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 judge may have considered and relied upon specific "social file" information in making the decision (and entering the 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 in the form of an exhibit, or is judicially noticed. The Court of Appeals cannot review a juvenile court's judgment for sufficiency of the evidence or legal error if the judgment is based on information that is "outside the record."

ORS 419A.253 requires that, when a juvenile court does consider "social file" information in making a ruling (and the information is not presented through sworn testimony), the judge must make the information part of the evidentiary 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(s). **ORS 419A.253** further provides that, in the event of an appeal in which "the designation of record includes exhibits, the [juvenile] court shall cause the exhibit 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
Appellate Court Decisions

DEPENDENCY CASES

1. *State ex rel Department of Human Services v. E. K.*, ___ Or App ___, ___ P3d ___ (July 29, 2009) (affirming permanency judgments changing case plans for four of the mother's six children where, notwithstanding reasonable efforts by DHS and the mother's access to community resources, the mother's deficiencies continue to prevent her from being able to adequately supervise her children or meet their psychological and emotional needs)

THE COURT OF APPEALS' SUMMARY:

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

EXCERPT FROM OPINION:

> We turn to whether mother has made sufficient progress to allow reunification within a reasonable time. In *Shugars*, we characterized our inquiry as a determination of whether "the parents' behavior * * * evidenced a lack of sufficient continuing progress," with our "predominant consideration" being the children's "health and safety." 208 Or App at 712. In *State ex rel Dept. of Human Services v.*

S.L., 211 Or App 362, 372, 155 P3d 73 (2007), we stated that "[m]ere participation in services * * * is not sufficient to establish adequate progress toward reunification."

In July 2008, mother admitted to the allegations in the jurisdiction petitions that her cognitive difficulties impaired her memory and that she needed the state's assistance in parenting. We conclude that, in November of that year--the time of the permanency hearing--she remained unable to adequately supervise her children when all six were under her care or to meet their psychological and emotional needs. Despite DHS's efforts, in the parent-child assessment conducted in October 2008, one week before the permanency hearing, mother was unable to adequately supervise all the children together. When mother is with all six children, E is forced to act as a parent and to take responsibility for supervising the children, three of whom have serious special needs. That in turn creates a chaotic environment where the siblings harm each other both physically and psychologically. The sibling interaction and mental health assessments demonstrate the following effects on the children from the family dynamic of mother with the six children: (1) E is ignored by mother and forced to parent her siblings, which neglects her needs as a child; (2) JM is bullied by his siblings; (3) M is frustrated with the amount of control that E has over him; (4) JC acts aggressively and destructively; (5) N has significant emotional and behavioral issues; and, (6) S self-harms and shows signs of "being ignored, neglected[,] and having to meet her own needs." To the extent that mother was making progress, that progress was insufficient.

The special needs that JM, JC, and N have increased the detrimental impact of mother's less-than-minimally adequate parenting skills. Sweet and Stebbins both expressed concern that mother was in denial with respect to the seriousness of their needs and believed that the chaotic environment in mother's home had a detrimental impact on them. Erickson concluded that "the children's needs collectively are so high that even skilled parents would have extreme difficulty parenting all six children together." JM, JC, and N struggled in school while living with mother, but their attendance and performance both socially and academically improved dramatically when they were living in their respective foster homes. Thomas, in working with JC, noted that his behavioral problems had diminished substantially while living in his therapeutic foster home.

Thus, the final question is whether mother's progress would have continued at a sufficient pace to allow the children to return to her home "within a reasonable time." ORS 419B.090(5). The record does not support the conclusion that it would have. Although Flora's assessment indicates some improvement in mother's parenting skills, only E and M lived with mother when Flora was working with her. Thus, Flora's assessment does not provide support for the conclusion that mother would be a minimally adequate parent with all six children in the home. Even with only two children living in the home, mother's progress was limited--mother allowed E to be too controlling of M and failed to intervene in their disputes, even when E became physically aggressive with M. Sweet's testimony indicates that whatever progress mother may have made with E and M, that progress did not carry over to situations in which the whole family was together. His testimony about the October 2008 parent-child interaction assessment demonstrates that, at the time of the permanency hearing, mother's ability to parent all of the children together had not improved significantly since July 2008. Mother's refusal to sign the October 2008 "Action Agreement" and her request to Stebbins to quit services also suggest that

her willingness and ability to incorporate DHS's parenting training programs were limited and that her progress was likely to be insufficient to allow the children to return to her home within a reasonable time. Moreover, Erickson concluded that "[JM,] [JC,] * * * [N,] and [S] need permanency now," and Sweet concluded that it was "important" that "the situation for the children get resolved soon."

In sum, even with responsibility for only two of the six children--those whom Thomas had identified as having the lowest levels of special needs--mother had difficulty applying the parenting training that DHS had provided. The evidence demonstrates that she had even greater difficulty adequately parenting all six children. Given Erickson's recommendation that the children need permanency "now" and Sweet's conclusion that it was important that the situation be resolved "soon," we conclude that the preponderance of the evidence demonstrates that it was unlikely that mother would make sufficient progress to allow the other four children to be returned within a reasonable period. *See S. L.*, 211 Or App at 372 (affirming where "a preponderance of the evidence demonstrates that mother has not made sufficient progress toward remedying the conditions or conduct that led to the removal of" her child). Thus, we conclude that the juvenile court did not err in changing the permanency plan for JM, JC, N, and S.

2. *State ex rel Juv. Dept. v. C. D. J.*, 229 Or App 160, ___ P3d ___ 2009) (the juvenile court erred in changing plan to adoption where, under the circumstances, putative father's acknowledgment of paternity and cooperation with paternity testing constituted sufficient progress)

THE COURT OF APPEALS' SUMMARY:

Father appeals a permanency judgment that found that the Department of Human Services (DHS) had made reasonable efforts to return his 10-month-old child safely home, that father had not made sufficient progress to make it possible for child to return home, and that changed the permanent plan to adoption. Father was in prison during all of the proceedings in this case. DHS took child into protective custody shortly after her birth. Child had no legal father. Two months after child's birth, DHS personally served father with a letter informing him that he had been named as child's biological father and requiring him to respond within 14 days. Five months later, father acknowledged that he was child's biological father. At that time, DHS began to integrate father into the dependency proceeding. However, because of doubts about whether mother had been married at the time of child's birth--presumably to someone other than father--DHS also asked father to submit to paternity testing. Father complied with those requests. One week after the juvenile court established jurisdiction over father, the court held a permanency hearing at child's request and, as noted, changed the permanent plan to adoption. At that time, DHS had not offered father any services. *Held:* Under Oregon law, DHS has no obligation to offer

services to a putative legal father who has not assumed, or attempted to assume, the responsibilities normally associated with parenthood. Under the circumstances of this case, DHS's efforts to establish father's legal relationship with child and its efforts to integrate father into the case constituted reasonable efforts to make possible child's return home. Given the minimal nature of DHS's requests and accelerated pace of the paternity hearing, father's acknowledgment of paternity and his cooperation with paternity testing constituted sufficient progress toward reunification.

3. *State ex rel Department of Human Services v. N. S.*, 229 Or App 151, P3d (2009) (reversing permanency judgment changing plan to guardianship)

THE COURT OF APPEALS' SUMMARY:

Mother appeals an order establishing a guardianship under ORS 419B.366 for her three-year old child. The Department of Human Services (DHS) first took custody of child because of concerns about mother's inability to protect child from father. Those concerns have since been alleviated. DHS later learned that mother's brother had been convicted of third-degree sodomy, an offense that, by statute, involves "deviate sexual intercourse" with a person less than 16 years of age. Despite DHS's suspicions that mother shares a home with her brother, mother denies living with her brother and, despite "numerous" home visits, DHS has found no evidence that mother lives with her brother. Mother's brother currently resides half a mile away from mother's home, and mother occasionally receives mail addressed to him. Although mother planned to maintain a relationship with her brother, she testified that her brother would not be allowed to have any contact with child. Shortly before the hearing in this case, an unidentified male answered the telephone at mother's home and identified himself as mother's roommate. *Held:* The evidence presented to the juvenile court established neither that mother's brother would have contact with child nor a nexus between the nature of his prior offense and this particular child.

EXCERPTS FROM OPINION:

> First, the record does not establish that mother's brother would have contact with child. With the exception of DHS's suspicions, there is no evidence that mother's brother resides with her. Indeed, DHS acknowledges that, despite "numerous" home visits, it has found no indication that mother and her brother are living together. Although there is evidence that, one month before the hearing, there was an unknown male (who identified himself as mother's roommate) at the residence, there was no evidence--even accounting for mother's somewhat unsatisfying explanations--that that person was her brother.

Second, the record contains insufficient evidence of a risk to this particular child. When this court previously has confronted the issue of when and whether a sex offender presents a risk of harm to child, we have required some nexus between the nature of the offender's prior offense and a risk to the child at issue. *See State ex rel Dept. of Human Services v. L.C.J.,* 212 Or App 540, 546, 159 P3d 324 (2007) (evidence that the mother lived with a person who had been adjudicated to be a sex offender based on allegations of victimizing a girl close to the child's age and who was likely to reoffend was sufficient to establish a risk of harm to the child); *cf. State ex rel Dept. of Human Services v. Shugars,*202 Or App 302, 315, 121 P3d 702 (2005) (acknowledging, in a dependency case, the postulate that "harm to one child presents a risk of similar or related harm to other children in the same household," but noting that the rule did not automatically justify the blanket imposition of dependency jurisdiction without a consideration of each child's circumstances). Here, DHS has provided no evidence of the circumstances of mother's brother's sexual offense other than that it involved a person who was less than 16 years old and that it occurred sometime before 2002. ***Rather, DHS's position appears to be that, because mother's brother is an untreated sex offender, he necessarily presents a safety risk to child.***

This court previously has rejected similar arguments. In *State ex rel SOSCF v. Burke*, 164 Or App 178, 181-84, 188, 990 P2d 922 (1999), *rev den*, 330 Or 138 (2000), a termination case, we declined to infer, in the absence of any evidence that the father had ever victimized his toddler children, that he presented a risk to the children, despite evidence that, before their birth, he had engaged in numerous incidents of sexual contact with teenage females. *See also State ex rel Juv. Dept. v. K.D.*, 228 Or App 506, 516 n 4, ___ P3d ___ (2009) (noting that a father's 13-year-old conviction for the statutory rape of two girls, aged 13 and 14, "does not necessarily demonstrate a propensity * * * to be a threat to his toddler son"). ***Consistently with those cases, we decline to infer, without other evidence, that, because mother's brother is an untreated sex offender, he is a threat to child, even if he resides near mother's home.*** Because DHS presented insufficient evidence at the guardianship hearing to demonstrate that mother's brother presented a risk to child that prevented child's safe return to mother, the juvenile court erred in establishing the guardianship.

* * * * *

[FOOTNOTE 1:] Acting on DHS's motion, the juvenile court limited the scope of the evidence below to events that occurred after the April 2008 permanency hearing. The court reasoned that, at the April hearing, it had determined that child could not be returned to mother within a reasonable time, one of the requirements for an ORS 419B.366 guardianship. The court announced that "the information that was adduced" at the earlier hearing would be "incorporated" into the guardianship proceeding, that it "formally adopt[ed]" that information, and that its April 2008 permanency judgment reflected--and it had "a recollection of reviewing"--various documents, including a DHS letter and court report, notes from mother's FSAT participation, an evaluation from child's therapist, and various visitation notes.

With the exception of the DHS letter and a court report (the latter of which appears to be an updated version of a report that was presented to the court in April), none of the documents mentioned by the court was entered into evidence, and they do not otherwise appear in the trial court

> ***file. Accordingly, they are not part of the record on appeal.*** *See State ex rel DHS, Lewis*, 193 Or App 264, 270, 89 P3d 1219 (2004). Although it is well established that courts may take judicial notice of records and prior proceedings in the same case, *Oden v. Oden*, 157 Or 73, 76, 69 P2d 967 (1937), we do not interpret the juvenile court's vague statement that the information "adduced" at the April hearing was "incorporated" into the guardianship proceeding as taking judicial notice of that information.

229 Or App at 157-59 (emphasis added).

4. *State ex rel Juv. Dept. v. M. U.*, 229 Or App 35, 210 P3d 254 (2009) (denying motion for leave to file "late appeal")

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment establishing dependency jurisdiction and disposition with respect to her daughter. In response to the Court of Appeals' order to show cause why the appeal should not be dismissed as untimely, mother moves for an order allowing her to pursue a late appeal under the authority of ORS 419A.200(5) and *State ex rel SOSCF v. Hammons*, 169 Or App 589, 10 P3d 310 (2000). *Held:* Because, unlike in *Hammons*, the delayed appeal procedure established by the legislature in ORS 419A.200(5) was available to mother to remedy appointed counsel's default in failing to file a timely notice of appeal of the juvenile court judgment--and mother did not timely invoke that remedy--the appeal must be dismissed.

5. *State ex rel Juv. Dept. v. K.D.*, 228 Or App 506, 209 P3d 810 (2009) (finding "compelling reason" not to file termination petition and reversing permanency judgment changing plan to adoption)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment directing a change in the permanency plan for her child, R, from reunification to adoption. Mother argues that she made sufficient progress to allow R to return to her care, and therefore the trial court erred in changing the permanency plan because she had fully complied with DHS and her case plan. Mother also contends that the trial court did not sufficiently evaluate whether DHS had made reasonable efforts. *Held:* The court erred in changing the permanency plan to adoption. Where mother complied with the requirements of her prior case plan, and the case plan at the time of the proceeding had been in effect for only a few weeks, it is unreasonable for the court to evaluate her progress as to that plan at the

time of the hearing. The trial court did not provide a compelling reason why it is in the best interest of the child to move to a permanency plan of adoption.

EXCERPTS FROM OPINION:

ORS 419B.476(2)(a) governs the juvenile court's permanency plan determination and provides:

> "At a permanency hearing the court shall:
>
> "(a) If the case plan at the time of the hearing is to reunify the family, determine whether the Department of Human Services has made reasonable efforts * * * 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."
>
> * * * * *

* * * ***We again underscore the importance that the juvenile court make the required findings on the basis of the most recent case plan in order to justify its decision and to allow efficient judicial review.*** *H. S. C.*, 218 Or App at 427 n 2 ("We are inhibited in our review of the ORS 419B.476(2)(a) requirements of 'reasonable efforts' made by DHS and the lack of 'sufficient progress' by father because of the absence of an updated service agreement that reflects conditions present during the time immediately before the permanency hearing."); *M. A.*, 227 Or at 183 ("By requiring that the court make such findings, the legislature has expressed its 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.").

* * * ***The first issue is whether the evidence shows that DHS made reasonable efforts and mother achieved insufficient progress toward reunification with R.*** That assessment is made on the basis of the case plan in effect at the time of the permanency hearing and the particular issues of parental unfitness alleged in the dependency petition. The second issue on appeal is whether the court erred in concluding that there was not a compelling reason to avoid filing a petition to terminate mother's parental rights to R.

* * * * *

The basis for dependency in this case is mother's allowance of continued association between father and R. It is obvious that mother made progress with respect to that reason for dependency. Mother was directed to divorce father by the November 2007 case plan, and she did so. There is no evidence that mother allowed any interaction between R and his father after December 2006. Her contact with father was by telephone, at his initiation. Mother arguably did not comply with the DHS requirement that she change her "thinking" about father and his "sexual predatory nature." There was no evidence in the record, however, of the current nature of father's sexual predations. Nonetheless, mother's disassociation and

divorce from father is significant progress toward remedying the barrier to reunification with R identified in the dependency petition and the applicable case plan.

Those efforts of mother [under the initial case plan] are sufficient to require continuing efforts by the state to reunify mother with her son. No other barrier to reunification was identified in the dependency petition. * * * By the time of the second permanency hearing, mother had submitted to another psychological evaluation and had continued parenting visits and therapy. Mother was making progress in developing her parenting skills and relationship to R, even if that progress was not moving by leaps and bounds.

On July 24, 2008, DHS [had] adopted a new case plan that required mother to continue to demonstrate autonomy and independence, seek and obtain a divorce, and develop parenting skills, tasks already accomplished or in progress. * * * The two weeks between the new case plan and the permanency hearing was not a reasonable amount of time to measure further progress under the new plan. Thus, mother made sufficient progress under the original case plan, and there was insufficient time to evaluate her progress under the new case plan. The state did not meet its burden to show that R could not be returned to mother's custody within a reasonable time. Accordingly, the trial court erred in changing the permanency plan from reunification with parent to adoption.

Our final inquiry is whether there was a compelling reason not to file a termination petition in accordance with ORS 419B.498. That statute requires that DHS initiate termination proceedings after the child has been in substitute care for 15 of the previous 22 months, a period that R had exceeded at the time of the second permanency hearing. ORS 419B.498 authorizes DHS to defer filing the petition if there exists a compelling reason to do so. * * *.

At the hearing, the state argued that there were no grounds for a termination petition, and therefore the court should continue the plan of return to parent. "[S]uch a request coming from the agency charged with protecting the children is entitled to greater weight than a request coming from a party." *State ex rel Juv. Dept. v. K.L.,*223 Or App 35, 43, 194 P3d 845 (2008). DHS acknowledged that mother was complying with all offered services. The juvenile court concluded that mother was not successfully participating in services, and there was no possibility of reunification and therefore no compelling reason existed not to proceed with termination. ***On appeal,*** DHS argues that mother's minimal progress was a product of her immaturity and patterns of denial and deception when dealing with authority figures and that therefore she was not "successfully participating" in services. That argument is without merit.

As we have already held, mother was making sufficient progress in reference to the first case plan, and there was an inadequate time to measure her progress under the second plan. ***We agree with mother that, in this case, allowing the state more time to support reunification would make it possible to more effectively evaluate whether R could safely return within a reasonable time, thus satisfying the statutory preference that children live in their own homes with their own families. ORS 419B.090(5).*** Just as in *K. L.*, there was a "compelling reason" not to file a termination petition because more time was needed to assess mother's progress under the new case plan. Accordingly, the trial court

> erred in concluding that it was required to advance to the termination stage and order a permanent plan of adoption.

228 Or App at 513-19 (emphasis added).

6. ***State ex rel Dept. of Human Services v. C.B.*, 228 Or App 85, 206 P3d 1139 (2009) (challenge to DHS rule defining "relative")**

THE COURT OF APPEALS' SUMMARY:

In this dependency case, mother attempts to challenge the validity of an administrative rule of the Department of Human Services (DHS) that defines "relative" for purposes of placing a child in foster care to include adoptive parents of a child's biological siblings. According to mother, a "relative" should be construed to be limited to those who are biologically related to the child. The juvenile court rejected mother's contention, but then entered a judgment that did not change the child's placement with a biological relative. Mother nevertheless appeals, challenging the court's ruling on the validity of the rule and arguing that she could be affected at some point in the future if DHS decides to alter the child's placement. *Held:* Because the judgment that mother appeals did not change the child's status or otherwise adversely affect mother, mother may not appeal it.

7. ***State ex rel Dept. of Human Services v. M.A.*, 227 Or App 172, 205 P3d 36 (2009) (reversing permanency hearing judgment because the juvenile court did not make findings required by ORS 419B.476(5)(a))**

THE COURT OF APPEALS' SUMMARY:

In this dependency case, mother appeals from judgments directing a change in the permanency plan for two of her children, D and C, from reunification to "another planned permanency living arrangement" (APPLA), specifically long-term foster care. On appeal, mother argues that the judgment failed to comply with the requirements of ORS 419B.476(5)(a) and (f), which require a court to make specific findings when it approves a change of that kind of plan. *Held:* The court erred in failing to make the specific findings required by ORS 419B.476(5)(a) and (f). Where the judgment refers to what the court "heard from the parties" and states that the court took judicial notice of the caseworker's report but fails to make specific findings, the judgment is inadequate to satisfy the statutory requirement that the court identify a "compelling reason" why it is in the best interest of the children to move to a permanency plan of long-term foster care.

EXCERPT FROM OPINION:

[T]he relevant statutes required the judgment to include the following: (1) the court's determination as to whether DHS had made reasonable efforts to make it possible for the children to safely return home, ORS 419B.476(5)(a), (2); (2) a brief description of DHS's efforts with regard to reunification, the case plan in effect at the time of the hearing, ORS 419B.476(5)(a); (3) the court's determination whether mother had made sufficient progress to make it possible for the children to safely return home, ORS 419B.476(5)(a), (2)(a); and (4) a "compelling reason, that must be documented by [DHS], why it would not be in the best interests of the [children] to be returned home, placed for adoption, placed with a legal guardian or placed with a fit and willing relative[,]" ORS 419B.476(5)(f).

Here, the judgment fulfilled the first requirement--the "reasonable efforts" determination and, arguably, the third--lack of sufficient progress on mother's part. However, it indisputably failed to include a brief description of DHS's efforts or, most significantly, a "compelling reason" why it was not in the best interest of the children for them to be returned home or placed in another permanency option, such as adoption, guardianship, or placement with a relative.

* * * In the state's view, * * * the judgment, "[a]lthough not ideal," nonetheless comports with the statutory requirements because the findings were "incorporated into the order when the court included in the judgment what it 'heard from the parties' as the basis for its findings of reasonable efforts and insufficient progress by mother" and because the court took judicial notice of the court report and its contents.

We disagree. The fact that the judgment refers to what the court "heard from the parties" and states that the court took judicial notice of the caseworker's report, establishes, at most, the information on which the court relied in making its decision. It does not, without more, reflect the court's reasoning or demonstrate the basis for the court's ultimate decision, much less set forth, as required in this case, a "compelling reason" why it is in the children's best interest to move to a permanency plan of long-term foster care. Thus, it is inadequate to meet the requirements of the statute.

By requiring that the court make such findings, the legislature has expressed its 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. That is particularly the case when the recommended change is to APPLA, which is the "least permanent" and, consequently, "least preferred" of the permanency plans available for a child in substitute care. OAR 413-070-0528(6) ("APPLA is the least permanent of all the permanency plans and must be used only when the other plans have been ruled out."); OAR 413-070-0528(7) ("When APPLA is utilized as a child's permanency plan, the plan should be regularly reviewed to determine whether a more permanent plan has become appropriate for the child."); OAR 413-070-0532 ("APPLA is the least preferred permanency plan for a child."); OAR 413-070-0536(1) (providing that "[t]he Department may identify APPLA as a permanency plan for a child only if the Department has determined that there is a *compelling reason* * * * that it would not be in the best interests of the child to be placed on a permanent basis" with a parent, in an adoptive home, in a guardianship, or in a permanent placement with a

> fit and willing relative (emphasis in original)). Accordingly, we reverse and remand to the trial court for further proceedings consistent with this decision.

227 Or App at 182-84 (emphasis added).

8. ***State ex rel Dept. of Human Services v. M.B.,* 226 Or App 215, 215 P3d 258 (2009) (affirming judgment establishing guardianship under ORS 419B.366)**

THE COURT OF APPEALS' SUMMARY:

Mother appeals after the juvenile court established a guardianship under ORS 419B.366 for her three youngest children. *Held:* Given the long history of domestic violence problems and mother's lack of engagement in services during most of the year before the guardianship hearing, the threat of domestic violence prevents the children's return to mother within a reasonable time. The children are doing well in the proposed guardians' care, and guardianship is in the children's best interests.

EXCERPT FROM OPINION:

> We begin by considering whether the children can safely return to mother's care within a reasonable time. At the time of the guardianship hearing, mother was still in a relationship with father, despite his history of assaultive behavior. Mother and father had received domestic violence prevention services and participated in parenting classes more than once over the course of DHS's 10-year involvement with the family. Nevertheless, when the children were removed in April 2007, the parent's relationship still involved frequent fighting that continued even when M begged them to stop. An incident of violence occurred in July 2007, after both parents had completed their most recent domestic violence classes. Although mother briefly separated from father after that incident, she apparently reunited with him soon after. In September 2007, the couple moved to Arizona together despite the fact that DHS could not provide services there, and mother engaged in no further services. Given the long history of problems that have continued despite both parents' participation in services, and given mother's lack of engagement in services for most of the year that her young children have been living with the proposed guardians, we conclude that the threat of domestic violence prevents the children's safe return to mother within a reasonable time. *See State ex rel Dept. of Human Services v. G.B.R.,* 216 Or App 282, 299, 172 P3d 286 (2007), *rev den*, 344 Or 280 (2008) (concluding, in a termination of parental rights case, that the child's safe return to the father within a reasonable time was improbable where, after receiving services to address domestic violence issues, the father had not made substantial progress in avoiding violence and related behaviors).

226 Or App at 222-23.

9. *State ex rel DHS v. W. P.*, 345 Or 657, 202 P3d 167 (2009) (holding that the "exclusionary rule" does not apply in juvenile court dependency proceedings)

THE SUPREME COURT'S SUMMARY:

[T]he Oregon Supreme Court held that the exclusionary rule, under which illegally obtained evidence is excluded from certain court proceedings, does not apply to a parent's motion to suppress evidence in a juvenile dependency proceeding.

In connection with a drug investigation involving mother, police executed a search warrant of the home of mother, father, and child. During that search, officers found drugs in the home and on father's person. Both parents were arrested, and the police contacted the Department of Human Services (DHS) concerning child. DHS placed the child in foster care and filed a juvenile dependency petition, requesting that the court take jurisdiction over child. Pursuant to that petition, the juvenile court conducted a jurisdictional and dispositional hearing. At that hearing, father moved to suppress evidence found in the search. The juvenile court denied the motion because it concluded that the exclusionary rule does not apply in juvenile dependency proceedings. The court then found child to be within the jurisdiction of the court, made child a ward of the state, placed child in the legal custody of DHS, and ordered father to participate in various services, including drug treatment and psychological evaluation. Pursuant to that order, father's progress will be evaluated, and father may regain custody if he makes sufficient progress so that child can safely return home. Father appealed, arguing that the juvenile court had erred in refusing to apply the exclusionary rule to the juvenile dependency proceeding. The Court of Appeals affirmed without opinion.

In a unanimous opinion by Justice Thomas A. Balmer, the Supreme Court affirmed the decision of the Court of Appeals and the judgment of the circuit court. The Court first concluded that the Oregon Constitution did not require exclusion of the evidence. The Court noted that it had previously applied the state exclusionary rule in traditional criminal prosecutions and in a probation revocation proceeding in a juvenile delinquency case. Here, considering the temporary and conditional nature of the restriction on father's parental rights and the distinctive aspects of a juvenile dependency proceeding, where the purpose of the proceeding is to protect the child's interests, the court determined that father's interest was not sufficiently analogous to the interests involved in those proceedings to require exclusion of the evidence.

The Court next concluded that the federal exclusionary rule, which applies only when the social benefits of applying the rule outweigh the costs, did not apply. In determining the likely social benefits, the Court noted that the evidence would be excluded in any criminal prosecution against father. Then, applying the United States Supreme Court's reasoning, the Court determined that applying the exclusionary rule to the juvenile dependency proceeding would provide little, if any, additional deterrence. Either the exclusion of the evidence in the criminal prosecution would sufficiently deter law enforcement from violating Fourth Amendment rights, in which case excluding the evidence from the juvenile dependency proceeding would have only a marginal effect, or law enforcement would not be deterred by exclusion, in which case the exclusionary rule is not a useful deterrent and should not be used at all. In contrast, the Court determined that the likely social costs, including the likelihood that the state would be unable to respond effectively to threats to a child's safety, were great. Weighing the substantial social cost of ignoring children's safety against the minimal additional deterrence achieved by applying the exclusionary rule to juvenile dependency proceedings, the Court concluded that the federal exclusionary rule did not apply. Because the exclusionary rule did not apply under either the federal or state constitution, the Court concluded that the trial court had properly denied father's motion to suppress.

10. *State ex rel Juv. Dept. v. G. A. K. and A. M. F.*, 225 Or App 477, 201 P3d 930 (2009) (the juvenile court abused its discretion in dismissing petitions as a sanction for discovery violations)

THE COURT OF APPEALS' SUMMARY:

The state appeals judgments dismissing with prejudice its petitions for dependency jurisdiction over the parties' two children. The petitions alleged that the children were at risk of harm as a result of father's sexual abuse of one of the children and mother's failure to protect her from father. The state argues that the trial court erred in (1) determining that the state had committed discovery violations under ORS 419B.881, (2) precluding the admission of evidence as sanctions for those alleged violations, and (3) dismissing the state's petitions with prejudice. *Held:* Even assuming (without deciding) that DHS committed one or more discovery violations, the court abused its discretion under ORS 419B.881(9) in ordering exclusion of the state's evidence as a sanction where the record lacked evidence that the state acted willfully and the court failed to take into account the interests of the children.

EXCERPT FROM OPINION:

"[A] decision that is clearly against reason and evidence may be, for that reason, outside the range of legally permissible outcomes." *State ex rel Dept. of Human Resources v.S.P.B.,* 218 Or App 97, 103, 178 P3d 307 (2008). We conclude that this is such a case. Although ORS 419B.881(9) itself does not prescribe the factors material to the court's exercise of discretion in imposing a sanction for a discovery violation, we discern some guiding principles from the relevant context. For example, other provisions of ORS 419B.881 authorize the court to supervise discovery as necessary to ensure that it proceeds properly and expeditiously, ORS 419B.881(2)(b), and to deny, restrict, or defer disclosure upon a showing of good cause, ORS 419B.881(5). The legislature thus contemplated the court's continuing involvement in addressing discovery problems as they arise. That, in turn, indicates that the serial nature or "willfulness" of the party's actions in disregarding the discovery rules is at least one factor relevant to the court's determination as to the appropriate sanction to be imposed for that conduct. *Cf. Pamplin v. Victoria*, 319 Or 429, 434, 877 P2d 1196 (1994) (finding of willfulness, bad faith, or fault of similar degree on part of disobedient party is required for trial court to impose sanction of dismissal for failing to obey discovery order under ORCP 46(B)(2)(c)).

We have also recently observed that, in cases arising under the Juvenile Code, "the interests of the children will always be a relevant, even primary, consideration." *State ex rel Juv. Dept. v. D.J.,* 215 Or App 146, 154, 168 P3d 798 (2007); *see also* ORS 419B.090 (recognizing that it is the policy of the state of Oregon to safeguard and protect children's rights to safety, stability, and freedom from abuse, exploitation, and neglect).

Application of those principles in this case leads us to conclude that the court abused its discretion in ordering preclusion of the state's evidence. First, we are not persuaded on the record before us that there is any evidence of willfulness on the part of DHS to delay disclosure or otherwise circumvent the strictures of the statute. Rather, it appears--again, on this record--that the state first received notice that mother and father were alleging discovery violations on the morning of the hearing and no evidence of willful delay was presented. Moreover, the court failed to consider the interests of the children before making its decision to exclude the evidence, although the children's attorney counseled against it. Given the seriousness of the allegations in the petitions, and the nature of the evidence excluded--which resulted in the state's inability to prove allegations of sexual abuse--the court's decision to exclude the state's evidence was, under the circumstances, unjustified by, and clearly against, reason and the evidence.

225 Or App at 486-87.

11. *State ex rel DHS v. J. N.*, 225 Or App 139, 200 P3d 615 (2009) (although the juvenile court's failure to make written findings required for permanency judgment was "plain error," Court of Appeals declined to exercise its discretion to review that unpreserved claim)

THE COURT OF APPEALS' SUMMARY:

In this dependency case, father appeals a judgment that changed the permanency plan for the child from permanent foster care to adoption. He advances two assignments of error. First, he contends that the trial court erred in failing to make findings of fact required by statute before changing the plan. Second, he contends that, on the merits, the record does not demonstrate that it is in the child's best interests to change the plan to adoption. The state contends that father's first assignment is not preserved and that a trial court's failure to make required findings can never be reviewed as plain error. The state also contends that, on the merits, the record establishes by a preponderance of the evidence that adoption is in the child's best interests. *Held:* Addressing only father's first assignment of error, the Court of Appeals concluded that, although the trial court's failure to make statutorily required findings constitutes plain error, it is not appropriate for the Court of Appeals to exercise its discretion to review that error in this case.

EXCERPTS FROM OPINION:

> * * * ORS 419B.476(2)(d) and ORS 419B.449(2) and (3) plainly require the trial court to make particular findings of fact at the conclusion of a permanency hearing. The legal requirement is obvious and not in dispute. In this case, the trial court did not make all of the required findings. That much also appears obvious, apparent from the face of the record, and not in dispute; even the state concedes that the trial court did not make the required finding concerning the number of schools attended. Consequently, we conclude that the trial court committed plain error. * * *.
>
> * * * * *
>
> We turn, then, to the question whether it is appropriate for us to exercise our discretion in this case to review the trial court's error. We conclude that it is not. To begin with, as the state suggests, it appears that the trial court *did* make the required findings in all but one respect, *viz*., the number of schools attended. It is at least arguable that, in all other respects, the written judgment, the court's oral findings, and its reference to incorporation of evidence in the record satisfied the statute. With that in mind, we also note that father does not explain why the particular finding that was required matters in this case--that is to say, father does not explain how the absence of the finding harmed his case. Moreover, * * * we

> note that, had there been a request for all of the findings required by ORS 419B.449(3), the trial court easily could have complied with the request.
>
> We therefore decline to review father's contention that the trial court erred in failing to make the findings that the statutes require.

225 Or App at 144-45.

12. ***State ex rel Juv. Dept. v. J. S. W. and T. L. W.,*** **223 Or App 177, 195 P3d 408 (2008) (mootness of appeal)**

THE COURT OF APPEALS' SUMMARY:

The Department of Human Services (DHS) removed the children from parents' care in November 2006 and placed them in substitute care until December 2007. Parents contend that, for three months during that time period, DHS failed to make reasonable efforts toward reunifying the family and appeal the juvenile court's finding to the contrary. The state has moved to dismiss the appeal, arguing that, because the children have been reunified with parents during the pendency of the appeal, the appeal is moot because a decision by this court would have no effect on parents' rights. Parents answer that the operation of ORS 419B.498(1)(a)--which requires DHS to file a petition terminating the parental rights of any parent whose child has been in substitute care for 15 of the most recent 22 months--is a potential effect on their rights. They argue that, because their children were in substitute care for 12 months, DHS will be required to file a petition if the children are placed in substitute care for three additional months. Parents assert that, so long as the court's finding on the disputed time period remains in effect, DHS will be required to file a termination petition sooner than it otherwise could. Parents contend that, in the event the children are again placed in substitute care, a favorable decision in this appeal would allow them more time to rectify DHS's concerns before the agency files a termination petition. Accordingly, they reason that their appeal is not moot. Held: So long as the children have been in parents' custody for more than seven of the previous 22 months, DHS cannot rely on ORS 419B.498(1)(a) as the basis for filing a termination petition. Because the children have spent approximately 10 months in parents' care since their return from substitute care, it is impossible for them to be in substitute care for 15 months of any 22-month period that includes the disputed time period. Parents' appeal is moot.

13. ***State ex rel Juv. Dept. v. K. L.,*** **223 Or App 35, 194 P3d 845 (2008) (the juvenile court erred in denying DHS's request for a 90-day continuance of return-to-parent case plan, even though granting the request would continue the child's out-of-home placement beyond the 15-out-of-22-months time line under ORS 419B.498(1)(a))**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from an order that the trial court issued after a permanency hearing under ORS 419B.476 that determined that the Department of Human Services / Community Human Services--Child Welfare (DHS) should implement its concurrent plan of adoption for mother's children rather than continuing to plan for their integration to her home. Held: On de novo review of the record, the trial court erred when it denied DHS's request for a 90-day continuance of the hearing.

EXCERPTS FROM OPINION:

> The trial court apparently believed that it did not have the authority to grant the continuance that DHS requested. ORS 419B.476(1) provides that a trial court shall conduct a permanency hearing in accordance with, among other statutes, ORS 419B.310(1). That statute, in turn, provides that the court may continue the hearing from time to time. The trial court, however, was concerned about the requirement in ORS 419B.498(1)(a) that DHS initiate termination proceedings after the children had been in substitute care for 15 of the previous 22 months, a period that * * * would have elapsed before the end of the requested 90 days. However, ORS 419B.498(2)(b) authorizes DHS to defer filing a termination petition if there is a compelling reason, which DHS has documented in its case plan, for determining that filing a petition would not be in the children's best interests. The statute includes a nonexclusive list of several possible compelling reasons, including that the "parent is successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time * * *." ORS 419B.498(2)(b)(A).
>
> ***In the circumstances of this case, there was a compelling reason not to file a termination petition immediately after the children spent 15 months in substitute care.*** After much effort, [which included moving "to the other end of the state" to "break free" from an abusive relationship,] mother had placed herself in a position in which it was possible for her to participate fully in the services that DHS had available, and she was doing so successfully. The purpose of the proposed 90-day continuance was to determine whether the changes that she was making would make it possible for the children to safely return home within a reasonable time, thus satisfying the statutory preference that children live in their own homes with their own families. ORS 419B.090(5). The children are currently living with relatives and have frequent contact with mother, so the relatively small delay in filing a termination petition--assuming it becomes necessary to do so--was unlikely to be damaging. The trial court, thus, had the lawful authority to grant the requested continuance, and there was no discernable reason for it not to have done so.

* * * * *

[FOTTNOTE 2:] ***The record consists of a DHS 12/14 Month Permanency Review Report and of unsworn colloquies between the court, on the one hand, and the mother, mother's attorney, the DHS representative, and others present in the courtroom, on the other. ORS 419B.325 and ORS 419B.476(1) make admissible reports, testimony, and other material related to the children's history and prognosis without regard to their competency or relevance under the rules of evidence, but they do not provide for unsworn testimony. It is not clear that all of the evidence would be admissible under these statutes even if it were sworn. However, because no party objects to our using the existing record in deciding this appeal, we do not consider the issue further.***

223 Or App at 43-44 (emphasis added).

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

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

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

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

220 Or App at 220.

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

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

> has repeatedly stated "that she understands [that father] is dangerous [and] she doesn't want anything to do with [him], [but then she gets] back together with him," and that DHS requires "insight as to if there is some underlying mental health diagnosis that may be leading to this" before the agency could properly assess mother's service needs**. *That evidence conclusively establishes that DHS is entitled to a psychological evaluation of mother in order to develop its case plan to include "[a]ppropriate reunification services to parents * * * to allow them the opportunity to adjust their circumstances, conduct or conditions to make it possible for the child to safely return home within a reasonable time," consistent with the legislative policy to strive for reunification expressed in ORS 419B.090(5).***

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

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

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

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

children under the protection of the juvenile court. Whether or not they remain in the home will be determined in a subsequent proceeding.").

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

> ***In this case, although it was mother's conduct toward one child that precipitated state intervention, the evidence supports establishment of jurisdiction for all three children.*** In light of the ordinary nature of V's conduct on March 30--losing something and inadequate housekeeping--it is reasonable to infer that the circumstances leading to the abuse that day are likely to recur. Mother gave little indication in her testimony that she would handle things differently in the future. Unlike in *Shugars I*, the evidence here did not differentiate the risk of harm to V from risks to the other children. *See Imus*, 179 Or App at 35 (evidence supported jurisdiction of the juvenile court over two children based on the allegation that younger child was subjected to physical abuse by way of severe facial bruising caused by a nonaccidental physical blow). Although V was the victim of mother's conduct on March 30, all three children have been similarly struck at different times. Both A and G testified that mother has hit them with her hands and with objects when they are "in trouble." Although mother may have stopped hitting G, that change was recent and was a consequence, not of a change of approach on mother's part, but of the grim reality that mother can no longer physically intimidate G. Even though that change may reduce the risk of physical harm to G while he is in the home, G testified that he has run away in the past as a result of mother's mistreatment, which places him at risk of harm. Moreover, the evidence established that mother hits A and is likely to continue doing so.
>
> ***ORS 419B.100 authorizes the state to intervene not only when children have suffered actual harm, but to protect children from a substantial risk of harm.*** *State ex rel Juv. Dept. v. Gates*, 96 Or App 365, 774 P2d 484, *rev den*, 308 Or 315 (1989); *see also* ORS 419B.005(1)(a)(G). Under the totality of the circumstances, mother's conduct has endangered the welfare of all three children, and the children are within the jurisdiction of the juvenile court under ORS 419B.100(1)(c).

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

DELINQUENCY CASES

16. *State ex rel Juv. Dept. v. K. S.*, 229 Or App 50, 209 P3d 845 (2009) (admission of hearsay in delinquency proceeding over Sixth Amendment objection; leaving open the question whether Article I, section 11, of the Oregon Constitution apply in delinquency proceedings)

THE COURT OF APPEALS' SUMMARY:

Youth appeals a judgment of the juvenile court finding him to be within the jurisdiction of the court based on his conduct that, if committed by an adult, would constitute fourth-degree assault. He also appeals the court's subsequent revocation of his probation. He contends that the court erred in admitting certain hearsay statements made by the victim. *Held:* If

the court erred, that error was harmless; because of that determination, there was no error in revoking youth's probation.

EXCERPTS FROM OPINION:

* * * [The youth] asserts that the admission of [the victim's medical records, including her hearsay statements as] Exhibit 1 under the business records exception violated his confrontation right under the Oregon Constitution because, according to youth, the business records hearsay exception is not "firmly rooted." Because youth did not make that argument before the juvenile court, we decline to consider it.

As for youth's federal constitutional challenge, we conclude that youth preserved a Sixth Amendment challenge to the admissibility of the ER record and the social worker summary. At the delinquency proceeding, youth objected to the admission of Exhibit 1 on the ground that it contained J's statements identifying him as her assailant, which he contended were testimonial hearsay. The social worker summary contains J's statement explicitly naming youth as her assailant, and the portion of the ER record prepared by Bridges notes that J identified her assailant as her "boyfriend." * * *.

On the merits of youth's first assignment of error, we first address the ER record. Under *Crawford v. Washington*, 541 US 36, 53-54, 124 S Ct 1354, 158 L Ed 2d 177 (2004), the admission of "testimonial" hearsay without an opportunity for cross-examination violates a defendant's Sixth Amendment right to confront an adverse witness. In distinguishing "testimonial" and "nontestimonial" hearsay, the United States Supreme Court explained in *Davis v. Washington*, 547 US 813, 822, 126 S Ct 2266, 165 L Ed 2d 244 (2006), that a statement is testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

In addressing that same issue, we have concluded that a victim's hearsay statements were testimonial under the Sixth Amendment after considering the victim's purpose in making the statement, the questioner's purpose in talking to the victim, and the amount of police involvement in or direction of the questioning. *S.P.*, 218 Or App at 155-56. We noted that, in the context of a child abuse investigation, the victim's purpose in making a statement is less important than the questioner's purpose and the level of police involvement in the questioning. In *S.P.*, the state referred the victim's parents to CARES for the purpose of furthering a criminal abuse investigation, and a Clackamas County Sheriff's deputy observed the CARES interview. In reversing the youth's conviction, we noted that a primary purpose of the CARES social worker's interview with the victim was to create evidence for use in a future prosecution and that there was significant state involvement in the interview.

In contrast, in this case, J went to the Emanuel emergency room because she was pregnant and had been experiencing "worsening" abdominal cramps. She made the out-of-court statements found in the ER record for the purpose of obtaining medical treatment. Bridges, a nurse, questioned J in her capacity as a medical professional and for the purpose of medical diagnosis and treatment; moreover, there was no police or state involvement in the questioning at that time. ***We conclude that J's statements contained in the ER record were not***

> ***testimonial and that their admission did not violate youth's confrontation right under the federal constitution. The juvenile court did not err in admitting the ER record.***
>
> Turning to the admissibility of the social worker summary, we do not need to decide whether the juvenile court erred under OEC 803(6) or the Sixth Amendment in admitting it, because we conclude that, if there was any error, it was harmless. Given our *de novo* review function in this juvenile delinquency case, an error is harmless "if we are convinced that the properly admitted evidence establishes the acts in the [delinquency] petition beyond a reasonable doubt." *State ex rel Juv. Dept. v. Sauer,* 189 Or App 78, 84, 73 P3d 293 (2003). In our view, even excluding the social worker summary, the record is sufficient to establish youth's acts.

229 Or App at 55-57 (emphasis added).

17. ***State ex rel Juv. Dept. v. J.J.,*** 228 Or App 746, 208 P3d 1054 (2009) (remanding case for findings required for OYA commitment under ORS 419C.478(1))

PER CURIAM OPINION:

Youth admitted that he had committed acts that, if committed by an adult, would constitute the crimes of unlawful use of a weapon and unlawful possession of a firearm. The trial court then ordered him committed to the legal custody of the Oregon Youth Authority. Youth appeals, arguing that the trial court erred in failing to make written findings as required by ORS 419C.478(1).

The state does not dispute that the trial court failed to make the findings required by that statute, but insists that the matter was not preserved and is unreviewable. The state acknowledges that, in *State ex rel Juv. Dept. v. K.M.-R.*, 213 Or App 275, 160 P3d 994 (2007), and *State ex rel Juv. Dept. v. C.N.W.,* 212 Or App 551, 159 P3d 333 (2007), we concluded that a trial court's failure to make the findings required by ORS 419C.478(1) amounts to plain error that warrants the exercise of discretion to review. The state contends that those decisions are inconsistent with the Supreme Court's decision in *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993), which the state reads to hold that a failure to make statutorily required findings, if not objected to below, cannot be reviewed as plain error.

As we explained in *State ex rel Dept. of Human Services v. J.N.,* 225 Or App 139, 144-45, 200 P3d 615 (2009), *Bucholz* did not hold that a failure to make statutorily required findings can never be reviewed as plain error. Rather, that case stands for the proposition that, although the failure to make such findings may amount to plain error, under some circumstances, it

may not be appropriate to exercise our discretion to review the error. *J. N.*, 225 Or App at 145.

In this case, as in the factually indistinguishable *K. M.-R.* and *C. N. W.*, we conclude that it is appropriate to exercise our discretion to review the error. We therefore remand to the juvenile court with instructions to make such written findings as it deems appropriate to satisfy the requirements of ORS 419C.478(1).

18. *State ex rel Juv. Dept. v. M.A.-J.*, 228 Or App 580, 209 P3d 381 (2009) (the juvenile court erred in denying motion to suppress)

THE COURT OF APPEALS' SUMMARY:

In this juvenile delinquency case, youth was found to be within the jurisdiction of the juvenile court for having committed an act that, if committed by an adult, would have constituted the offense of unlawful possession of a firearm. On appeal, he contends that the court erred in denying his motion to suppress evidence of a firearm that a police officer found in youth's possession as a result of a patdown during what youth argues was a stop. Youth argues that both the stop and the patdown were unlawful. *Held:* Even assuming that the stop was lawful, the patdown was unlawful. Accordingly, the juvenile court erred in denying youth's motion to suppress.

19. *State ex rel Juv. Dept. v. S.L.M.*, 227 Or App 408, 206 P3d 283 (2009) (the juvenile court erred in denying motion to suppress evidence found by the youth's mother)

THE COURT OF APPEALS' SUMMARY:

In this juvenile delinquency case, the juvenile court found that youth committed acts that, if committed by an adult, would constitute possession of a controlled substance. On appeal, youth contends that the court erred in denying her motion to suppress evidence found during a search of her purse by her mother, which was conducted at the suggestion of a police officer. Youth argues that there was no cause for her mother to search her purse and that, because her mother acted at the suggestion of the police, the search was unlawful. The state concedes the point. *Held:* Youth's mother's actions constituted state action. Because it is undisputed that she did not act pursuant to a search warrant and that no exception to the warrant

requirement applies, the parties are correct that the search of youth's purse was unlawful and that the evidence obtained should have been suppressed.

EXCERPT FROM OPINION:

> We begin with the issue of parental authority. Juveniles are entitled to the protections guaranteed by Article I, section 9, of the Oregon Constitution. * * * Parents may have rights and duties concerning a minor child that affect the child's exercise of his or her rights under that constitutional guarantee. *State v. Carsey*, 295 Or 32, 42-43, 664 P2d 1085 (1983). The extent of a parent's authority, however, will depend on the facts of each case--for example, the nature of the relationship between the parent and the child and, in particular, the record of the nature of their use and control of the property that was involved in the search. *Id.* at 43-46; *State v. Will*, 131 Or App 498, 504-05, 885 P2d 715 (1994).
>
> In this case, the state acknowledges that there is nothing in the record to establish whether youth's mother had a right to control the effects of her daughter. We agree.
>
> That leaves the question whether youth's mother's actions in searching youth's purse nevertheless did not violate youth's rights under Article I, section 9, because, as the trial court concluded, that constitutional guarantee applies only as to state action, and youth's mother was not acting as an agent of the state. A privacy or possessory interest under Article I, section 9, "is an interest against the state; it is not an interest against private parties." *State v. Tanner*, 304 Or 312, 321, 745 P2d 757 (1987). When a private person acts at the request of a police officer, however, Article I, section 9, governs the propriety of that action. *State v. Tucker,* 330 Or 85, 90, 997 P2d 182 (2000). In this case, the trial court found that the police officer "encouraged" youth's mother to empty the contents of youth's purse on the back seat of the police car. As noted, the state acknowledges that, when youth's mother did as the officer suggested, that action triggered Article I, section 9, which requires a warrant or an applicable exception to the warrant requirement before searching the property of another. *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994). It is undisputed that youth's mother did not act pursuant to a search warrant and that no exception to the warrant requirement applies. The trial court therefore erred in denying youth's motion to suppress.

227 Or App at 411-12.

20. ***Patterson v. Foote,* 226 Or App 104, 204 P3d 97 (2009) (construing "rehabilitate," as that term is used in ORS 181.820, which establishes a procedure for seeking relief from the duty to report as a sex offender)**

THE COURT OF APPEALS' SUMMARY:

In 1993, petitioner pleaded guilty to a misdemeanor sex offense and was sentenced to probation, which he successfully completed. In May 2006, he sought an order under ORS 181.820 (formerly ORS 181.600) relieving

him of the duty to report as a sex offender. After a hearing, the trial court denied relief. *Held:* Under ORS 181.820, if a trial court is satisfied by clear and convincing evidence that a petitioner is rehabilitated and does not pose a threat to the safety of the public, the court shall enter an order relieving the petitioner of the duty to report. Whether a petitioner has met that standard is a question of law. In this case, petitioner met his evidentiary burden under the statute. The trial court therefore erred in denying relief.

EXCERPT FROM OPINION:

> In this case of first impression, petitioner appeals an order denying his petition for relief from the duty to report as a sex offender. The relevant statute requires the court to grant that relief if, among other things, a petitioner who was previously convicted of a single misdemeanor sex offense provides clear and convincing evidence that he has been rehabilitated and no longer constitutes a threat to public safety. Petitioner contends that he provided uncontroverted evidence that he has not reoffended in more than 10 years, that he successfully completed sex offender treatment, and that, in the view of the only expert to testify, his "recidivism risk is virtually nil." According to petitioner, he met his burden. The state responds that, even if the risk of reoffending is less than one percent, that represents *some* risk of harm and thus a basis for the trial court's finding that defendant has not been rehabilitated or poses a threat to public safety. We conclude that petitioner met his burden and that there is no basis for the trial court's determination that petitioner has not been rehabilitated or poses a threat to public safety. * * *
>
> * * * * *
>
> As pertinent here, the verb "rehabilitate" means "to restore to a useful and constructive place in society" and "to put on a proper basis or into a previous good state." *Webster's Third New Int'l Dictionary* 1914 (unabridged ed 2002). The noun "rehabilitation" means "the process of restoring an individual (as a convict * * *) to a useful and constructive place in society through some form of * * * correctional or therapeutic retraining." *Id.* Nothing in the ordinary meaning of the term suggests that, to be "rehabilitated," an individual must establish that he or she is now absolutely free of *any* risk--however small--of future error.
>
> * * * * *
>
> Thus, consistently with the applicable standard of proof and the plain meaning of the terms "rehabilitated" and "threat" to public safety, we understand ORS 181.820 to require a petitioner for relief from the sex offender reporting requirement to demonstrate by clear and convincing evidence that he or she has successfully completed programs or services designed to ameliorate his or her previous behavioral and psychological patterns and to prevent a recurrence of unlawful conduct, and that, as a result, the petitioner does not present a threat, that is, he or she is not likely to reoffend.

226 Or App at 106, 112, 114-15.

21. *State ex rel Juv. Dept. v. M.A.D.,* 226 Or App 21, 202 P3d 249 (2009) (holding that Article I, section 9, of the Oregon Constitution applies to the search of a student by a school official when the evidence found is used in a juvenile delinquency proceeding)

THE COURT OF APPEALS' SUMMARY:

The issues in this case concern whether the guarantees against unreasonable searches and seizures in Article I, section 9, of the Oregon Constitution are implicated when school authorities search a student and seize contraband which is then used as evidence in a juvenile delinquency proceeding. On appeal, defendant assigns error to the juvenile court's denial of his motion to suppress evidence obtained when school officials conducted a warrantless search of his person after another student had informed them that youth had marijuana and was trying to sell it at a location near the school campus. *Held:* In order for the state to use evidence derived from a search of a student in a delinquency proceeding under the juvenile code, the requirements of Article I, section 9, must be satisfied.

EXCERPTS FROM OPINION:

> The issues in this case concern whether the guarantees against unreasonable searches and seizures in Article I, section 9, of the Oregon Constitution are implicated when school authorities search a student and seize contraband which is then used as evidence in a juvenile delinquency proceeding. Youth appeals a judgment finding him within the jurisdiction of the juvenile court for acts that, if committed by an adult, would constitute felony and misdemeanor crimes of possession and delivery of less than an ounce of marijuana within 1,000 feet of a school. *Former* ORS 475.904 (2003), *renumbered as* ORS 475.904 (2005). * * *.
>
> * * * * *
>
> * * * Probable cause to search lawfully exists under Article I, section 9, when a reasonable person would believe that seizable things will more likely than not be found in the location to be searched. *State v. Anspach*, 298 Or 375, 380-81, 692 P2d 602 (1984). This case does not involve a criminal prosecution but a prosecution under the juvenile code. Nonetheless, school officials are deemed by the law to be government actors subject to the restrictions on searches imposed by Article I, section 9, and the exclusionary rule under Article I, section 9, applies to the searches of students if the seized items are used as evidence in a prosecution under the Code. *State ex rel Juv. Dept. v. Doty*, 138 Or App 13, 18 n 3, 906 P2d 299 (1995); *DuBois*, 110 Or App at 318; *State v. Walker*, 19 Or App 420, 424, 528 P2d 113 (1974); *see also State ex rel Juv. Dept. v. Finch*, 144 Or App 42, 46, 51, 925 P2d 913 (1996) (holding that, in conducting searches of students, school officials act as agents of the government).

* * * * *

* * * [T]he state argues that probable cause is not required under the circumstances of this case in order to satisfy Article I, section 9. Rather, according to the state,

> "[e]ven if the facts did not establish probable cause, they did provide reasonable grounds for the search, and the search was reasonable in scope. The Fourth Amendment [to the Constitution of the United States] permits a search under those circumstances, and because of the special nature of schools, this court should hold that Article I, section 9, of the Oregon Constitution also permitted the search in this case."

* * * In the past, we have found it unnecessary to reach the issue of whether the constitution permits school authorities to conduct a search based on less than probable cause, either because we have determined that probable cause and exigent circumstances justified the search, *see State ex rel Juv. Dept. v. Gallegos*, 150 Or App 344, 347-48, 945 P2d 656 (1997), *DuBois*, 110 Or App at 318; because there was not even reasonable suspicion for the search, *see Finch*, 144 Or App at 47, *State ex rel Juv. Dept. v. Stephens,* 175 Or App 220, 227-28, 27 P3d 170 (2001), *State ex rel Juv. Dept. v. Rohlffs*, 147 Or App 565, 571, 938 P2d 768 (1997); or because the search was justified by the youth's voluntary consent, *see Doty*, 138 Or App at 21-22. ***This case presents squarely that previously undecided question.***

* * * * *

* * * [T]he state does not rely on well established exceptions to the warrant requirement based on the school district's administrative policy; nor is the district's administrative policy part of the record before us. Moreover, the state seeks to use the evidence in this case in a proceeding involving youth under ORS 419C.005, which provides that the juvenile court has exclusive jurisdiction in any case involving a person under the age of 18 who has committed an act that, if done by an adult, would constitute a violation of the criminal laws of the state of Oregon. ***On this record, therefore, the search conducted by school officials as agents of the state implicates the protections of Article I, section 9.***

* * * ***The holding in this case is confined to the facts of this case. For example, this case does not involve the issue of whether school officials can use evidence seized in violation of Article I, section 9, in a school disciplinary proceeding by school officials.*** Moreover, the exclusionary rule is not necessarily applicable in every context involving evidence seized in violation of Article I, section 9. Rather, the answer to the question of how broadly the exclusionary rule ought to be applied in a particular context is found in the reasons for the rule itself and must be applied on a case-by-case basis. *State ex rel Dept. of Human Services v. W. P.*, ___ Or ___, ___ P3d ___ (February 5, 2009); *State Forester v. Umpqua River Nav*., 258 Or 10, 18, 478 P2d 631 (1970), *cited in State ex rel Juv. Dept. v. Rogers*, 314 Or 114, 118-19, 836 P2d 127 (1992). Accordingly, our decision does not inform whether a seventh-grade teacher

> can lawfully seize a note from an unruly student or whether the exclusionary rule applies to a school disciplinary measure or proceeding.
>
> In summary, we hold that youth did not voluntarily consent to the search of his jacket and that the search occurred without probable cause to believe that drugs would be found in it. We also hold that Article I, section 9, requires that probable cause must have existed before the disputed evidence in this case is admissible in a juvenile delinquency proceeding. Those holdings lead us to the conclusion that the juvenile court erred in denying youth's motion to suppress.

226 Or App at 21, 27-30, 33-35 (emphasis added).

22. ***State ex rel Juv. Dept. v. J. H.-O.,*** **223 Or App 412, 196 P3d 36 (2008) (in delinquency proceedings, the judgment finding jurisdiction and the judgment providing for the disposition in the case are separate appealable judgments)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals a juvenile court dispositional judgment committing her into the custody of the Oregon Youth Authority (OYA). Youth was found to be within the juvenile court's jurisdiction after she admitted to acts that, if committed by an adult, would constitute second-degree theft, and the court entered judgment to that effect. At the time of her admission, youth, who was on probation for an earlier offense, was not represented by counsel. Youth did not appeal from that judgment. Several months later, at the dispositional hearing on the matter, the court revoked youth's probation and committed her into OYA custody. Youth was not represented by counsel at the dispositional hearing. On appeal, youth assigns error to the court's jurisdictional and dispositional judgments. As to the jurisdictional judgment, she contends that the court committed plain error by finding that her admission of jurisdiction was intelligent and that she had waived her right to counsel. As to the dispositional judgment, youth asserts that the court committed plain error by revoking her probation at a dispositional hearing in which she was not represented by counsel. Held: The Court of Appeals lacked jurisdiction to consider youth's challenges to jurisdictional judgment because youth did not appeal from that judgment. Because the juvenile court's error was plain and of constitutional magnitude, and there was no evidence that youth encouraged the court's decision to conduct a dispositional hearing without providing her with counsel, the Court of Appeals exercised its discretion to correct the error. Dispositional judgment reversed and remanded.

23. ***State ex rel Juv. Dept. v. S.R.R.,*** **223 Or App 253, 195 P3d 411 (2008) (*per curiam*) (reversing supplemental judgment ordering restitution)**

EXCERPT FROM OPINION:

Youth appeals, arguing that the juvenile court erred in ordering restitution, given that the restitution hearing did not occur within the required 90-day period and that the state did not demonstrate good cause for the delay. The state concedes the error, and we accept the concession.

ORS 419C.450(1)(a)(B) provides, in part, that the court shall

> "[i]nclude in the judgment a requirement that the youth offender pay the victim restitution, and that the specific amount of restitution will be established by a supplemental judgment based upon a determination made by the court within 90 days of entry of the judgment. * * * The court may extend the time within which the determination and supplemental judgment may be completed for good cause."

As the state correctly acknowledges, the statute makes clear that a determination of the specific amount of restitution must be made within 90 days of the entry of the jurisdiction judgment in the absence of a showing of good cause.

In *State v. Biscotti,* 219 Or App 296, 182 P3d 269 (2008), we addressed whether losing track of a file during personnel changes in a district attorney's office constitutes "good cause" for a delay in holding a restitution hearing within the time required by a similar statute, ORS 137.106(1)(b). After surveying cases construing the term "good cause" in a variety of different contexts, we concluded that the courts of this state consistently have held that the term does not include prosecutorial inadvertence or neglect. *Id.* at 301-02. ***In this case, as well, we conclude that--as the state correctly concedes--the inadvertence of the prosecutor in failing to bring the restitution matter to hearing in a timely fashion does not constitute "good cause" within the meaning of ORS 419C.450(1)(a)(B).***

223 Or App at 254-55 (emphasis added).

24. ***State ex rel Juv. Dept. v. R.A.,*** **221 Or App 509, 191 P3d 702 (2008) (proof of criminal mischief in the second degree)**

THE COURT OF APPEALS' SUMMARY:

Youth appeals a juvenile judgment finding him within the jurisdiction of the court for an act that, if committed by an adult, would constitute first-degree criminal mischief. On appeal, he raises four assignments of error. Held: On de novo review--and without considering evidence the admissibility of which youth challenges on appeal--the court finds beyond a reasonable doubt that it was youth who engaged in the criminal mischief. Because the

state proved only that youth caused damage in the amount of $482.99, it did not prove one of the elements of first-degree criminal mischief, which requires damage in excess of $750. Accordingly, a new judgment must be entered finding youth within the court's jurisdiction for an act that, if committed by an adult, would constitute second-degree criminal mischief. Reversed and remanded for entry of a judgment finding youth within the jurisdiction of the juvenile court for an act that, if committed by an adult, would constitute second-degree criminal mischief.

TERMINATION-OF-PARENTAL-RIGHTS CASES

25. *State ex rel Department of Human Services v. R. J. T.*, ___ Or App ___, ___ P3d ___ (July 15, 2009) (mother's suicidal ideation and suicide attempts, together with her underlying depression, constituted grounds for termination of her parental rights under ORS 419B.504)

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment terminating her parental rights in her child on the ground that mother is unfit because of conduct or condition seriously detrimental to L. Mother contends that she has made substantial progress in overcoming her suicidal and self-harming conduct, that her conduct is not seriously detrimental to the child, that the child could be returned to her care within a reasonable time, and that termination is not in the child's best interests. *Held:* After two years during which the child was out of mother's care and mother received services, mother still engaged in suicide attempts and expressed suicidal ideation. That conduct is seriously detrimental to the child, who would be at risk of depression and anxiety and of mimicking mother's behavior if she were returned to mother's care. The child needs permanency and cannot continue to wait for mother to gain control over her suicidal conduct. Termination of parental rights is in the best interests of the child, who has an ambivalent, anxious bond with mother and a secure attachment to the foster parents who are her adoptive placement.

EXCERPT FROM OPINION

> Under [ORS 419B.504], we first consider whether the parent has engaged in conduct or is characterized by a condition and whether the conduct or condition is

seriously detrimental to the child. If so, we then consider whether it is improbable that the child may safely be returned to the parent within a reasonable time. *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, 36 P3d 490 (2001). A "reasonable time" is a period "that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments." ORS 419A.004(20). If the grounds for termination are proven, then we consider whether termination is in the child's best interests. ORS 419B.500.

Here, mother contends that her conduct is not the sort of behavior that would justify termination of her parental rights. In her view, she has engaged in services, despite financial strains, and has made substantial progress in overcoming her self-harming behaviors; her conduct cannot be seriously detrimental to L, because she made appropriate arrangements for L's care and because "L was and is bright, energetic, and resilient." Mother argues that, in light of her willingness to engage in further services, L can be returned to her care within six months. Finally, mother contends that termination is not in L's best interests because L is bonded to mother.

DHS responds that mother's conduct renders her unfit and is unlikely to change within a reasonable time, given that mother, particularly in times of stress, continues to struggle with instability and to engage in self-harming behaviors after two years of services. DHS contends that mother's conduct is seriously detrimental to L because, despite L's resilience, she is sensitive, anxious, and in need of permanency. In light of L's immediate need for permanency and mother's continued instability, DHS argues, L cannot be returned to mother within a reasonable time, and termination is in L's best interests. We agree.

We begin with mother's present conduct and conditions. More than two years after DHS became involved with the family, mother continues to engage in the sort of conduct that made her unable to care for her children: expressing suicidal ideation and engaging in self-harming behavior. Mother continues to have major depressive disorder and borderline personality disorder, conditions that underlie her self-harming conduct.

Mother's conduct is seriously detrimental to L. If L were to be returned to mother, L would very likely be exposed to mother's self-harming conduct and suicidal ideation, either directly or indirectly. L has already lived in a place where police and paramedics came late at night to check on mother's well-being. L has likely seen evidence of cuts on mother's legs, a theme that emerged in L's psychological evaluation. In instances that did not directly involve L but that present a troubling view of the risks to L, mother slapped R when she confronted mother about self-harm, blamed R for the family's problems, and exposed R and E to a suicide attempt that coincided with a visit that mother had scheduled. L's awareness of mother's conduct would likely increase as L grows older; it is hard to imagine that this bright, sensitive child would not question why mother is hospitalized.

Conduct that presents serious risks may be deemed detrimental to a child before the potential harm comes to pass. See, e.g., State ex rel Dept. of Human Services v. J.S., 219 Or App 231, 261-62, 182 P3d 278 (2008) (focusing on the threat of future harm to the child from the mother's continuing methamphetamine use and drug dependence where the child had

been in the state's custody since his birth). Here, mother's self-harming conduct threatens L's well-being. L's therapist and the psychologists who evaluated mother and L identified serious risks, including the danger that L would mimic mother's self-harming behaviors. If returned to mother, L would, according to Eastman, likely suffer depression as a result of the disruption of her current placement, and mother seems unlikely to model safe ways for L to address such depression.

In addition, the risk that L will develop a painful sense of responsibility for mother's suicidal ideation or self-harming seems especially great. Mother attributed her alcohol abuse to being bored without her children, and she partially attributed her depression, with ensuing suicidal ideation, one month before trial to her children's failure to call on Mother's Day. Although mother undoubtedly loves L, mother's conduct places a tremendous burden on a young child to fill mother's emotional needs, and mother does not appear to recognize with any consistency the effects of her conduct on L. As one witness observed, mother loves her children, but at times she cannot take care of herself, let alone a child. L, who faces additional risk factors associated with earlier disruptions and her biological family's mental health history, would face very real risks as a consequence of mother's self-harming and suicidal conduct.

We recognize that "perfection in parenting is neither attainable nor required." *State ex rel Dept. of Human Services v. Simmons,* 342 Or 76, 103, 149 P3d 1124 (2006). Here, however, mother's conduct at the time of trial falls too far short of providing a secure environment. *Cf. id.* at 101-03 (concluding that the mother's personality disorder was not seriously detrimental to the child after the mother completed drug abuse treatment, where the child was doing well and the mother had accepted responsibility for past problems so that the child understood that she was not responsible for the mother). Mother's suicide attempts and suicidal ideation create risks of severe emotional harm, as well as physical harm if L imitates mother's behavior. Although L is doing well in the care of her foster parents, mother's conduct is seriously detrimental to L. Contrary to the dissent's view, ___ Or App at ___ (Schuman, J., dissenting) (slip op at 14-15), we are not removing L from a troubled but minimally adequate parent: Mother's uncontrolled self-harming behaviors create serious emotional risks to L, who is more vulnerable than the average child, and also create the risk that L will mimic mother's self-harming behaviors.

Having concluded that mother's conduct is seriously detrimental to L, we consider whether it is improbable that L can be reintegrated into mother's home within a reasonable time. Krechman suggested that mother should demonstrate at least six months of stability before L could be safely returned, and Eastman thought that mother would need at least a year. In the months immediately before trial, however, mother attempted suicide more than once. Two years after L left mother's care, mother still had not achieved stability in avoiding suicide attempts and suicidal ideation. L needs a sense of closure and a safe, stable home. Given L's pressing need for permanency, it is improbable that L can be reintegrated into mother's care within a reasonable time.

Finally, we consider whether termination is in L's best interests. L has a secure primary attachment with her foster parents, who wish to adopt her. They have provided her with stability when mother could not, and L already views them as

> her parents. L's bond with mother, on the other hand, is marked by anxiety and ambivalence. Although continuing contact with mother may be beneficial to L, termination of mother's parental rights is in L's best interests.

(Slip opinion at 11-13) (emphasis added).

26. *State ex rel Dept. of Human Services v. A.L.S.*, 228 Or App 700, 209 P3d 817 (2009) (termination of parental rights warranted where, among other things, the mother remains addicted to alcohol, the child has multiple special needs and requires a stable placement immediately, and a disruption of the child's bond with the foster family would result in a regression in her development)

THE COURT OF APPEALS' SUMMARY:

Mother appeals a judgment terminating her parental rights to her five-year-old child. Mother, who has struggled with drug and alcohol addiction for 15 years, has participated in at least eight substance abuse treatment programs. Mother's only significant period of abstinence from substance use followed residential treatment and, since 2007, mother has been under a court order to complete residential treatment. Six months before trial, mother completed her eighth drug and alcohol treatment program--an outpatient program. Several weeks later, mother consumed alcohol "four or five times" but, in the four months preceding trial, did not consume drugs or alcohol. Mother does not believe that she requires any further treatment. The state's expert testified that mother would need to demonstrate 18 to 24 months of sobriety--dating from her last use of alcohol--before child could be returned to mother. Child has been diagnosed with focal onset epilepsy, an adjustment disorder, and methicillin-resistant staphylococcus aureus, a disease that causes painful boils to form on child's skin. Child is well-bonded to her foster family and there was expert testimony that child, who has been waiting for a permanent home for three years, has already waited too long for a permanent placement. *Held:* The Department of Human Services proved by clear and convincing evidence that mother has failed to effect a lasting adjustment to her addiction to intoxicating substances; that child has special needs, is well-bonded to her foster family, and that any disruption of those bonds would cause a regression in child's development; that return home was not possible within a reasonable time; and that termination was in child's best interests.

27. *State ex rel Dept. of Human Services v. R.T.,* 228 Or App 645, 209 P3d 390 (2009) (reversing judgment terminating parental rights)

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal judgments terminating their parental rights in their child on the ground that they are unfit, ORS 419B.504, and with regard to father, on the ground that he neglected his child, ORS 419B.506. Both parents assign error to the court's determination that the state has proved by clear and convincing evidence that their rights should be terminated on the basis of unfitness. Father also asserts that the trial court erred in terminating his parental rights on the basis of neglect. *Held:* The state failed to establish by clear and convincing evidence that integration of the child into parents' home is improbable within a reasonable period where (1) parents had made substantial and sustained efforts to address their drug abuse and domestic violence issues, and they were maintaining consistent contact with their child; (2) their child did not suffer from special needs that required immediate permanency; and (3) the state's expert acknowledged that he was unable, at the time of the termination trial, to render an opinion as to the likelihood that parents would be able to assume care of their child within a reasonable time and that he would need an additional three to five months to do so. Further, although father had been ordered to pay support for his child, the state failed to establish by clear and convincing evidence the statutory grounds for neglect where (1) the evidence in the record established that father had little disposable income after paying for necessities; (2) he had made substantial efforts to address his issues; and (3) he had a record of consistent and positive contacts with his child.

28. *State ex rel Dept. of Human Services, K.D.,* 228 Or App 403, 209 P3d 328 (2009) (affirming judgment denying termination of parental rights because the state had not failed to prove that it is highly probable that the mother's child cannot be returned to her custody within a reasonable time)

THE COURT OF APPEALS' SUMMARY:

The state appeals a judgment dismissing its petition to terminate mother's parental rights to her two-year-old son, who has been in foster care since his birth, on the basis of unfitness under ORS 419B.504. ORS 419B.504 sets out a two-step analysis for a court to apply in determining whether to terminate parental rights. First, a court must consider whether the parent has engaged in conduct or is characterized by a condition and

whether the conduct or condition is seriously detrimental to the child. Second, if the parent is unfit, the court must determine whether the integration of the child into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change. *Held:* The state has not carried its burden of proving that it is highly probable that mother's child cannot be returned to her custody within a reasonable time. Mother and her new husband have demonstrated their intentions to rehabilitate their lives by their behavior, and they have done so for a substantial period of time.

EXCERPTS FROM OPINION:

Mother's probation officer since June 2006 also testified at the hearing that mother had generally been compliant with the conditions of her court-ordered probation and could be off probation as early as April 28, 2007. She was only one test away from obtaining her GED. * * * At the time of trial, mother was voluntarily going to AA or NA meetings three or four times a week.

The trial court also heard the testimony of Dr. Ewell, a licensed psychologist, who examined mother on August 2, 2007. * * * Ewell testified that mother presented a history of methamphetamine dependence, that she demonstrated symptoms consistent with an antisocial and histrionic personality disorder, and that, "[t]o date, the volatility of her emotions, the inconsistent nature of her living arrangements and general lifestyle would have a negative impact on her ability to adequately parent." However, he opined that "[i]t is possible * * * that [mother's] lifestyle will stabilize in the future if she maintains abstinence from drugs" and that, "[i]f [mother] continues with treatment and remains invested in it, she might be able to parent in the reasonable future." He concluded by suggesting "that a period of four to eight months of additional treatment beyond this point might be necessary."

* * * [T]he primary concern held by DHS at the time of trial was mother's relationship with her new husband. The state characterizes mother's husband as a sex offender who never has completed treatment and who has a significant history of domestic violence and criminal convictions, including convictions involving consensual sexual contact with underage females. There is evidence in the record that supports the state's concerns. However, once again, there is also countervailing evidence.

Mother met her husband in the summer of 2007, and they were married on December 15, 2007. Mother's husband, age 27 at the time of trial, was released in June 2007 from a state correctional facility after completing a drug and alcohol treatment program. He returned to Linn County and completed an outpatient treatment program in October 2007. On February 26, 2008, mother's husband was evaluated by Dr. Neilson, a licensed psychologist, who had also evaluated him in 1996. Neilson testified that, initially, he had diagnosed mother's husband with an "oppositional defiant disorder," which "continued right into antisocial personality disorder behavior as an adult." However, Neilson explained:

"when I saw him the second time, it was like--if you pardon the expression--he was born again. He was intent upon leading a socially acceptable life and

> turning everything around. He described himself in the most negative of terms * * *."
>
> The evidence is also in conflict as to whether mother's new husband is presently in need of sex offender treatment. Neilson opined, "There are many risks for [mother's husband] having to do with failure to achieve a different lifestyle. But I doubt that sex offending is one of these big risks." *Cf. State ex rel Dept. of Human Services v. L.C.J.,* 212 Or App 540, 546, 159 P3d 324 (2007) (the court inferred that the mother's relationship with an untreated sex offender made it highly probable that the child would be at serious risk of abuse if returned to mother's care).
>
> After reviewing the entire record, we agree with the trial court that the state has not carried its burden of proving that it is highly probable that mother's child cannot be returned to her custody within a reasonable time. As Neilson aptly testified, when asked whether good intentions are enough for a person to turn their life around, "the proof is in the behavior." Here, mother and her new husband have demonstrated their intentions to rehabilitate their lives by their behavior, and they have done so for a substantial period of time. Whether they ultimately will be successful depends on their future choices and behavior. Nonetheless, for the reasons discussed above, the trial court did not err on this record in ordering that the case plan for the child be "Return to Parent" with instructions that the agency immediately make reasonable efforts to achieve that goal.

228 Or App at 409-11.

29. ***State ex rel Dept. of Human Services v. K.C.J.,*** **228 Or App 70, 207 P3d 423 (2009) (holding that, in an ICWA case, each finding required to support termination of a parent's rights must be proved beyond a reasonable doubt, and construing "active efforts")**

THE COURT OF APPEALS' SUMMARY:

In this termination of parental rights case governed by the Indian Child Welfare Act, the trial court terminated father's parental rights on the ground of unfitness. On appeal, father contends that the court erred for three reasons: (1) the Department of Human Services (DHS) failed to prove his parental unfitness beyond a reasonable doubt; (2) the testimony of DHS's "qualified expert witness" did not establish beyond a reasonable doubt that returning the children to father is "likely to result in serious emotional or physical damage" to them; and (3) DHS failed to make "active efforts" to reunite him with his children. *Held:* On *de novo* review, the trial court did not err in terminating father's parental rights.

EXCERPTS FROM OPINION:

> The parties agree that the three children at issue in this case qualify as Indian children under ICWA. 25 USC § 1903(4). ICWA does not relieve DHS of its

obligation to prove a state law ground for the termination. *See* 25 USC § 1902 (stating the purpose of ICWA as, in part, to establish "minimum Federal standards for the removal of Indian children from their families"); *Cain*, 210 Or App at 239 ("The ICWA's requirements supplement and, where in conflict, displace state law governing the termination of parental rights to Indian children."); *State ex rel SOSCF v. Amador,* 176 Or App 237, 243, 30 P3d 1223, *rev den*, 333 Or 73 (2001) (same). ICWA does, however, impose additional procedural and substantive safeguards.

Two of those safeguards are relevant in this case. First, under ICWA, before a court may terminate parental rights, it must determine "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC § 1912(f); *see also* ORS 419B.521(4) (incorporating that standard into Oregon's juvenile code). That determination must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses." 25 USC § 1912(f). Such a witness "'must possess special knowledge of social and cultural aspects of Indian life.'" *Amador*, 176 Or App at 243 (quoting *State ex rel Juv. Dept. v. Charles*, 70 Or App 10, 17 n 3, 688 P2d 1354 (1984), *rev dismissed*, 299 Or 341 (1985)). "Where cultural bias is not implicated," however, "the expert witness need not possess special knowledge of Indian life." *State ex rel SOSCF v. Lucas,*177 Or App 318, 326 n 5, 33 P3d 1001 (2001), *rev den*, 333 Or 567 (2002); *accord State ex rel Juv. Dept. v. Tucker*, 76 Or App 673, 683, 710 P2d 793 (1985), *rev den*, 300 Or 605 (1986). Nevertheless, an expert witness is still necessary, and the expert must testify as to whether serious emotional or physical damage to the child is likely to occur if the child remains in the custody of the parent and must have substantial expertise in his or her area of specialty, although "[t]he expert need not express a conclusion on the ultimate question that the trial court must decide." *Lucas*, 177 Or App at 326. "Rather, * * * it is sufficient if the expert's testimony *supports* the court's determination * * *." *Id.* (emphasis added).

Second, ICWA requires DHS to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC § 1912(d); *see also* ORS 419B.498(2)(b)(C) (incorporating that standard into Oregon's juvenile code). ***"Active efforts" entails more than "reasonable efforts" and "impose[s] on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently."*** *State ex rel Juv. Dept. v. T.N.,* 226 Or App 121, 124, 203 P3d 262 (2009) (elaborating that "[a]ctive effort means that the agency must assist the client through the steps of a reunification") (citing *A.M. v. State*, 945 P2d 296, 306 (Alaska 1997)).

* * * * *

In examining the standard of proof question, we note that, in at least one prior case, Cain, 210 Or App at 240, we already have stated that ORS 419B.521(4) requires the state to prove all the facts that form the basis for termination of parental rights beyond a reasonable doubt and applied that standard to the facts of that case. We did not expressly engage in extensive analysis of the point, to be sure. But, as a rule, we adhere to our prior interpretations of statutes unless they are shown to have been "plainly" wrong. *Newell v. Weston*, 156 Or App 371, 380, 965 P2d 1039 (1998), *rev den*, 329 Or 318

(1999). ***In this case, our analysis of the text of ORS 419B.521 suggests that the legislature intended that, when an Indian child is involved, all the facts that form the basis for termination of parental rights must be established beyond a reasonable doubt.*** * * *

* * * * *

With that proper standard in mind, and on *de novo* review of the record, we conclude that the court did not err in terminating father's parental rights in this case. Regarding his unfitness, father was provided with years of intensive services and was unable to take the steps necessary to avoid the circumstances that resulted in the children being removed from his care. We conclude that DHS proved the requisites for a finding of unfitness beyond a reasonable doubt. Further analysis would benefit neither the bench nor bar.

Father's argument that DHS did not prove beyond a reasonable doubt that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child[ren]," 25 USC § 1912(f), is also not well taken. Because this case implicates no cultural bias, the tribal representative is not the only "qualified expert witness" whose testimony can be considered to support the court's finding. On this record, the testimony by all of the expert witnesses was more than enough evidence to establish, beyond a reasonable doubt, that returning the children to father would likely result in their serious emotional and physical damage. We reject father's contention to the contrary.

We also reject father's contention that DHS's active efforts ceased when he moved to Grants Pass. DHS provided him with the information he needed to access services in his new location. He did not keep his caseworkers updated as to how to contact him and did not take the minimal steps required to access services. Furthermore, DHS provided father with bus passes to travel for visits with his children. The fact that DHS and the tribe decided that it was not in the best interests of the children to travel for the visits does not mean that DHS's efforts were not "active." Despite DHS's efforts, father visited the children only once after he moved and had not seen them in five months at the time of the termination trial. On this record, DHS proved beyond a reasonable doubt that it expended active efforts to reunite father with the children and that those efforts were unsuccessful. The trial court did not err in so finding.

228 Or App at 73-74, 78-79, 83-84) (emphasis added).

30. *State ex rel Dept. of Human Services v. K.C.*, 227 Or App 216, 205 P3d 28 (2009) (affirming termination judgment under ORS 419B.502 and holding that the juvenile court did not abuse its discretion in denying the mother's motion for a continuance)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment terminating her parental rights to her son, A. The trial court found that, when A was six months old, mother shook him and caused serious physical injury. Based on that incident, a psychological evaluation, and other circumstances, the court held that mother was unfit by reason of extreme conduct, ORS 419B.502, and by reason of conduct or conditions seriously detrimental to A, ORS 419B.504, and that terminating mother's parental rights was in A's best interest, ORS 419B.500. *Held:* (1) The trial court did not err in concluding that mother had engaged in an incident of extreme conduct toward A under ORS 419B.502(3), thereby rendering her unfit, or in concluding that A's best interest will be served if he is freed for adoption; and (2) the court did not abuse its discretion in denying mother's pretrial motion for a continuance and her subsequent motion to keep the record open for additional evidence.

EXCERPTS FROM OPINION:

> We conclude that the record establishes, by clear and convincing evidence, that mother shook A, causing A serious physical injury, and that such conduct constitutes "extreme conduct" for purposes of ORS 419B.502. * * *Mother twice admitted to police and to Jamie that she had shaken A on April 23, 2007, and Jamie testified that A began behaving strangely and appeared lethargic that afternoon--before he was in the care of the Criders or Troupe. Mother admitted to police that that she had shaken A "*hard* a couple of times" and "in a *rough* front to back jerking-motion." (Emphasis added.) Moreover, mother offers no alternative explanation for A's injuries. Combined with the expert testimony presented at trial that A's injuries were consistent with shaking, that evidence is sufficient to establish a high probability that mother's shaking of A caused A's injuries. Furthermore, on appeal, mother does not dispute that those injuries, which Skinner testified were "serious" and "life threatening," constitute "serious physical injury." We thus conclude that the trial court did not err in finding that mother had engaged in an incident of extreme conduct toward A under ORS 419B.502(3), thereby rendering her unfit.
>
> The question remains whether termination of mother's parental rights is in A's "best interest." ORS 419B.500. * * * Given mother's denial of responsibility for A's injuries, her failure to seek prompt medical care for A, her unwillingness to accept the need to modify her behavior, her inclusion of a known abuser on the list of people who could visit A in the hospital, her inability to cope with stressful situations, her failure to promptly engage in counseling, her minimization of A's "life threatening" injuries as "mild," "small," and "not * * * a cause of serious concern," and the fact that three of mother's relatives wish to adopt A, we conclude that A's best interest will be served if he is freed for adoption.

> In a second assignment of error, mother asserts that the trial court should have allowed mother's pretrial motion for a continuance and motion at trial to keep the record open to allow mother time to obtain additional testimony relating to the timing of A's injuries. The following facts are relevant to that assignment. Before trial, mother filed a motion for a continuance on the ground that she had recently located an osteopath, Dr. Jollo, who could provide expert testimony regarding when A's injuries occurred. In an affidavit in support of that motion, mother stated that Jollo would be out of the country during the scheduled trial dates and that "continuing [the] matter to allow for an opportunity for Doctor Jollo to review all the medical records and testify at trial is necessary for [mother] to receive a constitutionally adequate defense." DHS objected to the motion and offered to depose Jollo before the trial. The trial court denied mother's motion for a continuance. Jollo was never deposed, nor did mother request that such a deposition occur.
>
> * * * * *
>
> We review the trial court's denial of mother's motions for a continuance and to keep the record open for an abuse of discretion. *See State ex rel SOSCF v. Thomas*, 170 Or App 383, 385, 391-92, 12 P3d 537 (2000) (reviewing party's request at trial to continue trial because party was not prepared to proceed for an abuse of discretion); *State ex rel Juv. Dept. v. Mohamed*, 53 Or App 407, 411, 632 P2d 31 (1981) ("Generally, it is within the sound discretion of the trial judge to grant a continuance in termination proceedings."). Those rulings will not be overturned without a showing of both an abuse of discretion and prejudice to the moving party as a result of the court's denial. *State v. Beaty*, 127 Or App 448, 456, 873 P2d 385, *rev den*, 319 Or 406 (1994). A court abuses its discretion when its decision is not within the range of legally permissible choices, *State v. Rogers,* 330 Or 282, 312, 4 P3d 1261 (2000), or exceeds the bounds of reason, *Ramsey v. Thompson*, 162 Or App 139, 144-45, 986 P2d 54 (1999), *rev den*, 329 Or 589 (2000). Here, mother's counsel stated that it was "hard to know exactly what [Jollo] would testify to," that Jollo had reviewed only "part of the medical evidence," and that the substance of Jollo's testimony turned on his review of "all the other documentation." Under those circumstances, it is impossible to determine whether mother suffered prejudice as a result of the trial court's decision, and we cannot say that the court abused its discretion in denying mother's motions on the basis that the value of Jollo's testimony was highly speculative.

227 Or App at 227-28, 230.

31. ***State ex rel Juv. Dept. V. T.N.,*** **226 Or App 121, 203 P3d 262 (2009) (affirming judgment terminating parental rights under ORS 419B.504 and finding that DHS made both active and reasonable efforts)**

THE COURT OF APPEALS' SUMMARY:

On appeal from a judgment terminating her parental rights, mother contends that (1) the trial court erred in terminating on the ground of

neglect; (2) the state made inadequate efforts to provide services to her; (3) termination was not in the best interests of the children; and (4) she received inadequate assistance of counsel. *Held:* The state concedes that the trial court erred in terminating mother's parental rights on the ground of neglect and, on *de novo* review, the court accepts the state's concession. The court further finds that DHS made reasonable efforts to provide services to mother, that mother is presently unfit to parent, and that termination is in the best interests of the children. The court further rejects mother's contention that she was denied adequate assistance of counsel.

EXCERPT FROM OPINION:

One of the children in this case, the two-year-old daughter, A, is eligible for enrollment in the Cheyenne Arapaho Tribe of Oklahoma. Accordingly, as to that child, the Indian Child Welfare Act (ICWA) applies. Among other things, ICWA requires--in addition to the foregoing showing--that the state demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC § 1912(d). The "active efforts" standard is understood to impose on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently. Active effort means that the agency must assist the client through the steps of a reunification. *See A.M. v. State*, 945 P2d 296, 306 (Alaska 1997).

In this case, mother has a long history of untreated mental illness, including psychosis and paranoia, and residential instability or homelessness, and has received services since shortly after the birth of L, who was removed from the home in November 2005, at the age of six. A was born in August 2006, and immediately placed in the same foster care home as L. Mother does not challenge the determination that she engaged in some conduct, or that she is characterized by a condition, that is seriously detrimental to the children. Her only contention is that the Department of Human Services (DHS) failed to make reasonable or active efforts to return the children to her home after removal. Specifically, mother contends that she should have been offered therapeutic visits with L, family counseling, and additional housing options after a first program was unsuccessful due to mother's behavior, and that the services that were offered were not provided for a sufficient length of time to determine that there could be no lasting adjustment by mother.

We note, initially, that as to L--who is not subject to ICWA--ORS 419B.504(5) applies, and that statute merely states as *one factor* to be considered whether a parent has failed to make a lasting adjustment after available social agencies have made reasonable efforts. Mother has not assigned error to the trial court's determination that, based on an evaluation of all the relevant factors under ORS 419B.504(5), she is unfit. Her complaint about the need for additional efforts with respect to L, as a result, is academic.

In any event, on *de novo* review of the record, we find that the state has established that, for a period of at least two years, DHS engaged in reasonable *and* active efforts to provide services to mother, directed at both her housing situation and the treatment of her mental illness. Mother was hostile and resistant to any

> intervention by DHS. That resistance was exacerbated by her severe mental illness and her refusal to provide DHS any information as to her whereabouts.

226 Or App at 124-25.

32. *State ex rel DHS v. D. F. W. and S. N. D.*, 225 Or App 220, 201 P3d 226 (2009) (discussing *Simmons* and reversing judgments terminating parental rights of mother and father)

THE COURT OF APPEALS' SUMMARY: Mother and father separately appeal from a judgment terminating their parental rights to their daughter, M. W. At the time that the Department of Human Services (DHS) took custody of M. W., mother and father each had serious problems. For about a year, each resisted efforts to get them to address those problems. M. W. also developed serious problems in the first foster home where DHS placed her. For different reasons, after about a year father and mother began admitting the extent of their problems and working to resolve them. By the time of the termination hearing, each had made significant progress. A new foster placement also led to a substantial reduction in M. W.'s problems. *Held:* In determining whether a parent is unfit under the criteria of ORS 419B.504, the court must consider the parent's condition at the time of the termination hearing, not at some earlier period. At the time of the hearing in this case, there was not clear and convincing evidence that either mother or father was unfit under any of the criteria that the trial court found that the Department of Human Services had alleged and proved.

EXCERPTS FROM OPINION:

> *Stillman* and *Simmons* have informed our subsequent termination decisions, including those where the evidence has led to different results. In *State ex rel Juv. Dept. v. J.L.M.,* 220 Or App 93, 184 P3d 1203, *rev den*, 345 Or 158 (2008), the father did not engage in any services in the two years before he began serving a 24-month prison sentence. While in prison, he completed a drug treatment program, but he failed to participate in services or to be honest with his parole officer after his release. He had little contact with the child during this entire period. We upheld the trial court's judgment terminating his parental rights.
>
> In *State ex rel Juv. Dept. v. F.W.,* 218 Or App 436, 180 P3d 69, *rev den*, 344 Or 670 (2008), both parents had extensive histories of drug use, and the children had cycled in and out of foster care. Both children developed psychological problems as a result of the stress that their situation created. After a number of relapses, the father began seriously working on his drug and other problems. A psychologist testified that it would take a year to 18 months from the time of the trial before father was ready to be a parent to the children, who continued to have serious problems. We reversed the trial court's decision denying termination. In doing so, we observed that the Supreme Court in *Simmons* did not give an open-ended license to parents "to engage in cycles of treatment, relapse, and recovery while their children remain in the foster care system." *Id.* at 461.

On the other hand, in *State ex rel Dept. of Human Services,* 211 Or App 221, 240-43, 154 P3d 148 (2007), we held that a significant risk that the mother would relapse into drug use did not justify termination of her parental rights, because the evidence showed that she had not used drugs for more than a year before the hearing. There was thus insufficient evidence that she was presently unfit. We also held that evidence that the father had had anger management problems in the past did not justify termination when some of that anger arose from frustration with the agency's processes, the father had, after original resistance, worked to control his anger problems, and his interactions with the child were positive.

* * * * *

We * * * find that there is not clear and convincing evidence to support the allegations of subparagraph l) [of the state's petition]. In the year before the termination trial, mother made substantial efforts to adjust her circumstances, conduct, and conditions to make it possible to return M.W. to her custody, and she had substantial success in doing so. We cannot say that it appears reasonable that no lasting adjustment can be effected. Similarly, there is not clear and convincing evidence to support the allegations of subparagraph h). If mother had a mental or emotional illness at the time of the hearing, it was borderline personality disorder. When mother learned of that diagnosis, she immediately sought out dialectical behavioral therapy, which Sorensen recommended and which Giesick testified is an effective treatment for that disorder. ***In light of mother's recent and generally successful efforts to resolve her other problems, it appears that she will work diligently on this condition. Thus, there is no clear and convincing evidence that mother's mental or emotional illness is of a nature and duration that would render her incapable of providing care to M.W. for an extended period of time. Unlike the parents in F.W., mother is making steady progress rather than showing a continuing cycle of treatment, relapse, and recovery.***

* * * ***In the meantime, M.W. is doing well in her current foster home, which is not a potential adoptive home. She also continues to see mother and is closely bonded to her. We recognize that it is important to M.W. to have a home that she knows will be permanent and in which she can feel secure. Thus, any further delay is unfortunate. However, as in Stillman, given the time that M.W. has already been in foster care and her need to recover from the negative effects of the first foster placement, there is not clear and convincing evidence that the necessary delay before she can return to mother is seriously detrimental to M.W.*** We therefore find that DHS has not proved the allegation of subparagraph e) by clear and convincing evidence.

The allegations that cause us the most concern are those in subparagraph b), relating to mother's use of drugs and alcohol. As we have described, mother successfully completed drug treatment and remains active in 12-step programs. However, two witnesses testified that she used alcohol and marijuana in September 2007, several months before the hearing. One witness was a person with whom she had a short relationship; the other was a potential employer. The two witnesses are friends; mother met the first witness through the second. Both witnesses were impeached. The first witness needed a commercial driver's license for his job and, as a result, was subject to random urinalyses, a situation that made smoking marijuana highly risky for him. Mother worked for the second witness for a short period, and

> the witness decided to pay her under the table for reasons that are not fully clear. The trial court nevertheless believed those witnesses. They testified by telephone, so the extent to which the trial court based its credibility determination on their demeanor is not entirely clear. However, they were neutral witnesses whom DHS discovered during the course of the hearing; the first, at least, was testifying, in part, against his own interest.
>
> ***Based on that testimony, we find that, despite her protestations, there have been occasions when mother has relapsed from being clean and sober. However, what DHS alleged is that she engages in "[a]ddictive or habitual use" so that her "parental ability has been substantially impaired." In light of the other evidence of mother's commitment to overcoming her alcohol and drug problems and of her success in doing so, we cannot say that there is clear and convincing evidence that any use at the time of the hearing was either addictive or habitual or that it had substantially impaired her parental ability. We remain concerned about the possibility of a more serious relapse; it is important that mother not return to her previous patterns. However, because we cannot find that there is clear and convincing evidence to support any of the allegations against mother, we must reverse the judgment terminating her parental rights.***

225 Or App at 236-40 (emphasis added).

33. *State ex rel DHS v. J. S. and B. A. S.*, 225 Or App 115, 200 P3d 567, *rev den* 346 Or 157 (2009) (holding that, under ORA 419B.504, the state presented clear and convincing evidence that both parents were unfit at the time of trial and rejecting father's challenge to termination judgment based on trial court's failure to hold a permanency hearing)

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal a judgment terminating their parental rights to their three children on unfitness and neglect grounds. The trial court ordered the termination as to mother based on her conduct and conditions that are detrimental to the children, including her mental illness, unstable living conditions, and her failure to acquire adequate parenting skills. The court ordered the termination as to father because of his habitual alcohol use, domestic violence, and criminal conduct, as well as his failure to acquire adequate parenting skills. On appeal, both parents challenge the sufficiency of the evidence to support the terminations. The state concedes that the evidence of neglect was insufficient to warrant the terminations, but asserts that the evidence of unfitness was sufficient. Father also advances other assignments of error. He contends that the court abused its discretion in denying his motion to set aside the termination judgment with respect to his parental rights on the basis of his pending criminal appeal. He also argues that the court erred in proceeding to termination without first holding a

permanency hearing. Before the Court of Appeals, father asserts that his trial counsel was inadequate for failing to object to the failure to hold a permanency hearing. *Held:* The Court of Appeals agreed that the evidence of neglect is legally insufficient to support the terminations, but held that the evidence of unfitness was sufficient. The Court of Appeals rejected all of father's other assignments of error.

EXCERPTS FROM OPINION:

Mother has a diagnosed mental illness, schizoaffective bipolar disorder, that significantly impacts her ability to parent her children. ORS 419B.504(1) (2005). According to Dragovich, the symptoms of mother's mental illness and the resulting decompensations are dangerous to the children. In February 2005, mother was decompensating and took the children with her when she left the family residence as a result of domestic violence by father. When DHS located mother and the children, DHS took the children into protective custody because mother had not been properly caring for them.

Mother has a history of abusive relationships, and father has physically abused her in the presence of their children. Despite that, she plans to reunite with him and parent the children with him. Given that father has made no demonstrable progress in resolving his domestic violence issues, based on missed domestic violence classes and repeated instances of domestic violence against mother, it is highly probable that the children would continue to be exposed to domestic violence between the parents. Mother's mental illness also presents a significant challenge to her ability to safely parent three young children. Even when mother is compliant with her medication, she struggles with the burden of being the primary caregiver for several children. After the two daughters were returned to the parents and DHS continued to provide extensive support services (more services, a DHS caseworker observed, than any other client that that staff member knew of), mother became "run down." Now there are three children. Mother asserts that she would be able to safely parent the children with the support of the county mental health department and DHS services. Mother, however, was receiving the support of county mental health and DHS when the children were returned to the home in July 2005. Their circumstances nevertheless deteriorated, resulting in father's domestic violence against mother in the presence of the children and the children being removed from their care less than four months later.

Although mother is warm and affectionate with the children, Gomez characterized her parenting during supervised visits as endangering the children's mental and emotional well-being because mother cannot take charge in a way that reassures them that they are safe. Furthermore, as Dragovich testified, even when mother is taking her medications, "stability" for her consists of avoiding hospitalizations. That is not the stability the children need. We conclude that mother's condition and conduct are seriously detrimental to the children. *Stillman*, 333 Or at 145.

We also conclude that it is improbable that the children could be integrated into mother's home within a reasonable period of time. ORS 419B.504 (2005). Despite several attempts to do so, mother has been unable to permanently separate

from father, a person who has physically abused her in the presence of the children. She desires to reunite with him as long as he resolves what she considers to be the one issue that he needs to work on--his infidelity. Mother has participated in numerous services, but she has displayed little insight into and recognition of the physically abusive nature of her relationship with father.

Even if mother could separate from father, she does not have a stable living environment to which the children could be returned, and she has offered no plan to accomplish that. Furthermore, Gomez maintains that mother cannot parent the three children on her own without the regular presence of another adult. Even within the protected environment of supervised visitation, Gomez observed signs of fear in the children as a result of mother's inability to parent authoritatively. Mother has participated in parenting classes, has worked with DHS visitation center staff, and has engaged in several months of consultation with Gomez. Nevertheless, she has been unable to adapt her parenting skills to meet the children's needs, demonstrating that she will not be able to provide the children with the environment they need within the time period required.

* * * * *

Father has a history of criminal conduct, alcohol abuse, and domestic violence. He has engaged in services, numerous times, related to alcohol abuse and domestic violence with limited success. * * *.

Father asserts that, by the start of his incarceration, he had taken steps to remediate his alcohol abuse and domestic violence; he had enrolled in a treatment program and had begun domestic violence classes. He also notes that he is participating in programs during his incarceration. Father previously participated in those types of programs, however, with little or no success. He voluntarily signed numerous service agreements with DHS, but repeatedly failed to follow through on those commitments.

Father's alcohol abuse remains untreated. He engaged in physical violence against mother in the presence of the children. He also demonstrated poor judgment by consuming alcohol in violation of the terms of his probation, resulting in arrests at the family residence and a lengthy incarceration sentence. Father's conduct and condition are seriously detrimental to the children. *Stillman*, 333 Or at 145.

It is also the case that father has not and will not be able to make the necessary changes to allow integration of the children into his home within a reasonable time. * * *. It is true that father was enrolled in alcohol treatment and a domestic violence program at the time that he began serving his prison sentence and that he is participating in programs during his incarceration. Father has a history of poor performance in those types of programs, however, making it improbable that father will enjoy success in the time necessary for the children.

Furthermore, given their young ages, the children are likely to require parenting skills that exceed father's capacity. Even when the children were in the parents' care, father did none of the parenting. When mother and father were jointly visiting with the children, mother did all of the

> ***parenting. Once the parents began visiting the children separately, the visitation center staff took primary responsibility for parenting the children during father's visits. Father has participated in parenting classes with minimal success and has never demonstrated that he has the ability to parent the children, whether on his own or with mother.***

225 Or App at 129-33 (emphasis added).

34. ***State ex rel DHS v. G. R.*, 224 Or App 133, 197 P3d 61 (2008) (the juvenile court erred in denying father's motion to set aside termination judgment on ground of excusable neglect under ORS 419B.923)**

THE COURT OF APPEALS' SUMMARY:

Father appeals a judgment entered pursuant to ORS 419B.819(7) that terminated his parental rights to his child after he failed to appear on time for the scheduled termination trial. On appeal, father argues that the trial court abused its discretion in failing to set aside the judgment under these circumstances. The record shows that, although father was not present when court convened at 9:00 a.m., when the trial was scheduled to begin, the evidence was undisputed that father's failure to arrive on time was a result of a misunderstanding about the time the hearing would begin, and father was en route to the courthouse and arrived several minutes after the court had decided to proceed with summary termination pursuant to ORS 419B.819(7). Moreover, uncontroverted evidence was presented that, had father been in court at 9:00 a.m. as required, his case would not have gone to trial at that time, because another case was scheduled for trial the same day and would have taken precedence over father's case. *Held:* Under ORS 419B.923(1)(b), a court may set aside a previously entered judgment if the moving party demonstrates "excusable neglect." Where, as here, the material circumstances concerning father's nonappearance were uncontroverted, the question of whether father demonstrated "excusable neglect" is a matter of law. On review of the text of ORS 419B.923 and its legislative history, "excusable neglect" encompasses situations in which a parent makes a reasonable, good faith mistake as to the time or place of a dependency proceeding.

35. ***State ex rel DHS v. A.T.,*** **223 Or App 574, 196 P3d 73 (2008),** ***rev den*** **345 Or 690 (2009) (reversing judgment denying petition to terminate father's rights; discussing proof of present unfitness and serious detriment to child)**

THE COURT OF APPEALS' SUMMARY:

The state appeals a judgment that denied its petition to terminate father's parental rights to his child. The state argues that the trial court erred in failing to terminate father's rights under ORS 419B.504 on the ground of unfitness. *Held:* The state has demonstrated by clear and convincing evidence that father is unfit to parent his child and that the termination of his parental rights is in the child's best interest.

EXCERPTS FROM OPINION:

ORS 419B.504 governs the court's consideration of a petition to terminate parental rights on the ground of unfitness. That statute

> "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 address a parent's fitness: The court must find that the parent is 'unfit by reason of conduct or condition seriously detrimental to the child.' That, in turn, requires a two-part inquiry: The court must find that: (1) the parent has engaged in some conduct or is characterized by some condition; and (2) the conduct or condition is 'seriously detrimental' to the child. Second--and only if the parent has met the foregoing criteria--the court also must find that the 'integration of the child into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change.'"

State ex rel SOSCF v. Stillman, 333 Or 135, 145, 36 P3d 490 (2001) (quoting ORS 419B.504). The focus of both parts of the test for determining a parent's unfitness, as the court in *Stillman*[, 333 Or at 146,] explained,

> "is on the detrimental effect of the parent's conduct or condition on the child, not just the seriousness of the parent's conduct or condition in the abstract. Thus, the court first must identify the parent's conduct or condition, and then measure the degree to which that conduct or condition has had a seriously detrimental effect on the child."

Whether a parent's conduct or condition has had a seriously detrimental effect on the child is a "child-specific" inquiry that calls for "testimony in psychological and developmental terms regarding the particular child's requirements." Id. That is, "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).

Moreover, a parent's fitness must be measured as of the time of the parental rights termination hearing. Thus, evidence that grounds for termination may have existed previously, without evidence that those grounds continued to exist at the time of the hearing, is insufficient to support the conclusion that parental rights should be terminated. *Stillman*, 333 Or at 148-49. Finally, the court must also find that termination of parental rights is in the best interest of the child. ORS 419B.500.

* * * * *

On this record, we conclude that DHS has proved both prongs of the unfitness inquiry by clear and convincing evidence. DHS has proved that father has various conditions--cannabis dependency, opiate dependency, and cocaine dependency**--**and has engaged in conduct**--**domestic violence--that are in various stages of treatment but that, in combination, render father presently unfit to parent any child, particularly a child with N's anxiety issues and need for constant supervision. ***Father does not dispute that his substance abuse has been seriously detrimental to N in the past. For example, when in the throes of his addiction, father neglected N's needs and associated with individuals who directly threatened the safety of his family. The evidence in the record demonstrates that, although those chemical dependencies were in the process of being treated, father had not yet completed treatment that would provide any degree of certainty that father would maintain his recovery. Moreover, although father took a 16-hour anger management class, he has not engaged in any treatment specifically aimed at domestic violence--an issue that has permeated his previous relationships.***

The more difficult question, given the timing of the termination hearing and the stage of father's treatment upon his release from prison, is whether N's integration into father's home is improbable within a reasonable time due to conduct or conditions not likely to change. Whether a particular time for reintegration is "reasonable" depends on the particular needs of the child. ORS 419A.004(20) (a "reasonable time" is a "period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments").

As noted above, the evidence demonstrates that father was still in the process of being treated for chemical dependency. The trial court was convinced that father would complete that treatment and maintain sobriety, based primarily on the court's factual determination that father was earnest in his desire to achieve recovery and to reunify with N. Although we, like the trial court, find father's efforts to be commendable, father's *intentions* are not the only predictor of success in this case. Father has been addicted to drugs for more than half of his life. The only sustained periods in the past 10 years of his life in which he has been drug-free have been in prison. McClaflin, father's current drug counselor, testified that treatment for chemical dependency while incarcerated is "very, very, very different" from treatment outside prison. That is, people who are incarcerated do not "hav[e] to deal with any of their normal day-to-day type activities. So they're gaining information about their use, they're in a supportive environment, but they're not actually having to walk it out." In McClafin's experience, "usually folks kind of tend to go backward a little bit as soon as they get released from incarceration, and then we have to start moving forward again." That was the case with father when, in

> 2006, the stresses of everyday living, work, recovery, and visitations compromised the progress that father had made with his chemical dependency while incarcerated. The stress was such that father relapsed. According to McClaflin, it generally takes six months to a year to be confident in a person's recovery status.
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> ***The past, in this case, is the best predictor of father's future success; we find it to be highly unlikely that father would be able to balance the stresses of everyday living, work, recovery, and domestic violence and parenting training, and to progress to the point where integration is possible, in less than six months. Thus, we conclude, given father's extensive drug abuse history and the testimony of McClaflin, that father is at least six months away--likely more--from achieving a level of recovery that would permit the reintegration of N into father's home.***
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> ***Six months to a year is too long for N to wait, particularly given how speculative reintegration is at this point. At the time of trial, N had been in DHS custody for half of her life. Although she had done well in foster care, she needs stability and permanence at this stage of her development, as well as the opportunity to form lasting attachments. Because of her anxiety, N has a heightened need for a structured, consistent, and stable routine in the immediate future. For that reason, we find that integration into father's home within a reasonable time is improbable.***
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> ***Finally, we conclude that termination of father's parental rights is in N's best interest. The evidence in the record is that N is very adoptable and has done "extremely well" in foster care. By contrast, she had no contact with father the year before the termination hearing, and very little contact with him during the year before that. The evidence further demonstrates that N, though not presenting the same parenting challenges that G presents, still requires "a really high rate of supervision" and would benefit greatly from a "very structured home" with predictable routines. For all of those reasons, we find that it is in N's best interest that father's parental rights be terminated and that DHS move forward with an adoptive placement that will provide N with the stability, permanency, and supervision that she requires***.

223 Or App at 585-89 (emphasis added).