# APPELLATE UPDATE SUPPLEMENT

***State ex rel Juvenile Department of Jackson County v. J. F. B.,*** **___ Or App ___, ___ P3d ___ (August 5, 2009) (reversing permanency hearing judgment because of inadequate findings)**

THE COURT OF APPEALS' SUMMARY:

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

EXCERPTS FROM OPINION:

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

ORS 419B.476(5) provides as follows:

"The court shall enter an order within 20 days after the permanency hearing. In addition to any determinations or orders the court may make under subsection (4) of this section, *the order shall include*:

"(a) The court's determination required under subsections (2) and (3) of this section, including a brief description of the efforts the department has made with regard to the case plan in effect at the time of the permanency hearing;

"* * * * *

"(d) If the court determines that the permanency plan for the ward should be adoption, the court's determination of whether one of the circumstances in ORS 419B.498(2) is applicable;

"(e) If the court determines that the permanency plan for the ward should be establishment of a legal guardianship or placement with a fit and willing relative, the court's determination of why neither placement with parents nor adoption is appropriate[.]"

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

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

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

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

"(A) The parent is successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time as provided in ORS 419B.476(5)(c);

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

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

"(c) The department has not provided to the family of the child or ward, consistent with the time period in the case plan, such services as the department deems necessary for the child or ward to safely return home, if

reasonable efforts to make it possible for the child or ward to safely return home are required to be made with respect to the child or ward."

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

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

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

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

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

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

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

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

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

"At a permanency hearing the court shall:

"(a) If the case plan at the time of the hearing is to reunify the family, determine whether the Department of Human Services has made reasonable efforts or, if the Indian Child Welfare Act applies, active efforts to make it possible for the ward to safely return home and whether the parent has made sufficient progress to make it possible for the ward to safely return home. In

making its determination, the court shall consider the ward's health and safety the paramount concerns. * * *.

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

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

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

(Emphasis added).

***State ex rel Dept. of Human Services v. A.C.,*** **____Or App ____, ____P3d ____ (August 5, 2009) (adhering to earlier decision affirming juvenile court's denial of petition seeking termination of parental rights based on "extreme conduct" under ORS 419B.502)**

THE COURT OF APPEALS' SUMMARY:

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