constitution, apply in juvenile dependency proceedings?

3. ***Clarinda Middleton and Bill Middleton v. DHS and Michelle Hemphill and Brian Hemphill*, 219 Or App 458, 183 P3d 1031 (2008) (circuit court review of DHS "order in other than a contested case" selecting foster parents – instead of relatives of the child -- to be the adoptive family)**

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (DHS) appeals an order of the circuit court setting aside its order in an "other than contested case" that had determined that a child in its custody, A, should be placed for adoption with his foster family, the Hemphills. The circuit court concluded that DHS was required to place A with the Middletons, who are members of A's extended family. DHS appealed. *Held:* The trial court erred in concluding that DHS had "erroneously interpreted a provision of law," ORS 183.484(5). The statutes and administrative rules at issue indicate that, although DHS has a strong policy of affording placement preference to family members, its ultimate decision on adoptive placement is to be guided by the best interests of the child. In this case, two families were approved for adoptive placement: A's current foster family, the Hemphills, with whom he has lived most of his life, and the Middletons, A's great aunt and her husband, who traveled regularly from their home in North Dakota in order to establish a relationship with A. DHS considered the strengths and weaknesses of each family, and concluded that it was in A's best interests to remain with the Hemphills, given his attachment to them. Substantial evidence supports DHS's decision to select the Hemphills as A's adoptive placement. Reversed; order of Department of Human Services reinstated.

EXCERPTS FROM OPINION:

> [DHS's] rules, collectively – and when read in conjunction with the directive of OAR 413-010-0340 that DHS "will protect a child's right to live with his or her immediate or extended family except when there is indication that family members will not adequately provide for the child's welfare" – indicate that the agency's first priority in moving toward adoption of child in its care is to identify potential relatives as placement resources and determine their suitability for placement. To be sure, the rules also provide that foster parents who have the status of "current caretakers" of a child also have a priority; however, those rules, viewed in context, indicate that the current caretakers have priority over "general applicants," but not over relatives, as adoptive placements. * * * Consequently, the circuit court correctly understood that, under DHS's rules, relatives are entitled to preference with respect to adoptive placements.
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> However, the circuit court erred in understanding, and treating, that *preference* to be a functional *mandate.* That is, the court erred in concluding that the rules *required* DHS to select an adoptive placement with relatives, either as a matter of law or as a matter of fact in this case.
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> The decision at issue in this case – *viz.*, which of two highly suitable families should be chosen as an adoptive placement for A – is the type of decision on which reasonable minds could and did differ. A full description of the evidence would not benefit the parties, the public, the bench, or the bar. One observation suffices: Substantial evidence in the record, and corollary reasonable inferences as to A's best interests, would have supported placement with either party. Consequently, substantial evidence in the record supported DHS's decision * * * to place A with the Hemphills.

219 Or App at 473-74.

4. ***State ex rel Juv. Dept. v. L. V.*, 219 Or App 207, 182 P3d 866 (2008) (reversing permanency hearing judgment)**

THE COURT OF APPEALS' SUMMARY:

Father appeals a judgment entered after a permanency hearing after which the juvenile court found that he had not yet made sufficient progress to make it possible for him to care for his two-year-old child, A. Although father requested it, the court declined to order placement with father or to order a family-decision meeting to implement transition of A to father's care. Father appealed, assigning error to the court's failure to order placement or a family-decision meeting and to the court's designation of a concurrent permanent plan

of guardianship. *Held:* Although a review hearing was held after father appealed from the permanency judgment, his appeal was not moot because the permanency judgment continues to have a practical effect on whether and under what circumstances father can parent A. The juvenile court's denial of father's requests that A be placed in his care and that the court order a family-decision meeting to create a plan to transition A to his care adversely affected father, and the judgment is therefore appealable. The Court of Appeals declined to review the juvenile court's designation of a concurrent permanency plan, however, because the issue was not sufficiently developed. Regarding the permanency plan, a *de novo* review of the record on appeal revealed no basis to conclude that father cannot currently parent A. Father had remedied the conduct and conditions that formed the basis for juvenile jurisdiction by completing the required services and developing a parental relationship with A. Accordingly, the juvenile court erred by concluding that father is not currently able to parent A on his own, and the Court of Appeals reversed the portion of the judgment that orders father to continue his involvement with services and indicates that the anticipated date of A's placement with father is "unclear." Instead, the anticipated date of return and transition should be the earliest reasonable date determined by a family-decision meeting to be held at the first available opportunity. Reversed in part; remanded with instructions to enter a permanency judgment consistent with this opinion; otherwise affirmed.

5. ***G.A.C. v. State ex rel Juv. Dept.*, 219 Or App 1, 182 P3d 223 (2008) (reversing judgments dismissing petitions alleging physical abuse)**

THE COURT OF APPEALS' SUMMARY:

Three children appeal from separate judgments dismissing the state's petitions for establishment of juvenile dependency jurisdiction over them on the ground that the state and the children failed to prove that mother subjected the children to physical abuse or inappropriate discipline, thereby placing the children at risk of harm. *Held:* Striking child with wooden spoon and leaving raised welts that were still visible four hours later is physical abuse and conduct that endangered the child's welfare, and circumstances leading to the abuse are likely to recur. Under the totality of the circumstances, mother's physical abuse of one child endangered the welfare of all three children; therefore, all three children are within the jurisdiction of the juvenile court under ORS 419B.100(1)(c). Reversed and remanded.

EXCERPTS FROM OPINION:

ORS 419B.100(1)(c) calls for a fact-specific inquiry whether the court should take jurisdiction over children. *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652, 853 P2d 282 (1993). In *Smith*, the court rejected the proposition that any specific condition or circumstance *per se* does or does not suffice to establish dependency jurisdiction under that provision. *Id.* Rather, the court must consider the totality of circumstances before it. *Id.* at 652-53. If, after, considering those circumstances, the court finds a "reasonable likelihood" of harm to the child's welfare, jurisdiction exists. *Id.* The pertinent conditions or circumstances need not involve the child directly but may be found harmful because they create a harmful environment for the child. *Id.* In deciding whether the juvenile court has jurisdiction, the court must determine whether the child needs the court's protection, not the nature or extent of the necessary protection. *See State ex rel Juv. Dept. v. Brammer,* 133 Or App 544, 549 n 5, 892 P2d 720, *rev den*, 321 Or 268 (1995) ("Our decision merely places the children under the protection of the juvenile court. Whether or not they remain in the home will be determined in a subsequent proceeding.").

* * * * *

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

* * * * *

We need not decide whether mother's conduct toward V constituted a criminal assault. As discussed, where juvenile dependency jurisdiction is concerned, conduct that endangers a child's welfare is not limited to criminal conduct, and the evidentiary standard is one of preponderance, not the absence of reasonable doubt. ***If a parent causes physical injury to a child by nonaccidental means, the parent has physically abused the child, and such abuse cannot constitute lawful discipline.*** Mother in this case caused physical injury to V by other than accidental means. V suffered raised red welts and bruising on her arms and thigh that caused her substantial

pain, according to her testimony, at a level of eight to eight and a half on a scale of one to ten. The photographs of V's injuries are consistent with her testimony. Because mother abused V by causing her physical injury which, in turn, endangered V's welfare, V was within the juvenile court's jurisdiction under ORS 419B.100(1)(c).

* * * * *

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

* * * * *

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

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

219 Or App at 11-15 (emphasis added).

6. ***State ex rel Dept. of Human Services v. H.S.C.*, 218 Or App 415, 180 P3d 39 (2008)(reversing permanency hearing judgment because DHS did not make "reasonable efforts" to reunify the family following the father's out-of-state detention by immigration authorities)**

THE COURT OF APPEALS' SUMMARY:

Father appeals a judgment authorizing the Department of Human Services (DHS) to pursue adoption as the permanency plan for his daughter. The juvenile court found that DHS had made reasonable efforts to reunify father and the child and that father had not made sufficient progress for the child to return home. Father claims on appeal that, considering the change of circumstances because of his detention in an immigration facility, the evidence does not support changing the permanency plan from reunification to adoption. *Held:* When a parent is detained by immigration authorities and DHS makes no inquiry into what services are possible at that location, the mere detention of the parent does not excuse the state from making reasonable efforts by inquiry and arranging services that might be available under the circumstances. DHS is obliged to undertake reasonable efforts to make it possible for the ward to safely return home based on the circumstances existing during the period prior to the permanency hearing. Given the significant change in circumstances due to father's detention and possible deportation, it was not reasonable efforts for DHS to continue enforcement of an outmoded service agreement and to make no further efforts to provide services to father. Reversed.

EXCERPTS FROM OPINION:

> To warrant a change in the permanency plan from reunification to adoption, the court must find that, despite DHS's reasonable efforts to make it possible for the child to return home safely, a parent has not made sufficient progress to enable that to occur. *State ex rel Dept. of Human Services v. S.L.*, 211 Or App 362, 372, 155 P3d 73 (2007); *State ex rel Dept. of Human Services v. Shugars*, 208 Or App 694, 711, 145 P3d 354 (2006); *State ex rel Juv. Dept. v. Wiliams*, 204 Or App 496, 130 P3d 801 (2006). We explained in *Williams* that "[t]he 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 depends on the particular circumstances." 204 Or App at 506 (internal quotation marks omitted). We also consider whether a parent has attempted to make appropriate changes and whether he or she ignored or refused to participate in plans as required by the state. *State ex rel Juv. Dept. v. Devore*, 108 Or App 426, 432-33, 816 P2d 647 (1991); *State ex rel Juv. Dept. v. Oseguera*, 96 Or App 520, 526-27, 773 P2d 775 (1989).

Thus, "[i]f the case plan at the time of the hearing is to reunify the family," ORS 419B.476(2)(a) requires proof at the permanency hearing of "reasonable efforts" by DHS *and* proof of "[in]sufficient progress" by the parents to allow the child to return home in order to obtain a permanency plan of adoption. ***The issues in this case are whether the state made reasonable efforts to reunify father and S when father was in ICE custody during the five months immediately preceding the permanency hearing and whether father made "sufficient progress" given those efforts.***

* * * * *

[***The decisions in*** *Williams* ***and*** *Shugars***] teach that DHS is obliged to undertake reasonable efforts to make it possible for the ward to safely return home based on the circumstances existing during the period prior to the permanency hearing and that period must be sufficient in length to afford a good opportunity to assess parental progress.*** In this case, father attended the shelter hearing in July 2006 and signed a service agreement agreeing to undergo a psychological evaluation and to visit the children regularly. He complied with both requirements, and the record shows that those visits were appropriate. On October 26, father again signed a court-imposed service agreement, this time agreeing to take advantage of services through Goodwill Industries, to report to the caseworker, and to obtain therapy services from Jackson County Mental Health. Father engaged with Goodwill Industries and was enthusiastic about his progress, and he had appointments for parenting and mental health services in the near future. In mid-November, he was detained in Washington on an immigration hold and was therefore unable to take advantage of the programs offered to him in Oregon. From November 2006 to April 2007, DHS made no attempt to inquire about possible services that could be offered to father at the ICE facility, such as whether visitation could be facilitated there or whether mental health services could be offered. Instead, DHS ceased offering father any services in November 2006, told him that the agency would offer him services if he were deported, and five months later testified that no more services were available and that father had not made sufficient progress.

It is clear from our case law that incarceration alone does not excuse the state from making reasonable efforts. * * * ***Similarly, when a parent is detained by immigration authorities and DHS makes no inquiry into what services are possible at that location, the mere detention of the parent does not excuse the state from making reasonable efforts by inquiry and arranging the services that might be available under the circumstances.*** Given the significant change in circumstances precipitated by father's detention and potential deportation, it was not reasonable for DHS to expect father to comply with the existing case plan and service agreement. Without any evidence of an endeavor to inquire into the possibility of father completing his counseling and other requirements while in detention, we are unable to conclude that "reasonable efforts" toward reunification were undertaken by DHS in this case.

218 Or App at 423-24, 426-27 (emphasis added).

7. ***State ex rel Dept. of Human Services v. S. P. B.*** **218 Or App 97, 178 P3d 307 (2008) (affirming without-prejudice dismissal of jurisdictional petition)**

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (DHS) filed an amended petition in juvenile court asking the court to make "an investigation * * * of the circumstances concerning" father's daughter, over whom the court already had jurisdiction, and "to make such order or orders as are appropriate." The court dismissed the petition without prejudice. On appeal, father argues that the dismissal should have been with prejudice, because the dismissal without prejudice needlessly prolongs the period of uncertainty regarding child's permanent placement. The state argues that the Court of Appeals does not have jurisdiction to adjudicate father's appeal because he was not "adversely affected" by the judgment of dismissal. ORS 419A.200(1). *Held:* Because the dismissal of the amended petition without prejudice denied father the affirmative relief that he sought and exposed him to the possibility of having to relitigate sexual abuse allegations, he was "adversely affected" under ORS 419A.200(1), and the Court of Appeals has jurisdiction to decide the appeal. The trial court did not abuse its discretion in dismissing the petition without prejudice. Affirmed.

EXCERPT FROM OPINION:

> In the present case, father does not contend that the court's decision to dismiss without prejudice is not within its lawful powers, and we are aware of no authority that would support such a contention. Father offers two reasons why the court's decision to dismiss the petition without prejudice was nonetheless an abuse of discretion. Neither is persuasive. He first relies on ORS 419B.340(1), which requires the court to determine whether DHS has made reasonable efforts to prevent the need for removal of the ward from the home. Thoroughly investigating the sexual misconduct allegations, according to father, is such an effort, and DHS has not done so. However, ORS 419B.340(1) requires judicial determination of agency efforts only in disposition orders: "If the court awards custody to [DHS], the court shall include in the disposition order a determination whether the department has made reasonable efforts * * *." Because father is appealing a contested jurisdictional petition and not a disposition order, ORS 419B.340(1) is not relevant. Nor does ORS 419B.340 itself include any kind of mechanism to enforce the requirement that DHS make reasonable efforts.
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> Second, father generally contends that dismissal without prejudice allows DHS to postpone indefinitely his reunification with his daughter. That argument is not without force. ***Although there is no evidence in the record to suggest that the state's inability to arrange for the***

> ***appearance of key witnesses regarding the sexual misconduct allegations resulted from a desire to delay the process or some other improper motive, nor will we speculate about what DHS might do in the future, we agree that DHS cannot prevent reunification indefinitely. Such a course of action would raise serious questions under the Due Process Clause. At this time, that has not occurred.*** The permanency plan remains to return the child to father. That process is governed by the timelines in ORS chapter 419B. *See, e.g.*, ORS 419B.470; ORS 419B.498. We therefore conclude that the court did not abuse its discretion in dismissing the petition without prejudice.

218 Or App at 103-04 (emphasis added).

8. ***State ex rel Juv. Dept. v. G. W,*** 217 Or App 513, 177 P3d 24 (2008) (juvenile court erred in denying father's motion for entry of judgment of nonpaternity without first considering the merits of his request under Oregon Laws 2005, chapter 160, section 9)

THE COURT OF APPEALS' SUMMARY:

Father appeals a denial of a motion for judgment of nonpaternity and dismissal in a dependency proceeding. Father argues that the trial court erred when it found that, under ORS 109.070(1)(a) (2001), he was conclusively presumed to be the father of the child, and that new 2005 legislation did not authorize the court to disestablish his paternity. *Held:* The trial court erred in denying father's motion for entry of judgment of nonpaternity without first considering the merits of his request under Oregon Laws 2005, chapter 160, section 9. Subsection (2) of section 9 expressly provides that, after paternity has been established under ORS 109.070(1), if no blood tests were performed to establish paternity, the legal father may petition the court to reopen the issue at any time. Reversed and remanded.

9. ***T. H., G. B., and S. N., v. M. P. B., S. D. B., and S. J. B.,*** 217 Or App 430, 175 P3d 1017 (2008) (modification of juvenile court guardianship order)

THE COURT OF APPEALS' SUMMARY:

In this guardianship proceeding, children carried their burden under ORS 419B.368 in showing that modification of a guardianship

order to allow overnight visits with the mother presently is not in their best interests, given the mother's continuing unstable situation and the substantial, ongoing problems that the children identified concerning the visits. The children failed to carry their burden to show their best interests required mother's parenting time with them to be limited to two four-hour visits each month. The reasonably good relationship between the children and mother, along with the substantial positive steps mother had made, support retaining the eight-hour unsupervised daytime visits as set by the previous guardianship judgment.

10. *State ex rel Dept. of Human Services v. T. F.*, 217 Or App 116, 175 P3d 976 (2007) (affirming permanency hearing judgment changing plan from reunification to adoption and observing that record did not support termination of the parents' rights)

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal from a judgment following a permanency hearing in which the juvenile court authorized the Department of Human Services (DHS) to change its plan for two children, T. K. and J. K., from reunification with their parents to adoption. ORS 419B.476(2)(a). *Held:* A preponderance of the evidence supported the trial court's conclusion that parents' notable progress was not of sufficient duration to allow for children's safe return in light of the serious nature of parents' conduct leading to their removal. Given children's need for permanence, the court correctly authorized DHS to proceed with a plan to achieve adoption. However, before DHS proceeds to subsequent steps toward termination of parental rights, parents would be entitled to request (and absent good cause, the court must grant) another permanency hearing to gauge whether parents' progress has continued to the point where safe reintegration of children into their home may be achieved. Affirmed.

EXCERPT FROM OPINION:

> * * * [T]o warrant a change in the permanency plan from reunification to adoption under the circumstances described in ORS 419B.476(2)(a), the court must find that, despite DHS's reasonable efforts to make it possible for

> the child to return home safely, the parents have not made sufficient progress to allow that to occur. *S. L.*, 211 Or App at 372; *State ex rel Dept. of Human Services v. Shugars,* 208 Or App 694, 711, 145 P3d 354 (2006).
>
> ***We agree that, at the time of the second permanency hearing, a preponderance of the evidence supported the trial court's conclusion that parents had not made sufficient progress to allow for the safe return of children.*** In light of the serious nature of parents' conduct leading to the removal of children, parents' notable progress was not of sufficient duration to justify the conclusion that children could safely return to their home. Children had been under the jurisdiction of the court for 17 months; given their need for permanence, the court correctly authorized DHS to proceed with a plan to achieve adoption. Such contingency planning is in children's interest.
>
> We also agree with the court regarding parents' progress. ***We presume that if parents have continued that progress and completed necessary services, they would have the opportunity to present evidence to that effect at a future hearing, and, as the juvenile court pointed out, they "certainly would not be the first * * * in a long list of parents who have continued to work and have changed the direction of the case for their children * * *."*** We also note that, as the state recognized at oral argument, the record at this point would not support termination of parents' parental rights.

217 Or App at 122-23 (emphasis added; footnote omitted).

11. ***State ex rel Dept. of Human Services v. W. C.,*** 216 Or App 137, 172 P3d 264 (2007) (reversing judgment finding voluntary acknowledgment of paternity to be invalid)

THE COURT OF APPEALS' SUMMARY:

Appellant seeks reversal of the juvenile court's determination that a voluntary acknowledgment of paternity affidavit naming him as father of the child was invalid and that he was therefore not the legal father. The court reasoned that the acknowledgment was invalid because mother's parental rights to the child had been terminated at the time she signed the affidavit. *Held:* Because DHS presented no evidence to support a reasonable belief that the voluntary acknowledgment of paternity was obtained through fraud, duress, or material mistake of fact, DHS lacked standing under ORS 109.070(3)(a)(B)(iii) to bring a legal challenge to the validity of the acknowledgment. Reversed.

DELINQUENCY CASE

12. *State ex rel Juv. Dept. v. S. P.*, 218 Or App 131, 178 P3d 318 (2008) (admission of statements victim made during CARES interview violated youth's confrontation rights and required reversal of jurisdictional finding based on sodomy allegations but did not require reversal of jurisdictional findings based on sexual abuse allegations)

THE COURT OF APPEALS' SUMMARY:

Youth appeals an order finding him to be within the jurisdiction of the juvenile court for committing acts that, if committed by an adult, would constitute first-degree sexual abuse and first-degree sodomy. On appeal, youth asserts that testimony recounting the three-year-old victim's statements made during an interview at CARES Northwest was improperly admitted under OEC 803(18a)(b), and, even if correctly admitted under the evidence code, violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Held:* Youth's arguments pertaining to OEC 803(18a)(b) were not preserved in the juvenile court, and any error in admitting the victim's statements pursuant to that provision was not apparent on the face of the record. The admission of the statements made by the victim to interviewers at CARES Northwest violated youth's confrontation rights under the Sixth Amendment. Given the nature and circumstances of the interview, and in particular the extent of police involvement in the interview process, the court concluded that the victim's statements were "testimonial" and could not be introduced into evidence against youth without providing youth with an opportunity to confront the witness. The court concluded, however, that even if the statements made in the CARES interview were excluded, sufficient evidence was presented at trial to affirm the juvenile court's finding of jurisdiction based on conduct that, if committed by an adult, would constitute first-degree sexual abuse. Juvenile court's finding of jurisdiction on ground that youth had engaged in conduct that, if committed by an adult, would constitute first-degree sodomy vacated and remanded; otherwise affirmed.

TERMINATION-OF-PARENTAL-RIGHTS CASES

13. *State ex rel Juv. Dept. v. J. L. M.*, 220 Or App 93, 182 P3d 1203 (2008) (father's conduct and conditions, considered in combination, rendered him "presently unfit" because he could not provide the steady, patient care needed to sustain the child's improved, but still fragile, mental health)

THE COURT OF APPEALS' SUMMARY:

Father appeals from a judgment terminating his parental rights. *Held:* Father had a long history of drug abuse that was seriously detrimental to child and failed to engage in services following his completion of a drug treatment program and release from prison. He had not addressed his drug addiction to a level that would enable child's safe return. In addition, father's pattern of anger and instability demonstrated that he could not provide the steady, patient care necessary to meet child's special needs. DHS made reasonable efforts, but it was improbable that child could be reintegrated into father's home within a reasonable time. Termination was in child's best interests. Affirmed.

EXCERPTS FROM OPINION:

* * * The [juvenile court] found clear and convincing evidence of unfitness on multiple fronts. Most pertinent to our analysis, the juvenile court found that father had a pattern of residential and employment instability that substantially interfered with his ability to care for child, that he had failed to adjust his circumstances despite offers of services, and that he had a pattern of ignoring court orders and resisting DHS. The court found that father did nothing after his release from prison to demonstrate that his various conditions had been ameliorated. Father had not participated in aftercare and had lied to his probation officer about it. He had "continued to manipulate the system to avoid taking" UAs, and his own statements were not credible, according to the trial court. Father also had not done parenting classes. The court noted, "If he had done the services after his release, perhaps this case would not be in the posture it is in. [Father] has no one to blame but himself."

The court observed that father listened to sad testimony about child's condition "without any affect whatsoever. It is absolutely clear that [child] requires a degree of parenting and care that * * * father is not capable of understanding, let alone * * * perfecting, even with

the assistance of social service agencies." The court concluded that termination was in child's best interests.

* * * * *

ORS 419B.504 requires a two-step analysis. First, the court must examine (a) whether the parent has engaged in conduct or is characterized by a condition and (b) whether the conduct or condition is seriously detrimental to the child. Second, if the parent is unfit, the court must determine whether it is improbable that the child will, within a reasonable time, be integrated into the parent's home. *State ex rel Dept. of Human Services v. Smith*, 338 Or 58, 80-81, 106 P3d 627 (2005); *State ex rel SOSCF v. Stillman*, 333 Or 135, 145-46, 36 P3d 490 (2001). ***A formerly unfit parent may become fit, and a parent's rights may be terminated only if the parent is presently unfit.*** *State ex rel Dept. of Human Services v. Rardin*, 340 Or 436, 448, 134 P3d 940 (2006).

The focus is on the detrimental effect of the parent's conduct or condition, not in the abstract, but on the child. *State ex rel Dept. of Human Services v. Simmons*, 342 Or 76, 96, 149 P3d 1124 (2006); *State ex rel Juv. Dept. v. F.W.*, 218 Or App 436, 456, 180 P3d 69 (2008). ***In examining whether a parent is unfit, the "inquiry necessarily focuses on the severity of the adverse effect of a parent's conduct or condition on the child. That is, the more adverse its effect on the child, the more likely it is that the parent's conduct or condition will render him or her unfit."*** *F. W.*, 218 Or App at 462.

Facts supporting termination must be proved by clear and convincing evidence, which is evidence that makes the asserted facts highly probable. ORS 419B.521(1); *State ex rel Dept. of Human Services v. Radiske*, 208 Or App 25, 48, 144 P3d 943 (2006). ***In assessing a parent's fitness, we view all proven conduct or conditions in combination.*** *Radiske*, 208 Or App at 49.

Here, father's conduct or condition is difficult to characterize succinctly, in part because father has avoided providing reasonable means for assessing his situation, particularly with respect to his sobriety and his psychological state. He manipulated the system to avoid UAs and lied to his PO about participating in aftercare, thus avoiding a requirement that he engage in treatment. He prevented any reliable psychological evaluation by being dishonest with Sacks and by failing to show up for the evaluation with Basham.

* * * * *

* * * ***[E]ven apart from his drug addiction, viewing father's conduct and history in light of child's specific needs, we find a pattern of conduct demonstrating that father cannot provide the steady, patient care needed to sustain child's improved, but still fragile, mental health.*** Father's failure to engage meaningfully in services during most of the time that child has been out of his care, particularly on his release from prison, constitutes a failure to adjust his conditions, conduct, and

circumstances to make it possible for child to safely return to father's care within a reasonable time. *See* ORS 419B.504(5). We address below the further specific aspects of father's conduct that are seriously detrimental to child--his inability to manage his anger, his unstable living situation, and his inadequate parenting skills, as well as his failure to engage in services to address each of those concerns.

* * *[F]ather is unable or unwilling to manage his anger. Although Smith identified anger management as an issue for father to address in aftercare, father failed to engage in that recommended treatment. Father's problems in managing anger are evident in his past behavior--including threats, assault, and admitted verbal abuse and occasional domestic violence with mother--and in his conduct during trial, a time when he reasonably would be expected to be on his best behavior.

Given child's anxiety and anger issues and his high need for stability, father's anger management issues would prevent him from meeting child's needs and thus are seriously detrimental to child. Indeed, father acknowledged that, as a result of his disputes with mother during child's earliest years, child is probably more sensitized to confrontations between adults. Child requires consistency, and father's inability to control his own anger is among the reasons why he cannot provide that consistency.

220 Or App at 116, 118-121 (emphasis added).

14. *State ex rel Dept. of Human Services v. T.D.H.*, 219 Or App 420, 183 P3d 205 (2008) (*per curiam*) (ICWA termination; whether drug use during pregnancy is a ground for termination)

THE COURT OF APPEALS' *PER CURIAM* OPINION:

Mother, a member of the Cherokee Nation of Tahlequah, Oklahoma, appeals a judgment terminating her parental rights to her child R. Mother argues that the state failed to prove beyond a reasonable doubt that her parental rights should be terminated. ORS 419B.521(4); 25 USC § 1912. ***We write only to address mother's argument that the trial court erred in finding "that [m]other's consumption of methamphetamine during pregnancy was a basis for the termination of [m]other's parental rights."***

In its petition to terminate mother's parental rights, the state alleged, among other things, that mother was unfit to parent R by reason of "[c]onduct toward a child, of a cruel or abusive nature by consumption of methamphetamine during pregnancy." The trial court found that the state had proved that allegation beyond a reasonable doubt. On appeal, mother argues that "there was no presentation of any evidence that [her] prenatal use was

> seriously detrimental to R[,]" and ***the state concedes that the record does not support termination on the ground that mother used methamphetamine during her pregnancy. We agree with the state's concession. The fact that a mother engaged in drug use during pregnancy, standing alone, is not a sufficient basis for termination of parental rights***. *State ex rel Dept. of Human Services v. Simmons,* 342 Or 76, 96, 149 P3d 1124 (2006) ("[A] parent's fitness must be measured *at the time of the parental rights termination trial.*") (emphasis in original); *cf. State ex rel Dept. of Human Services v. L.S.,* 211 Or App 221, 240-41, 154 P3d 148 (2007) (although drug use during pregnancy exposed child to risk of harm, evidence was insufficient to demonstrate that mother was unfit at the time of trial).
>
> ***Nevertheless, the trial court's finding that mother used methamphetamine during her pregnancy was only one of the bases on which it terminated mother's parental rights. The trial court found that mother had engaged in other conduct and suffered from other conditions that were seriously detrimental to R and were unlikely to change, thereby making it improbable that R could be integrated into mother's home within a reasonable time.*** A discussion of the facts and legal issues relevant to those additional and independent bases for termination and mother's other assignments of error would not benefit the bench, bar, or public, and we therefore affirm the trial court judgment without further discussion.

219 Or App at 421-22 (emphasis added; footnote omitted).

15. ***State ex rel Dept. of Human Services v. J. S.,*** 219 Or App 231, 182 P3d 278 (2008) (the serious detriment requirement of ORS 419B.504 does not mean that the detriment to the child must already have occurred as a prerequisite to termination)

THE COURT OF APPEALS' SUMMARY:

Child appeals a judgment denying his petitions to terminate mother's and father's parental rights. *Held:* On *de novo* review, the Court of Appeals concluded that child had established, by clear and convincing evidence as of the time of trial, grounds for terminating mother's and father's parental rights on the basis of unfitness. ORS 419B.504. It is unlikely that child will be integrated into mother's or father's home within a reasonable time, and termination is in child's best interests. Reversed.

EXCERPTS FROM OPINION:

ORS 419B.504 sets out a two-part test for determining whether to terminate parental rights, both parts of which must be met before the court orders termination. First, the court must assess the parent's present fitness. ***A parent is unfit, such that termination may be warranted, if the parent has engaged in conduct or is characterized by a condition and that conduct or condition is seriously detrimental to the child.*** *State ex rel SOSCF v. Stillman,* 333 Or 135, 145, 36 P2d 490 (2001); *State ex rel Dept. of Human Services v. L.S.,* 211 Or App 221, 239, 154 P3d 148 (2007). ***Termination is permissible only if the parent is unfit under that standard at the time of the termination trial.*** *State ex rel Dept. of Human Services v. Rardin* 340 Or 436, 448, 134 P3d 940 (2006). Second, if the parent is unfit, the court must assess the likelihood that the child will be integrated into the parent's home; termination may be warranted if it is improbable that the child will be integrated into the parent's home within a reasonable time because of conduct or conditions unlikely to change. The facts supporting termination must be proved by clear and convincing evidence; in other words, the court must find that the evidence establishes that the truth of the facts asserted is highly probable. ORS 419B.521(1); *Simmons*, 342 Or at 95; *State ex rel Dept. of Human Services v. Smith,* 338 Or 58, 79, 106 P3d 627 (2005).

* * * * *

* * * ***[T]he detriment requirement [of ORS 419B.504] "does not specify that the serious detriment must already have occurred as a prerequisite to termination. A condition or conduct can be deemed 'detrimental' based on potential harm even before that harm comes to pass."*** *State ex rel Dept. of Human Services v. J.A.C.,* 216 Or App 268, 279, 172 P3d 295 (2007) (some internal quotation marks omitted). ***In a case such as this, where there have been several previous terminations based on similar conduct and conditions, and where the instant child has been in state custody since birth, we must necessarily focus in large part on the likelihood of future detriment should the child be returned to the parents.***

* * * * *

* * * ***We agree that father's inability to comprehend and apply offered information about mother's drug use, and his continuing relationship with mother in light of that information and the effects of mother's drug use on the older children, create a substantial likelihood that father will not protect child from known risks.***

Moreover, given that child has already exhibited symptoms consistent with methamphetamine exposure, it is likely that he will exhibit additional symptoms as he develops, and it does not appear that father has the capacity to parent a child with special needs. * * *.

In addition, we conclude that father's inability to protect child from those risks has been and will continue to be seriously

> ***detrimental to child.*** For the reasons explained above in connection with mother, child was detrimentally affected by mother's use of methamphetamine while she was pregnant with child and is highly likely to continue to be detrimentally affected by mother's methamphetamine use; because father did not, and will not, protect child from mother's methamphetamine use, father's conduct is detrimental to child. The limitations on father's parenting skills are also likely to be detrimental to child; in particular there are substantial risks that father will fail to recognize child's developmental problems and seek appropriate help for them.

219 Or App at 257, 261, 265-66 (emphasis added).

16. ***State ex rel Dept. of Human Services v. B.S.I.*, 219 Or App 158, 182 P3d 230 (2008) (reversing judgment denying termination petitions and concluding that mother's conduct and conditions, considered in combination, were seriously detrimental to the children)**

THE COURT OF APPEALS' SUMMARY:

The state appeals from a judgment denying its petitions to terminate mother's parental rights to her children, arguing that the trial court erred in failing to terminate mother's rights under ORS 419B.504 on the ground of unfitness. *Held:* The state has demonstrated by clear and convincing evidence mother's unfitness and that the termination of mother's parental rights is in the children's best interest. Reversed.

EXCERPTS FROM OPINION:

> The critical issue in this case, as is true in many termination cases, is whether, after considering all of the circumstances of the case, including mother's fairly lengthy history of drug dependency, mental health, and behavioral problems, mother was unfit *at the time of trial*. The evidence shows that mother has had a history of substance abuse that has seriously affected her life, in particular, her ability to parent. Her psychiatrist, Suckow, who had worked with mother for some time, characterized her as having an "off and on" chronic substance abuse problem. Mother claims that she has had a fairly lengthy period of sobriety. That may be true. However, it is somewhat difficult to determine how long mother's sobriety actually has lasted because her claim that she has been sober for some time is based in large part on her own report. Mother has shown a pattern of adamantly claiming sobriety, and then later admitting that she was lying about it. Due to her history of substance abuse, mother certainly faces some risk of relapse, as the experts who evaluated her have indicated. However, it does appear that, at the time of trial, she had made progress with her drug dependence. ***If that were the only condition that allegedly rendered her unfit, the***

evidence of that condition alone would not be such to establish that she was unfit at the time of trial.

As this court has explained, however, all of a parent's conduct and conditions must be viewed in combination in determining whether a parent is unfit. *See, e.g., State ex rel Dept. of Human Services v. Radiske,* 208 Or App 25, 49, 144 P3d 943 (2006); *State ex rel SOSCF v. Mellor,* 181 Or App 468, 476, 47 P3d 19 (2002), *rev den*, 335 Or 217 (2003). ***Mother's substance abuse issues must be viewed together with her mental health and other behavioral issues.***

With regard to mother's mental health issues, the evidence establishes that mother's conditions are serious and long-term and that her mental health issues have significantly interfered with her ability to achieve stability and consistency in her life, and, consequently, to be a minimally adequate parent. Similar to the circumstances in *State ex rel Dept. of Human Services v. R.N.L.,* 218 Or App 188, ___ P3d ___ (2008), the evidence here establishes a nexus between mother's conduct and her inability to become an adequate parent to her children. As in *R. N. L.*, ***the experts in this case opined that, due to mother's mental conditions, she does not seem to have the ability to place her children's needs above her own. Further, the evidence shows that mother's mental health conditions have interfered with her ability to understand and meet her children's needs and to use the assistance that she has been offered to learn to improve her parenting skills in order to be able to meet her children's needs.***

* * * * *

The evidence here is clear and convincing that mother's conduct and condition have had and continue to have a seriously detrimental effect on the children. As the evidence regarding TI's behavior and development demonstrates, the instability and inconsistency in her life has had serious effects on TI and has put her at great risk for further damage if she is exposed to continued instability. Both children have been evaluated at different times since they have been in foster care. TI has exhibited aggressive and anxious behavior and has been diagnosed with an adjustment disorder and attachment concerns. Giesick, a child psychiatrist with the Children's Program, who evaluated TI in May 2006, before the second phase of the termination trial, said that she was a child "who is in need of some intensive attachment work." She stated that TI needed permanency as soon as possible and that

> "I can't, in good conscience, recommend that there be another disruption in placement. She--it's my strong opinion that she needs to remain where she is and to continue to develop that attachment to the prospective adoptive family. * * * It's rare for me to state it so clearly, but I'm very concerned about her confusion."

As to TH, she has been in foster care since her birth and has not experienced the degree of instability in her life that TI has.

Nonetheless, she has displayed signs of anxiety, including an inability to sleep and nightmares.

The described evidence establishes that the children's problems in this case are severe and that both children are fragile and in need of stability. The evidence also demonstrates that the detriment to the children from mother's conduct and conditions rises to the level contemplated by the legislature in ORS 419B.504 so as to provide a basis for concluding that mother is unfit.

219 Or App at 174-75, 177 (emphasis added).

17. *State ex rel Juv. Dept. v. F.W.*, 218 Or App 436, 180 P3d 69 (2008) (although father's drug dependency was in remission at the time of trial, the combination of father's drug dependency and mental disorders and the children's special needs made the father unable to adequately appreciate and meet the children's needs and rendered him presently unfit)

THE COURT OF APPEALS' SUMMARY:

The state appeals and children cross-appeal from judgments dismissing the state's petition to terminate father's parental rights. The state and the children assert that the trial court erred in failing to terminate father's parental rights under ORS 419B.504 on the ground of unfitness. *Held:* The children and the state have proved by clear and convincing evidence that father is unfit by reason of drug dependency and personality disorders that, in combination, are seriously detrimental to the children. Moreover, the state and the children have proved that integration of the children into father's home is improbable within a reasonable time due to conduct or conditions not likely to change and that termination is in the children's best interests. Because of the children's compelling special needs and father's substance abuse and mental disorders, father was presently unfit at the time of trial. Reversed.

EXCERPTS FROM OPINION:

* * * The inquiry of whether a parent's conduct or condition has had a seriously detrimental effect on the child is meant to be "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. Houston,* 203 Or App 640, 657, 126 P3d 710 (2006). For example, "minimally adequate parenting skills may be different for a severely disabled child from

those for a child that has no disabilities." *State ex rel SOSCF v. Wilcox,* 162 Or App 567, 576, 986 P2d 1172 (1999).

Importantly, the court in [*State ex rel SOSCF v.] Stillman*[, 333 Or 135, 36 P3d 490 (2001),] emphasized that a parent's fitness must be measured at the time of the parental rights termination trial. Evidence that grounds for termination may have existed at the time that the petition was filed, without evidence that those grounds continued to exist at the time of the trial, is insufficient to support the conclusion that a parent's parental rights should be terminated. *Id.* at 148-49. * * *.

* * * * *

* * * The central issue in this case--as the juvenile court and the parties have framed it--is whether, as a consequence of his drug dependency and mental health conditions, father was unfit at the time of trial. Father asserts that, "[g]iven his progress over the year before the trial, his willingness to seek assistance, and the ample evidence of his empathy and sensitivity to his children's needs, the state failed to establish by clear and convincing evidence that father is presently unfit to parent E and F." * * *.

* * * * *

* * * ***The children here have special needs, they are healthily bonded with their foster parents, but not with father, and the issue is not whether father is minimally adequate in light of his intellectual deficiencies but, rather, whether, he has simply waited too long to reform in light of the children's pressing needs.***

* * * * *

* * * It may be, as father contends, that his cyclical history of addiction and relapse alone is insufficient to prove his present unfitness. However, father's drug dependency, when viewed in combination with his mental disorders and the children's special needs, rendered father presently unfit at the time of trial. ***Those conditions, which deprived the children of their father for most of their early childhood years, have also--except to a rudimentary extent-- made him unable to adequately appreciate and accommodate the children's special needs. Despite his progress at the time of trial, father was still at least a year removed from being ready to parent the children.***

* * * * *

Except in cases where the juvenile court initially finds that no further services are required, ORS 419B.470(2) gives the Department of Human Services no more than 12 months after a child is found to be within the jurisdiction of the court under ORS 419B.100, or 14 months after the child is placed in substitute care, whichever is the earlier, to conduct a permanency hearing. ***That statute evinces the specific policy objective that children not be left indefinitely in a placement limbo, and it also more***

> ***generally reflects a child-centered policy orientation to the dependency process. At the time of trial in this case, two special needs children had been enmeshed in the child protection system for six and five years, respectively, and DHS had invested substantial resources in assisting father through multiple relapse and recovery cycles.***
>
> Unlike *Huston*, this is not a case where "the agency should have taken more [time]" to prepare father for the challenge of parenting these children. *Huston*, 203 Or App at 660 (Brewer, C. J., concurring). ***To the contrary, in this case, the "child-specific" testimony in psychological and developmental terms regarding the relationship between father's substance abuse and mental disorders and the special needs of E and F is compelling and essentially unrebutted.*** Unlike in *Simmons*, that evidence is not primarily confined to the probable effects of his very real risk of future relapse; instead, there is abundant evidence that, despite his more recent progress, father's conditions *currently* have (and have had) tangible detrimental effects on the children. That evidence is pertinent, not only to the issue of whether the children's integration into father's home is improbable within a reasonable time; it is also material to the issue of his present unfitness. *Stillman*, 333 Or at 146. In light of that evidence, we conclude that the children and the state have proved, by clear and convincing evidence, that father is unfit by reason of drug dependency and personality disorders that, in combination, are seriously detrimental to these children.

218 Or App at 456-57, 464, 467-69 (emphasis added).

18. ***State ex rel Dept. of Human Services, v. R. N. L.,*** **218 Or App 188, 180 P3d 704 (2008) (concluding that the juvenile court did not abuse its discretion in ordering mother to submit to a second psychological evaluation and that clear and convincing evidence established that mother's conduct and conditions are seriously detrimental to the child)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights to her child, M. She contends that the state failed to prove with clear and convincing evidence that she was unfit to parent at the time of the termination trial. Mother also assigns error to the trial court's order requiring her to participate in a second psychological evaluation. *Held:* The trial court did not abuse its discretion by ordering mother to submit to a second psychological evaluation where the psychologist who performed the first evaluation testified that his report was not

reliable and where the court set over the trial date to give mother an opportunity to prepare her defense. The state failed to present clear and convincing evidence that mother has failed to obtain and maintain a suitable and stable living situation. Nevertheless, the state presented clear and convincing evidence that mother is unfit to parent M as a result of her mental or emotional illnesses, her cruel conduct toward M, her failure to present a viable plan to address her conditions and conduct, and her failure to adjust her circumstances and conduct to enable M to be safely returned to her care in a reasonable amount of time. The state also presented evidence that mother's combination of conduct and conditions was seriously detrimental to M at the time of the termination trial. Because mother would require more than a year of intensive psychological treatment before she might be able to provide a safe and stable environment for M and because M's psychological health requires that she have permanency now, integration of M into mother's home is unlikely within a reasonable amount of time. M is adoptable, and termination of mother's rights is in M's best interests. Affirmed.

EXCERPTS FROM OPINION:

> * * * Because the trial court had the discretion to order the [second] psychological evaluation to determine the best interests of M, we review the order for abuse of discretion. *See State ex rel Juv. Dept. v. Maginnis*, 28 Or App 935, 937, 561 P2d 1044 (1977) (court authorized to order parent to undergo a psychological evaluation to determine the best interests of the child in a termination proceeding); *State ex rel Juv. Dept. v. Kopp,* 180 Or App 566, 579-80, 43 P3d 1197 (2002) * * *.
>
> Mother contends that the trial court abused its discretion by ordering the evaluation by Truhn because mother had been evaluated by Ewell two months earlier, and that "it is fundamentally unfair to require the parent to submit to one intrusive evaluation after another, for no reason other than to try [to] gain a tactical advantage at trial." The record does not support mother's contention that the state requested a second evaluation only to create a tactical advantage at trial; Ewell himself recommended the second evaluation after learning that he prepared his report based on incomplete information about M's circumstances. We need not determine the state's motivations for requesting the order, however, because the trial court made its motivation clear: to ensure that all relevant, helpful, and accurate information was available to decide a case that will drastically affect the lives of M and her mother. So that mother had an adequate opportunity to prepare her defense, the trial court set over the trial date when it issued the order, and mother was able to call an expert witness who disputed Truhn's report at trial. Under these circumstances, we find no abuse of discretion.
>
> * * * * *

> Here, the evidence establishes a nexus between mother's conduct and conditions and her inability to adequately parent M because her mental conditions render her unable to place M's needs above her own. *Cf. State ex rel Dept. of Human Services,* 216 Or App 268, 278, 172 P3d 295 (2007) (inability to recognize child's needs resulting from parent's mental deficiency rendered parent incapable of providing proper care). Despite some gains in self-esteem, mother had not acknowledged or meaningfully addressed the conduct and conditions that rendered her unfit at the time of the hearing. As Truhn explained, mother's lack of genuine insight into her conditions and her emotional and interpersonal instability renders her presently unable to parent M. Moreover, she will not be able to make therapeutic progress until she acknowledges her past wrongdoing and confronts her own accountability, which she has not done.
>
> We find the evidence extraordinarily persuasive that M continues to suffer from mother's past conduct. *Cf. A.M.P.*, 212 Or App at 106-107. She fears mother and is extremely anxious about seeing her. The evidence is also clear and convincing that mother presents an ongoing risk to M. She has not taken responsibility for her past conduct and is unrealistic about her future ability to parent. Moreover, M has special psychological needs, including the need for ongoing individual and family therapy that incorporates a trauma-focused cognitive behavioral therapy model, that mother has failed to recognize. Based on M's and mother's circumstances at the time of trial, we conclude that mother's unreformed conduct and unaddressed conditions continue to be seriously detrimental to M.

218 Or App at 215-16, 224-25.

19. ***State ex rel Dept. of Human Resources v. V.G.B.R.*** **216 Or App 282, 172 P3d 286 (2007), *rev den* 344 Or 280 (2008) (rejecting father's argument that state failed to prove serious detriment because child is well – adjusted and has done well in foster care)**

THE COURT OF APPEALS' SUMMARY:

Father appeals from a judgment terminating his parental rights, arguing that his conduct was not seriously detrimental to child and that child could be integrated into father's home within a reasonable time. *Held:* Although father made commendable progress by attaining sobriety, he failed to effect other lasting adjustments over a two-year period during which he was offered extensive services. Despite completing domestic violence education, father continued an abusive relationship with mother, and, despite parenting coaching, father did not develop parenting skills sufficient to keep child safe. That conduct

was seriously detrimental to child and prevented child's return to father. Termination was in child's best interests. Affirmed.

EXCERPT FROM OPINION:

> We next consider whether that conduct is seriously detrimental to child. Father argues that child has suffered no detriment from his conduct and is healthy and well-adjusted. We conclude, however, that father's conduct is seriously detrimental to child. As explained in expert testimony and as at least partially recognized by both parents, father's violence toward mother presents serious physical and emotional risks to child. Although child has done well in foster care, where he is protected from the relationship between father and mother, he was lethargic and not open to connections with other people when he was first taken into protective custody. If child were returned to father, he would likely be exposed to further domestic violence between father and mother, and emotional and physical harm would ensue. In addition, father's failure to learn parenting skills would expose child, an active little boy who needs close supervision, to choking and other hazards. The detriment is particularly apparent when father's conduct is viewed as a whole--that is, when we consider that father has trouble meeting child's needs even in a structured environment and that the relationship between father and mother is marked not by structure but by violence and trespass. Child's current healthy condition is a function of his placement with others, not evidence that father's conduct is safe for child. Rather, father's conduct is seriously detrimental to child.

216 Or App at 298.

20. *State ex rel Dept. of Human Services v. J.A.C.*, 216 Or App 268, 172 P3d 295 (2007) (mother's mental deficiency seriously detrimental to the child; under ORS 419B.504, a condition can be "detrimental" based on potential harm)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights regarding her daughter on grounds of unfitness under ORS 419B.504. *Held:* Mother has a mental deficiency that renders her incapable of learning the necessary parenting skills to provide safe and proper care for child for extended periods of time; she has failed to adjust her circumstances or conditions to make child's return possible by keeping child away from father, an unfit parent; and she has failed to effect a lasting adjustment after efforts by available social agencies for such time that it appears no lasting adjustment can be effected. These

factors provide clear and convincing evidence that mother will, in all probability, fail to change her conduct within a reasonable time, and that termination of mother's parental rights is in child's best interest. Affirmed.

EXCERPT FROM OPINION:

> We agree with mother that borderline intellectual functioning does not, by itself, foreclose the possibility of fit parenting. *See State ex rel Dept. of Human Services v. Smith,* 338 Or 58, 85, 106 P3d 627 (2005) (reversing trial court's finding of unfitness where there was no evidence of serious detriment to child as a result of mother's low IQ). However, the record in this case shows that mother's borderline intellectual functioning prevents her from absorbing and retaining necessary parenting information. Cooley and Eck, who both worked closely with mother and child, testified that mother's inability to retain information caused them considerable concern. Incidents such as that with the pacifier and the continual overfeeding of child as an infant demonstrate that mother is incapable of learning basic parenting skills, even after pointed and repeated instruction. Mother's statements when confronted about her behavior demonstrate not only an inability to learn, but also an obstinacy to corrective efforts. Further, the DHS workers who monitored mother's visits with child testified that mother would often project adult emotions and characteristics onto child, attributing child's behavior to child disliking her. ***This inability to recognize child's needs prevents mother from responding to those needs appropriately, rendering her incapable of providing proper care.***
>
> ***Mother correctly points out that the state must also prove that her condition is seriously detrimental to child. "That requirement does not specify that the serious detriment must already have occurred as a prerequisite to termination. A condition or conduct can be called 'detrimental' based on potential harm even before that harm comes to pass."*** *State ex rel DHS v. Payne,* 192 Or App 470, 483, 86 P3d 87 (2004). Gordon testified that mother's intellectual functioning is so low that her ability to safely parent a child on a sustained basis would be impaired. Mother has repeatedly demonstrated that impairment in her interactions with child. Furthermore, her condition is permanent and untreatable. The state has thus met its burden in showing that mother's mental deficiency is seriously detrimental to child.

216 Or App at 278-79 (emphasis added).

21. ***State ex rel Juv. Dept. v. D.J.*, 215 Or App 146, 168 P3d 798, *rev den* 342 Or 416 (2007) (construing the term "reasonable time" in ORS 419B.923 and holding that the juvenile court did not abuse its discretion in denying father's motion to set aside "default" termination judgment)**

THE COURT OF APPEALS' SUMMARY:

Father appeals from the trial court's denial of his motion to set aside a default judgment terminating his parental rights to his three children, asserting that a one-year delay in filing the motion was reasonable under the circumstances in light of the fact that father had relied on his attorney to take the appropriate action within the required time. *Held:* The determination of what constitutes a reasonable time within which to file a motion to set aside a judgment terminating parental rights under ORS 419B.923(3) must take into account the circumstances of the particular case, including reasons for the delay and the child's need for permanency. Father's reliance on the advice of his attorney is one of the circumstances that may be relevant; however, in light of the significant delay in filing the motion and the interest in achieving permanency for the children, the trial court did not abuse its discretion in denying the motion to set aside the default judgment. Motions to strike portions of excerpt of record granted; affirmed.

EXCERPTS FROM OPINION:

> ***On appeal, father contends that the trial court erred in concluding that his motion to set aside [under ORS 419B.923] had not been filed within a reasonable time.*** Father acknowledges that the trial court was correct in expressing concern for the children's needs for expeditious resolution of the case. He nevertheless insists that the children's needs in that regard must be weighed against other circumstances. In particular, father contends, we must weigh the interest of expeditious resolution against the facts that he had reasons for failing to show up at the termination hearing, that he relied on court-appointed counsel to protect his interests in seeking to overturn the default judgment, and that such drastic consequences result from that judgment.
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> * * * ***[Under ORS 419B.923,] given the fact that this is a case that arises under the Juvenile Code, the interests of the children will always be a relevant, even primary, consideration. But, given the fact that the particular statute speaks to the reasonableness of time to file a particular motion, we conclude that, in evaluating reasonableness,***

we also may consider the circumstances surrounding the filing, including the length of the delay and any reasons for it.

We turn to the question of our standard of review in evaluating the facts and circumstances of this case. In this case, both parties concur that, although the question of what "reasonable time" means is a question of statutory construction and, thus, a question of law, the trial court's determination that father's motion was not, on the facts of this case, filed within a reasonable time is a matter committed to the court's discretion. We agree. The denial of a motion to set aside a judgment under ORS 419B.923 is reviewed for an abuse of discretion. *State ex rel Juv. Dept. v. Kopp,* 180 Or App 566, 579, 43 P3d 1197 (2002). Similarly, the determination whether a motion has been filed within a "reasonable time" generally is reviewed for an abuse of discretion. * * *.

"Discretion" allows the court to choose among several legally correct outcomes. *Wells v. Santos,* 211 Or App 413, 418, 155 P3d 887 (2007). If the court's decision was within the range of legally correct discretionary choices and produced a permissible, legally correct outcome, then the court did not abuse its discretion. *Id.* In these circumstances, a decision is not within the range of legally correct discretionary choices if it is unjustified by, and clearly against, reason and the evidence. *Forsi v. Hildahl,* 194 Or App 648, 652, 96 P3d 852 (2004), *rev den*, 338 Or 124 (2005).

The remaining question is whether, in light of the proper understanding of the applicable statute, and in light of the applicable standard of review, the trial court erred in determining in this case that father had not filed his motion to set aside within a reasonable time--that is to say, whether the trial court's determination was unjustified by, and clearly against, reason and the evidence.

The trial court gave particular emphasis to the length of the delay in the filing of the motion, which was one week shy of one year from the judgment that father seeks to set aside. The court also noted the fact that the underlying proceeding was, at the time of father's motion, over two years old. The trial court noted the children's need for permanency and the fact that the case had extended well beyond the usual time lines for cases of this type. The court heard father's explanations for the delay, in particular, his "tactical choice" to seek an appeal rather than move to set aside the judgment, and concluded that the justification for the delay was not sufficient. In light of the significant period of delay and the significant interest in achieving permanency for the children--who are awaiting adoption--we cannot say that the trial court's decision was unjustified by, and against reason and the evidence.

215 Or App at 151, 1154-56 (emphasis added).

22. ***State ex rel Dept. Of Human Services v. R.O.W.*, 215 Or App 83, 168 P3d 322 (2007) (mother's mental deficiency and father's inability to protect the child from mother constitute conditions seriously detrimental to the child)**

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal from a judgment terminating their parental rights to their child, S. They contend that the state failed to prove with clear and convincing evidence that they were unfit to parent at the time of the termination trial. *Held:* The state presented clear and convincing evidence that mother is unfit to parent by reason of her mental defect, and that father is unfit to parent because he is unable to protect S from the dangers she would face in mother's care. Despite the state's reasonable efforts, parents have failed to make lasting adjustments to their conduct or conditions. Although parents presented a plan to have relatives constantly supervise mother and S, review of the record reveals that the plan presented will not ensure that mother and S are never alone together, and therefore cannot ensure S's safety. Thus, integration of the child into parents' home is unlikely within a reasonable amount of time. Also, termination of parents' rights is in S's best interests. Affirmed.

EXCERPT FROM OPINION:

> There is clear and convincing evidence that mother's mental deficiencies are "of such a nature and duration as to render [her] incapable of providing proper care for [S] for extended periods of time," and that mother's condition would be seriously detrimental to S because the plan for Omalie West to coordinate people to supervise mother at all times is likely to fail. ORS 419B.506. ***For the same reason, father's inability to protect S from mother or effect a lasting adjustment to that condition would be seriously detrimental to S if she were returned to parents' care.*** Although the state made reasonable efforts to assist mother, and despite Omalie West's offer to supervise, we conclude that integration of S into parents' home is improbable within a reasonable amount of time because the plan presented by parents at trial will not ensure that mother is constantly supervised in S's presence.

215 Or App at 105 (emphasis added).