

DEPENDENCY

Jurisdictional Proceedings

1. Dept. Human Services v. A.B., 256 Or App 854, --- P3d --- (2013) (reversing the juvenile court's judgment continuing wardship in the case)

THE COURT OF APPEALS' PER CURIAM OPINION:

In this dependency proceeding, mother appeals the juvenile court's judgment continuing wardship over her child. She asserts on appeal that the juvenile court erred in denying her motion to dismiss wardship. We review that denial for errors of law, *Dept. of Human Services v. G. E.*, 243 Or App 471, 478, 260 P3d 516, *adh'd to as modified on recons*, 246 Or App 136, 265 P3d 53 (2011), and, as explained below, reverse and remand the case to the juvenile court with instructions to terminate the wardship over the child.

In this case, the petition upon which jurisdiction was based set forth the following circumstances and conditions: (1) mother's involvement in criminal activities and incarceration left her unavailable to care for the child; (2) mother's substance abuse, if untreated, presented a threat of harm to the child; (3) mother's mental and emotional condition interfered with her ability to care for the child; (4) the child was subjected to a threat of physical abuse because a sibling had suffered a non-accidental injury by mother in the family home; and (5) father was unable to protect the child because he did not have a custody order or parenting plan. According to mother, it was improper for the court to continue the wardship over the child because it was undisputed at the time of the review hearing that the grounds for jurisdiction alleged in the petition had been ameliorated. In particular, mother had completed all services required by the Department of Human Services and none of the circumstances supporting jurisdiction as to mother continued to exist.

Pursuant to ORS 419B.100, the juvenile court has jurisdiction over a child whose "condition or circumstances are such as to endanger the welfare" of the child. "It is axiomatic that a juvenile court may not continue a wardship 'if the jurisdictional facts on which it is based have ceased to exist.'" *State v. A. L. M.*, 232 Or App 13, 16, 220 P3d 449 (2009) (quoting *State ex rel Juv. Dept. v. Gates*, 96 Or App 365, 372, 774 P2d 484, *rev den*, 308 Or 315 (1989)). "It is equally axiomatic that a juvenile court may not continue a wardship based on facts that have never been alleged in a jurisdictional petition." *G. E.*, 243 Or App at 479. Furthermore, "without some evidence that [a parent] is a present danger to [the child's] welfare, the lack of a custody order alone is not sufficient for jurisdiction pursuant to ORS 419B.100." *A. L. M.*, 232 Or App at 16.

The outcome in this case is controlled by our holding in *A. L. M.* Here, as there, there was no evidence that any of the circumstances alleged in the petition, other than father's lack of a custody order, continued at the time of the hearing. In the absence of any evidence that mother, as the result of a condition alleged in the petition, was a present danger to the child's welfare, father's lack of a custody order was an insufficient basis on which to continue the wardship. Accordingly, under the circumstances presented in this case, the juvenile court erred in continuing the wardship over the child. Reversed and remanded with instructions to terminate the wardship.

2. Dept. Human Services v. M.H., 256 Or App 306, 300 P3d 1262 (2013) (affirming the juvenile court's finding that the child is within the court's jurisdiction based on proof of certain allegations in the petition, but remanding for entry of a new judgment omitting findings that DHS had proved that the parents' living conditions, unemployment, or lifestyle created a current risk of harm to the child)

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal juvenile court judgments in which the court asserted jurisdiction over their daughter, V, and placed her in the custody of the Department of Human Services (DHS) on the ground that her condition and circumstances endangered her welfare. Mother asserts that the juvenile court lacked personal jurisdiction over V and also lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Both parents contend that the court erred in concluding that V's condition and circumstances endangered her welfare. Held: Under ORS 109.741(3), personal jurisdiction over V was not required for the juvenile court to make a custody determination. Even if it were required, ORS 419B.803(1)(b) confers personal jurisdiction under the facts of this case. The juvenile court had subject matter jurisdiction under the UCCJEA because Oregon is V's home state. On the merits, sufficient evidence supports the juvenile court's findings that V is at risk of serious harm as a result of father's sexual abuse of two children when he was a teenager, both parents' failure to engage in services, and father's unwillingness or inability to protect V from abuse or neglect by mother. The Court of Appeals agreed with parents, however, that the record does not support allegations that their living conditions, unemployment, or lifestyle created a risk of harm to V. Nevertheless, the court concluded that the totality of the circumstances supported the conclusion that V is within the juvenile court's jurisdiction. Remanded with instructions to enter a new jurisdictional judgment omitting the findings that DHS proved allegations 2(c) and (h); otherwise affirmed.

EXCERPT FROM OPINION:

We begin with whether DHS proved that father's sex offenses exposed V to a [current] risk of serious harm. Parents argue that DHS failed to demonstrate a nexus between father's offenses when he was a teenager and his ability to safely parent his own child. Parents acknowledge that Jensen testified, in essence, that a former child sex offender always presents a risk of harm to children, but they contend that our case law establishes that a parent's former criminal acts toward children are not enough to demonstrate a risk of harm to the parent's own child. In particular, parents rely on Dept. of Human Services v. B. B., 248 Or App 715, 274 P3d 242, adh'd to on recons, 250 Or App 566, 281 P3d 653 (2012).

In that case, the father had sexually abused two young children when he was 11 or 12 years old and later sexually abused a three-year-old girl in his care in 1994, when he was 21 years old. *Id.* at 719-20. He was released on post-prison supervision and began sex-offender treatment in 1996. He admitted to viewing child pornography several times in 1998. *Id.* at 720. He discontinued his treatment in 1999 when his post-prison supervision ended. The parents had their first child in 1999 and later had three other children. *Id.* at 721. The family moved to another state later that year, and then moved back to Oregon in 2010. *Id.* at 722. ***Soon thereafter, DHS filed petitions alleging that jurisdiction was warranted because the "father 'has a history of inappropriate sexual contact with minors and such behavior un-remediated endangers the child's welfare and safety.'" Id. DHS also alleged that the children were endangered***

because the father "had 'disclosed inappropriate sexual contact with minors and failed to complete the sex offender treatment as recommended by child welfare authorities.'" *Id.* The juvenile court found that DHS had proved both allegations.

We conducted *de novo* review, and we reversed because we were not persuaded that the evidence demonstrated a current risk of serious harm to the children. **We concluded that the juvenile court's finding that the father's sexual-offender conduct was unremediated was the determinative fact that--if supported by the record--would support the conclusion that his children were in danger. *Id.* at 723. We went on to conclude, however, that the evidence did not support a finding that the father's condition was unremediated. We based that decision in part on the fact that no evidence suggested that the father had had sexual contact with any children since 1994. Significantly, however, we also focused on the lack of expert testimony establishing that father was at risk of reoffending.** The juvenile court had stated that the only evidence regarding the risk that the father posed to the children was "the information from the treatment provider' that 'as time goes on, the longer you're away from treatment, the greater the risk [of sexually inappropriate behavior] actually becomes.'" *Id.* at 723-24 (brackets in *B. B.*). We noted that the trial court had misunderstood the evidence, as the only treatment provider who had testified actually had stated that sex-offender treatment was not required for the father to be "in remission." *Id.* at 724. Rather, his testimony indicated that the father "could have made changes in his life during the 11 years following [his] last treatment * * * so as not to 'recommit these types of offenses.'" *Id.* at 725. The only admissible evidence concerning the connection between sex-offender treatment and the likelihood of reoffending was the treatment provider's testimony that "the prevailing trend in the treatment community was that 'therapy would increase the likelihood for remission and reduce the likelihood of recidivism[.]'" *Id.* at 724. We found, on *de novo* review, that that evidence did not satisfy DHS's burden of proof. *Id.* at 726.

We also concluded, with respect to the second allegation, that, on the record before us, the father's failure to complete sex-offender treatment did not establish a current risk of abuse. *Id.* at 727. We held that "there is no presumption that father's failure to complete treatment some 11 years before the jurisdictional hearing, by itself, makes father 'an unremediated sex offender,' who in turn would be presumed dangerous to his children." *Id.*

Parents argue that, under *B. B.*, DHS was required in this case to prove that father had not ameliorated the condition that caused him to commit sex offenses in the 1980s and, consequently, that his status as a sex offender currently endangered V. Parents acknowledge Jensen's testimony that father was at "moderate to high" risk for reoffending, but they ask that we review *de novo* the testimony of all three psychologists and give greater weight to Gordon's and Robinson's conclusions.

Parents place more weight on *B. B.* than it will bear. Our opinion in that case was premised entirely on our *de novo* review of the facts. Indeed, the court emphasized that standard of review when it explained its disagreement with what it characterized as the dissent's argument "that we should affirm the juvenile court because it was entitled to draw different inferences and DHS had established evidence from which a reasonable factfinder could conclude that father was a danger to his children." *Id.* at 728 n 2. The court explained that, "[e]ven assuming * * * that the juvenile court could have drawn the inference that father is a current risk to his children's safety, we review this case *de novo*, and not under the standard of review the dissent applies." *Id.* Here, unlike in *B. B.*, we have declined to conduct *de novo* review. Accordingly--and again unlike in *B. B.*--we review the evidentiary record to determine whether any evidence, and the inferences that reasonably can be drawn from the evidence, supports the juvenile court's findings. Applying that standard of review, we are bound by the juvenile court's implicit finding that psychological evidence was persuasive.

Part of that evidence is Jensen's testimony, which itself is sufficient to support the court's finding that father's earlier offenses placed V at risk of serious harm. In addition to testifying that sexual deviance "doesn't go away," Jensen also stated that "[u]ntreated sex offenders are much, much more likely to reoffend. There's an extremely high risk of untreated sex offenders reoffending, if they place themselves in situations to have access to young children of the age they're attracted to." The juvenile court was not presented with any evidence that father could have remediated his condition as a sex offender by means other than treatment. Furthermore, unlike any expert evidence in B.B., Jensen's conclusion was based on a current assessment of father's risk.

256 Or App at 325-28 (footnotes omitted; emphasis in bold italics added)

3. Dept. of Human Services v. L.F., 256 Or App 114, 299 P3d 599 (2013) (affirming the juvenile court's judgment finding jurisdiction based on the mother's inability, or unwillingness, to meet or understand the child's medical and developmental needs)

THE COURT OF APPEALS' SUMMARY:

The juvenile court entered jurisdictional and dispositional judgments related to mother's son, H. Mother appeals from the jurisdictional judgment, contending that the evidence in the record is insufficient to support jurisdiction under ORS 419B.100(1)(c) on the basis that mother was unable or unwilling to meet or understand the medical and developmental needs of H, who had been diagnosed with autism. Mother also appeals from the dispositional judgment, assigning error to the provision ordering her to submit to urinalysis. Held: There is evidence in the record to support the juvenile court's finding that mother is unable or unwilling to meet and understand H's medical and developmental needs, and that evidence is sufficient for the juvenile court to conclude that mother's inability or unwillingness to meet H's medical and developmental needs subjected H to a threat of harm or neglect. Therefore, continued jurisdiction under ORS 419B.100(1)(c) was appropriate. The state agrees that the juvenile court decided that it would not require mother to submit to urinalysis and that the requirement that mother do that was erroneously included in the dispositional judgment. Jurisdictional judgment affirmed. Dispositional judgment reversed and remanded with instructions to enter a dispositional judgment that does not require urinalyses; otherwise affirmed.

4. Dept. of Human Services v. S.M., 256 Or App 15, 300 P3d 1254 (2013) (affirming the juvenile court's review hearing judgment granting DHS's request for an order authorizing the immunization of the children over the parents' objection)

THE COURT OF APPEALS' SUMMARY:

In this dependency case, the juvenile court asserted jurisdiction over parents' eight children based on the court's determination that the children's conditions and circumstances endangered their welfare. The children were subsequently placed in foster care. At a review hearing, the Department of Human Services (DHS) asked the juvenile court to order the

immunization of the children over mother's and father's religious objections to the children's immunization. The court granted DHS's request and issued a review judgment for each child that provided that the children may be immunized over the parents' objection. Mother and father appeal those judgments. Held: The Court of Appeals concludes that the court's order directing that the children may be immunized pursuant to medical advice was within the court's statutory authority and not an unlawful infringement on parents' constitutional rights to direct the upbringing of their children. Affirmed.

5. Dept. of Human Services v. J.D.F., 255 Or App 742, 298 P3d 653 (2013) (reversing the juvenile court's dispositional judgment because the juvenile court erred in concluding that DHS's efforts to reunify the child with the father were reasonable)

THE COURT OF APPEALS' SUMMARY:

In this juvenile dependency case, father appeals from a dispositional judgment in which the juvenile court determined that the Department of Human Services (DHS) had made reasonable efforts to eliminate the need for removal of the child, D, from the home. Although he does not challenge the juvenile court's disposition per se ("return to parent" with a concurrent plan of adoption), father argues that the court's "reasonable efforts" conclusion was erroneous because DHS did not contact him in the seven months between the filing of the jurisdictional petition and the dispositional hearing and provided him with no services during that period. DHS responds that, under the totality of the circumstances, its efforts were reasonable: Mother (who is not a party in this appeal) received extensive services, and DHS requested that officials in Kentucky, where father was living at the time, conduct a home study to determine whether D could be placed with him. Held: Based on the sparse record, the evidence does not support a determination that DHS made "reasonable efforts" to "eliminate the need for removal" of D or "to make it possible for [D] to safely return home" as to father. ORS 419B.340(1). Further, in determining the reasonableness of DHS's efforts at the dispositional stage, ORS 419B.340(1), the juvenile court must assess DHS's efforts as to each parent. Thus, despite DHS's efforts regarding mother and D, the trial court erred in concluding that DHS's efforts were reasonable as to reunification with father. Reversed and remanded.

6. Dept. of Human Services v. M.E., 255 Or App 381, 298 P3d 1227 (2013) (reversing the juvenile court's judgment finding jurisdiction under ORS 419B.100(1)(c) based on the state's concession that the evidence was insufficient to support the court's conclusion that the children's welfare is presently endangered and *vacating* the amended jurisdictional judgment entered by the juvenile court while the appeal from the original judgment was pending)

THE COURT OF APPEALS' PER CURIAM OPINION:

Mother and father appeal a judgment of jurisdiction over their four children that was based on findings that father had sexually abused one of mother's twin daughters from a previous marriage and mother did not believe that the abuse had occurred or that father was a threat.[1] While that appeal was pending, the trial court entered an amended jurisdictional

judgment for the purpose of incorporating excerpts from the transcript of the hearing that had led to the original judgment. Mother and father also appeal the amended judgment. We consolidated mother's and father's appeals from the original judgment (Case No. A150361) and the amended judgment (Case No. A151393).

Parents contend that the court erred in failing to dismiss the dependency petition and in asserting jurisdiction over the children because the state failed to prove that the children are subject to a current threat of harm that was reasonably likely to be realized, as is required for jurisdiction under ORS 419B.100(1)(c). See *State ex rel Juv. Dept. v. S. P.*, 249 Or App 76, 84, 275 P3d 979 (2012); *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405-06, 122 P3d 116 (2005). The state concedes the error. A discussion of the facts would not benefit the bench, bar, or public. Suffice it to say that we agree with the state that the evidence is insufficient to support the court's conclusion that the children's welfare is presently endangered, and we, therefore, accept the state's concession.

Accordingly, we reverse the jurisdictional judgment in Case No. A150361. However, we conclude that the juvenile court lacked jurisdiction to enter the amended jurisdictional judgment while the appeal of the original judgment was pending. See ORS 419A.200(7) (providing that the filing of an appeal does not "preclude the juvenile court after notice and hearing from entering such further orders relating to the ward or youth offender's custody pending final disposition of the appeal as it finds necessary by reason only of matters transpiring subsequent to the order or judgment appealed from"); ORS 419A.200(6) (appeal of juvenile court judgment "must be conducted in the same manner as an appeal under ORS chapter 19"); ORS 19.270 (describing circumstances under which a trial court retains jurisdiction notwithstanding the filing of a notice of appeal). Therefore, we vacate the amended judgment.

COMMENTS:

In its opinion, the Court of Appeals does not refer to ORS 419B.923(7), which provides that, subject to certain procedural requirements, "[a] motion [to modify or set aside a judgment] maybe filed with and decided by the [juvenile] court *during the time an appeal from a judgment is pending before an appellate court.*" (Emphasis added).

7. Dept. of Human Services v. M.E., 255 Or App 296, 297 P3d 17 (2013) (setting out apparently contradictory standards for jurisdiction under ORS 419B.100(1)(c) and reversing judgment finding jurisdiction because the totality of the circumstances failed to establish a current threat of harm to the child -- *i.e.*, the stepfather's sexual abuse of the child was a one-time incident that occurred four years ago, the results of a psychosexual risk assessment of the stepfather indicated that he did not pose a risk of sexual harm to any children, and the mother had agreed to protective measures)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a juvenile court judgment asserting jurisdiction over two of her children, twin girls who were 13 years old at the time of the jurisdictional hearing. The juvenile court found that mother's current husband--the twins' stepfather--had, on one occasion

approximately four years before the hearing, sexually abused one of the twins; that mother did not believe that the incident occurred; and, therefore, that the twins were at risk of harm sufficient to warrant juvenile court jurisdiction under ORS 419B.100(1)(c). The court also determined that mother's "negative comments" to one of the girls created a risk of injury to her emotional and physical wellbeing. Held: (1) Because one of the juvenile court's essential findings does not comport with the uncontroverted evidence in the record, the Court of Appeals exercised its discretion to review the facts de novo. (2) Considering the totality of the circumstances--including that the prior abuse was approximately four years previously, it was a one-time incident, the results of a psychosexual risk assessment of father indicated that he did not pose a risk of sexual harm to any children, including his stepchildren, and mother had agreed to protective measures-- the evidence is insufficient to establish that the twins' welfare is presently endangered. (3) The record does not support a conclusion that mother's negative comments to one of the girls--either alone or together with the other allegations--creates a current threat of serious loss or injury to that child. Reversed.

EXCERPTS FROM OPINION:

ORS 419B.100(1)(c) grants the court "exclusive original jurisdiction" in a case involving a child "[w]hose condition or circumstances are such as to endanger the welfare of the person or of others." Under the relevant case law, "a child's 'condition or circumstances' warrant the protection of juvenile court jurisdiction when, **'under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child.'** *State ex rel Juv. Dept. v. Vanbuskirk*, 202 Or App 401, 405, 122 P3d 116 (2005) (citing *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 652-53, 853 P2d 282 (1993))." *State v. S. T. S.*, 236 Or App 646, 654, 238 P3d 53 (2010). The focus is on the child's current conditions and circumstances and not on some point in the past. *Id.* Thus, as we recently summarized,

"[t]o endanger the child's welfare, the condition or circumstances must create a current 'threat of serious loss or injury to the child' and 'there must be a reasonable likelihood that the threat will be realized.' *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011); *Dept. of Human Services v. D. M.*, 248 Or App 683, 686, 275 P3d 971 (2012) (formulations in *Smith* and *A. F.* 'complement each other and correctly state the standard' for juvenile court jurisdiction under ORS 419B.100(1)(c)). The burden is on the state to prove facts sufficient to warrant jurisdiction. *Dept. of Human Services v. B. L. J.*, 246 Or App 767, 773, 268 P3d 696 (2011)."

Dept. of Human Services v. S. P., 249 Or App 76, 84, 275 P3d 979 (2012).

Here, the court concluded that the girls' welfare was endangered based on the circumstances alleged in paragraph A of the petitions--that stepfather had sexually abused MI several years ago and mother did not believe that it happened or that stepfather was a threat to the girls--and that father was unable to protect the girls because of the custody order. Necessarily implicit in that conclusion is the court's finding that stepfather continues to pose a threat of sexual abuse to MI and MA and that mother will not take steps to prevent that harm because she does not believe that it exists.

* * * * *

[I]t has been approximately four years since the abuse occurred, and the court expressly found that it was a one-time incident. That finding is amply supported by the record. There is no

hint in the record that there has been any sexual behavior by stepfather toward MI since the one incident, even though the incident of abuse was not disclosed and, consequently, there was no intervention. MI consistently denied that stepfather had acted inappropriately with her at any time after the single incident. She told the CARES interviewer that it was "awkward" between them at first, but "everything is fine now." There also is no evidence that stepfather has ever touched MA inappropriately.

Moreover, Dr. Colistro was quite definite in his opinion that stepfather presented no risk of sexual harm to MA and MI, particularly given his social-anxiety disorder. He wrote, "A sexual person-to-person crime is particularly unlikely given [stepfather's] intensely felt moral values and the fact that his social anxiety is at its highest in the context of close interpersonal relations."

In addition, Dr. Zorich, whom the trial court also found credible, opined that mother was capable of being protective even if she did not believe that the abuse had occurred. Indeed, although mother did not believe MA's disclosure about stepfather, she immediately agreed to a voluntary protection plan so that the twins would not be in his presence. In particular, she agreed that stepfather would leave the home, that MA and MI would stay with father, and that she would have only supervised visits with them. Mother also requested counseling for the twins as soon as she learned about MA's disclosure. Zorich testified that mother was willing to put into place whatever safety measures were needed to protect her children, including putting cameras in her home. In addition, mother had a policy--the "rule of three"--to never let one of the twins be alone in a room with an adult male. Although there was conflicting testimony regarding whether mother consistently applied that policy with regard to stepfather, there is no reason to doubt that she will do so in the future.

Given the totality of those circumstances, we are not persuaded that the evidence is sufficient to establish, by a preponderance of the evidence, that stepfather's four-year-old abuse of MI and mother's denial of that abuse present a current risk of harm to MI and MA.

255 Or App at 308-09, 311-12 (footnotes omitted; emphasis in bold italics added).

8. Dept. of Human Services v. N.P., 255 Or App 51, 296 P3d 606 (2013) (reversing judgment continuing dependency jurisdiction under ORS 419B.100(1)(c) because the evidence was insufficient to establish that the father's condition -- *i.e.*, his "anger and frustration" "viewed in the light of the risk that is represented by his use of controlled substances" -- exposed the child to a current threat of "serious loss or injury")

THE COURT OF APPEALS' SUMMARY:

Father appeals from a juvenile court judgment that continued jurisdiction over his son, T. He argues that the court erred in basing its decision on father's "anger and frustration," "viewed in light of the risk that is represented by his use of controlled substances," because there was insufficient evidence in support of the court's finding that father's condition exposed T to a serious loss or injury and, in any event, undisputed evidence showed that, at the time of the hearing, father had successfully completed substance abuse treatment, and there was no evidence regarding risk of relapse. Held: The court based its judgment on allegations regarding

father's substance abuse issues that had been ameliorated; therefore, the court erred in relying on those issues in finding that father's condition presented a risk of harm to the child. Reversed and remanded.

COMMENTS:

During the past year or so, the Court of Appeals has issued a number of decisions construing and applying ORS 419B.100(1)(c), in which the court set out what appear to be two contradictory standards for establishing jurisdiction under subsection (1)(c). See, e.g., *Dept. of Human Services v. G.J.R.*, 254 Or App 436, 295 P3d 672 (2013) (leaving unresolved the questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (**threat of "serious loss or injury"**), which appears to state a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("**reasonable likelihood of harm to the welfare of the child**"). In its decision in *Dept. of Human Services v. N.P.*, the court compounded that uncertainty by omitting -- without explanation -- any reference to the standard established by the Oregon Supreme Court in *Smith*:

Father is correct that, in order to justify continued jurisdiction, the department has to prove by a preponderance of the evidence that conditions or circumstances related to father's conduct or condition give rise to a current threat of serious loss or injury to the child. *Dept. of Human Services v. J. H.*, 248 Or App 118, 119, 273 P3d 203 (2012); *Dept. of Human Services v. C. Z.*, 236 Or App 436, 236 P3d 791 (2010).

255 Or App at 56.

9. Dept. of Human Services v. G.J.R., 254 Or App 436, 295 P3d 672 (2013) (reversing the jurisdiction judgment as to father because the evidence that he had not completed sex-offender treatment was not sufficient to establish a current threat of harm to the child and leaving unresolved the questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (threat of "serious loss or injury"), which appears to state a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("reasonable likelihood of harm to the welfare of the child"))

THE COURT OF APPEALS' SUMMARY:

Father appeals from, and seeks reversal of, a judgment in which the juvenile court concluded that the Department of Human Services (DHS) proved an additional allegation in an amended dependency petition that father's prior convictions for public indecency and his failure to complete court-ordered sex offender treatment created a risk of harm to child. The juvenile court had already taken jurisdiction over child as to father when father defaulted to allegations in

an earlier dependency petition that his substance abuse and residential instability created a current risk of harm to child. On appeal, father does not challenge the original bases for jurisdiction, but instead contends that DHS failed to prove that father's prior conduct or status as an untreated sex offender created a risk of current harm to child, even when considered in light of the already established bases for jurisdiction. DHS counters that the evidence produced at the hearing on the additional allegation, when considered in context with the established allegations from the original petition, was sufficient to prove that father's sex offense and failure to complete sex offender treatment creates a risk of harm to child. Held: The record does not contain evidence from which a reasonable factfinder could conclude, by a preponderance of the evidence, that father's sex offense and failure to complete sex offender treatment presented a current risk of harm to child. Further, even when considered in light of the established allegations, i.e., substance abuse and residential instability, there is no evidence that father's sex offense and failure to complete treatment contributed to or enhanced a current risk of harm to child. Reversed.

EXCERPTS FROM OPINION:

As a general matter, a person's status as a sex offender does not *per se* create a risk of harm to a child. *State ex rel Dept. of Human Services v. N. S.*, 229 Or App 151, 157-58, 211 P3d 293 (2009); *see also Dept. of Human Services v. B. B.*, 248 Or App 715, 722-23, 274 P3d 242, *adh'd to on recons*, 250 Or App 566, 281 P3d 653 (2012) (evidence that the father engaged in inappropriate sexual conduct with minors 16 years before the dependency petition at issue did not, by itself, justify jurisdiction). Generally there must be some nexus between the nature of the prior offense and a current risk to the child at issue. *N. S.*, 229 Or App at 158. Similarly, there is no presumption that a party's status as an "untreated" sex offender presents a safety risk to a child. *B. B.*, 248 Or App at 727. Rather, there must be evidence that the party's failure to engage in treatment endangered the child's welfare at the time of the jurisdictional hearing. *Id.*

In this case, we are left with only that presumption and without a sufficient nexus to a risk of harm to Z. There is no evidence that father has reoffended in the 10 years since his last conviction and no evidence from which a reasonable factfinder could find that Z fits within the class of father's victims. The record also lacks evidence that father's failure to complete sex offender treatment presents a current risk that he will offend. Given the record, a reasonable factfinder could not conclude, by a preponderance of the evidence, that the additional allegation of father's sex offense and failure to complete treatment presented a current risk of harm to Z.

* * * * *

* * * Given that there was no evidence that father's prior conviction and failure to complete sex offender treatment, even when considered in light of the established allegations, contributed to or enhanced a current risk of harm to Z, the trial court erred by asserting jurisdiction on the basis of the additional allegation.

254 Or App at 444, 446.

10. Dept. of Human Services v. M.Q., 253 Or App 776, 292 P3d 616 (2012) (reversing judgment of jurisdiction because the evidence failed to establish a current threat harm to the child, but leaving unresolved questions about the correct legal standard for jurisdiction under ORS 419B.100(1)(c) raised by the Court of Appeals opinion in *Dept. of Human Services v. A. F.*, 243 Or App 379, 386, 259 P3d 957 (2011) (threat of "serious loss or injury"), which appears to state a legal standard that is inconsistent with the standard established by the Oregon Supreme Court in *State ex rel Juv. Dept, v. Smith*, 316 Or 646, 853 P2d 282 (1993) ("reasonable likelihood of harm to the welfare of the child"))

THE COURT OF APPEALS' SUMMARY:

Father appeals a juvenile court judgment in which the court took jurisdiction over his child. The court determined that the child's welfare was endangered because the child had previously been a ward of the court; father had failed to complete court-ordered treatment, including substance abuse treatment; and father has a history of criminal activity and incarceration. Father argues that the evidence in the record is insufficient to support jurisdiction on that basis. Held: The record does not support a determination that the child currently is endangered because of the conditions and circumstances cited by the juvenile court. The record includes no evidence that father used drugs in the year preceding the jurisdictional hearing. The evidence also does not support an inference that father is at such a high risk of relapse that there is a reasonable likelihood that he will start using drugs again and will do so in a way that puts the child at risk of serious harm. The record also includes no evidence establishing how father's past criminal activity presents a current threat of serious harm to the child. Jurisdictional judgment reversed as to father; otherwise affirmed.

EXCERPTS FROM OPINION:

The [juvenile] court determined that jurisdiction was warranted because the child's welfare was endangered "by reason of the following facts":

"the child was previously a ward of the court, and the child's father failed to complete court ordered treatment, including chemical abuse treatment; coupled with a history of criminal activity, and incarceration, compromises his ability to safely and consistently and appropriately parent."

We agree with father that the evidence in this case is insufficient, as a matter of law, to support jurisdiction on that basis.

* * * * *

This is a close case. Certainly DHS has reason to be concerned about the welfare of a child whose father has a history of using methamphetamine, repeatedly has engaged in other criminal behavior, and currently is homeless with no plan for obtaining stable housing suitable for a child. But the juvenile court did not take jurisdiction based on the totality of those conditions and circumstances. ***Cf. State ex rel Juv. Dept. v. Vanbuskirk, 202 Or App 401, 405, 122 P3d 116 (2005) ("The key inquiry in determining whether 'condition or circumstances' warrant jurisdiction is whether, under the totality of the circumstances, there is a reasonable likelihood of harm to the welfare of the child.")***. To the contrary, the court dismissed as "not

proven" the allegation (as amended at hearing) that father's homelessness and lack of a consistent relationship with the child endangered her welfare. Instead, the court took jurisdiction based solely on the following determination:

"the child was previously a ward of the court, and the child's father failed to complete court ordered treatment, including chemical abuse treatment; coupled with a history of criminal activity, and incarceration, compromises his ability to safely and consistently and appropriately parent."

We agree with father that, as a matter of law, the record does not support a determination that the child currently is endangered-- that the child is reasonably likely to suffer serious harm in the absence of a jurisdictional judgment--because of those conditions and circumstances. Although father's methamphetamine abuse apparently resulted in the child being removed from his care in 2005, the record includes no evidence that he had used drugs in the year preceding the February 2012 jurisdictional hearing. Indeed, if father had not admitted to a DHS caseworker in December 2011 that he had used drugs 11 months earlier, there would be no evidence that he had had any involvement with drugs since his 2009 arrest.

We do agree with DHS that the evidence, including father's initial denial that he had been arrested on drug-related charges after 2005 and the excuses he gave for missing his UA, would support a determination that he is not credible. **But the juvenile court's apparent disbelief of father's claimed sobriety is not affirmative evidence that he still was using drugs at the time of the 2012 hearing. See State v. Reed, 339 Or 239, 245, 118 P3d 791 (2005) (disbelieving a witness's testimony "does not add anything affirmative to the state's evidence").** Nor does the evidence from which the court could find that father lacked credibility itself support an inference that father continued to use drugs. Father's agreement to submit to UAs was voluntary, as jurisdiction had not yet been established, and DHS had requested only one UA by the time of the jurisdictional hearing. Thus, this case does not involve the kind of pattern of missed court-ordered UAs from which a factfinder reasonably could infer that a person was attempting to hide his or her drug use. Moreover, father had been visiting the child weekly for several months preceding the 2012 jurisdictional hearing and never had been observed in a drug affected state. **In sum, the record simply includes no evidence supporting an inference that father was using drugs at the time that the juvenile court made the jurisdictional determination. Jurisdiction cannot be based on speculation that a parent's past problems persist at the time of the jurisdictional hearing in the absence of any evidence that the risk, in fact, remains. Dept. of Human Services v. S. P., 249 Or App 76, 90-91, 275 P3d 979 (2012).**

The evidence also does not support an inference that father is at such a high risk of relapse that there is "a reasonable likelihood" that he will start using drugs again and will do so in a way that puts the child at risk of serious harm. See C. Z., 236 Or App at 442-44 (reversing jurisdictional judgment based on the mother's use of marijuana because the record lacked "evidence showing that mother's use of marijuana, her 'chemical abuse problem' as found by the trial court, [was] a condition or circumstance that pose[d] any risk to her children"). DHS relies, in part, on the caseworker's testimony that she has not worked with any other parent who has recovered from a methamphetamine addiction without undergoing treatment. But that generalized lay observation is not enough, standing alone, to support an inference that father is reasonably likely to relapse in a way that is reasonably likely to endanger the child, as it is not tied to any evidence related specifically to father. In the absence of relevant individualized evidence about father's current circumstances, the juvenile court erred in asserting jurisdiction on the basis of any concern about his potential for relapse.

In addition to relying on his history of untreated substance abuse, the juvenile court cited father's "history of criminal activity, and incarceration" as part of its reason for asserting jurisdiction. But the record includes no evidence establishing that the child suffered in the past

because of father's few nondrug-related convictions and no evidence establishing how that past criminal history presents a current threat of serious harm to the child, even in combination with father's history of methamphetamine abuse. In sum, the record does not include any evidence supporting the juvenile court's assertion of jurisdiction as to father.

A question remains regarding the appropriate disposition. The juvenile court also asserted jurisdiction as to mother, based on an allegation that she admitted. Mother is not a party to this appeal, and father has not challenged the jurisdictional determination as to mother. Accordingly, we reverse the judgment only as to father, and we otherwise affirm. See *Dept. of Human Services v. J. H.*, 248 Or App 118, 119, 273 P3d 203 (2012) (ordering that disposition in analogous circumstances).

253 Or App at 778, 785-88 (emphasis in bold italics added; footnote omitted).

**11. Dept. of Human Services v. J.C.G., 253 Or App 588, 291 P3d 787 (2012)
(affirming order denying dismissal of wardship)**

THE COURT OF APPEALS' SUMMARY:

In this juvenile dependency case, the only issue on appeal is whether the trial court erred in denying defendant's motion to dismiss the wardship because father had ameliorated all of the bases for jurisdiction. Held: Because the safety plan was newly proposed at the hearing and had not been reduced to writing or implemented, the juvenile court could reasonably be concerned about father's ability to protect the child from the stepmother and could conclude that the original bases for jurisdiction had not yet been fully ameliorated and that the wardship should continue. Affirmed.

**12. Dept. of Human Services v. C.C., 253 Or App 271, 290 P3d 900 (2012)
(affirming judgment of jurisdiction, despite the juvenile court's "plain error" in failing to include findings required by ORS 419B.340(2))**

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment of the juvenile court making her two-year-old son a ward of the juvenile court and committing him to the custody of the Department of Human Services (DHS) based on allegations that the child was under threat of harm for neglect. Mother contends that the dispositional judgment is defective because it fails to include a brief description of DHS's reasonable preventive and reunification efforts and an explanation why further efforts could not have prevented or shortened the separation of mother's family, as required by ORS 419B.340(2). The error was not preserved, but mother contends that there was no need to preserve it or, in the alternative, that it is plain error, and the court should exercise its discretion to correct it. Held: Mother was required to preserve the asserted error, because it could have been raised at the conclusion of the hearing. Although the error is plain, the court declines to exercise its discretion to address it, for the reasons that, had mother informed the juvenile court of the error, it could have been corrected, and mother has not shown

that she suffered harm as a result of the juvenile court's failure to include the required description. Affirmed.

COMMENTS:

ORS 419B.340(2) requires that, if the juvenile court commits a child to the legal custody of DHS, the disposition judgment must include "a *brief description of what preventive and reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family.*" That statutory directive to the juvenile court applies, regardless whether -- in a particular case -- the Court of Appeals has decided not to reverse a disposition judgment that fails to include the required findings. Ensuring that findings required by statute are included in a judgment also may prevent the unnecessary delay and expense of an appeal.

The judgment form used by the juvenile court in this case was not legally sufficient because it failed to include (among other things) a "prompt" and space for the findings required by ORS 419B.340(2). The JCIP Model Form JF4B (combined jurisdiction/disposition judgment forms) does include a "prompt" and space for those findings:

► **Reasonable/Active Efforts Findings Required**

This judgment commits the child to the legal custody of DHS, and, having considered the circumstances of the child and parent(s) and the child's health and safety, the Court finds that DHS **has made** **has not made** **reasonable efforts** **active efforts** to prevent or eliminate the need for removal to make it possible for the child to safely return home.

Brief description of preventive and reunification efforts and why those efforts were or were not sufficient: _____

13. Dept. of Human Services v. S.C.S., 253 Or App 319, 290 P3d 903 (2012), rev den 353 Or 428 (2013) (affirming judgment of jurisdiction and determining that the juvenile court had authority under the UCCJEA to adjudicate the petition)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment of the juvenile court taking jurisdiction over mother's infant daughter, N, after finding that mother has a mental or emotional condition that puts N at risk. Mother contends that the court did not have jurisdiction over the case because she and N are both from Indiana and that, if the court did have jurisdiction, it erred in finding against mother on the facts. Held: The juvenile court properly concluded that it had jurisdiction over the child under ORS 109.741(1)(b). Evidence in the record supports the juvenile court's findings that N's welfare is endangered because, due to mother's mental or emotional condition, she is unable to provide N with the care, guidance, and supervision for her well being, and there is a reasonable likelihood of harm. Affirmed.

**14. Dept. of Human Services v. L.G., 252 Or App 626, 290 P3d 19 (2012)
(the state's evidence failed to prove that the child is within the juvenile court's jurisdiction under ORS 419B.100(1)(c) because the evidence did not establish a current risk of harm to the child)**

THE COURT OF APPEALS' PER CURIAM OPINION:

The state seeks reconsideration of our opinion in this case, *Dept. of Human Services v. L. G.*, 251 Or App 1, 281 P3d 681 (2012), in which we held that there was no basis for jurisdiction over L. The juvenile court took jurisdiction over L, finding that mother had been subjected to domestic violence by L's father, which presented a threat of harm to L. The court further found that mother had failed to obtain regular and adequate medical care for L's sibling, J, "and has a pattern of not meeting [J's] medical needs," which posed a risk of harm to L. We held that the bases for jurisdiction alleged in the petition, and on which the juvenile court had determined that it had jurisdiction over L, no longer exist. *Id.* at 5. We said:

"In particular, there is no evidence that mother is subject to harm from father, who no longer has a relationship with mother or with L. Accordingly, there is no current threat of harm to L based on exposure to domestic violence."

Id. The state contends in its petition for reconsideration that our opinion overlooked as a separate basis for jurisdiction the juvenile court's finding of a continuing risk of harm to L arising from mother's past failure to provide L's sibling, J, with needed medical care. We allow reconsideration and conclude explicitly that there is no evidence that mother's past medical neglect of J poses a current risk of harm to L.

**15. Dept. of Human Services v. R.V., 252 Or App 567, 287 P3d 1281 (2012)
(reversing judgment finding child within the within the juvenile court's jurisdiction under ORS 419B.100(1)(c) based on the state's concession that the evidence failed to prove a current risk of harm to the child)**

THE COURT OF APPEALS' PER CURIAM OPINION:

Mother appeals a judgment finding her daughter, C, to be within the jurisdiction of the juvenile court under ORS 419B.100(1)(c) based on allegations that mother had a history of choosing violent or unsafe partners, had knowingly failed to protect C from sexual abuse by mother's partner, had continued to allow contact between her partner and C, and had possessed pornography within reach of C. Mother argues that the trial court erred in finding that C's welfare was endangered at the time of the hearing. The state concedes the error. We agree and accept the state's concession. See *State v. S. T. S.*, 236 Or App 646, 654, 238 P3d 53 (2010) (to establish jurisdiction under ORS 419B.100(1)(c), the state must prove "that there is a *current* risk of harm and not simply that the child's welfare was endangered at some point in the past" (emphasis in original)).

DEPENDENCY

Permanency Proceedings

16. **Dept. Human Services v. A.R.S., 256 Or App 653, --- P3d --- (2013)**
(reversing a permanency judgment changing the case plan from reunification to adoption and denying the mother's motion to dismiss wardship because, in making both determinations, the juvenile court had considered facts extrinsic to the bases of jurisdiction)

THE COURT OF APPEALS' SUMMARY:

Mother and child appeal from a permanency judgment that denied their motions to dismiss jurisdiction over child and continued the plan of 'return to parent.' They argue, inter alia, that the juvenile court erred in denying their motions to dismiss and in determining that mother had made insufficient progress toward reunification based on circumstances--including mother's purported personality disorder--that were not pleaded and proved as a basis for jurisdiction. Held: A juvenile court may not deny a motion to dismiss jurisdiction, or assess the appropriateness of continuing a permanency plan of reunification, based on conditions or circumstances not explicitly stated or fairly implied by the jurisdictional judgment. The juvenile court improperly relied on mother's purported personality disorder, which was not alleged or otherwise implied as a basis for jurisdiction over the child, in concluding that mother had failed to make sufficient progress to make it possible for the child to be safely returned to her care and in denying appellants' motions to dismiss jurisdiction. Reversed and remanded.

COMMENTS:

The rule that determined the outcome of this case is now well established -- *i.e.*, when the juvenile court holds a permanency hearing in a case where the plan at the time the hearing begins is reunification, "both DHS's efforts and a parent's progress are evaluated by reference to the facts that formed the bases for juvenile court jurisdiction." See, *Dept. of Human Services v. N.T.*, 247 Or App 706, 715, 271 P3d 143 (2012). The rule often is easier to state than to apply, particularly in a case like this one where mental illness appears to underlie the established grounds for juvenile court jurisdiction. However, when that is the case, a new, or amended, jurisdictional petition should be filed. Since long before the Court of Appeals issued its decision in *Dept. of Human Services v. N.T.*, ORS 419B.343 has required that DHS case plans "bear[*] a rational relationship to the jurisdictional findings that brought the ward within the court's jurisdiction under ORS 419B.100(1)." And, as the Court of Appeals explained in *A.R.S.*:

Although we appreciate that it can be difficult to separate the conditions for jurisdiction from the causes of those conditions, under the court's approach here, it would be impossible for mother to cure the conditions that formed the bases for the court's jurisdiction without first addressing her purported—and unadjudicated--mental health condition. Yet, nothing in the

jurisdictional judgment would have alerted mother to that proposition. In other words, if, as the court concluded, mother indeed suffers from an underlying personality disorder that is the 'barrier' preventing her from reunification with child, mother is entitled to notice--and an opportunity to address--that condition. See *Dept. of Human Services v. J. R. L.*, 256 Or App 437, 449-51, ___ P3d ___ (2013); *G. E.*, 243 Or App at 481. Accordingly, we reverse and remand. See *J. R. L.*, 256 Or App at 452-53; *N. M. S.*, 246 Or App at 301 (reversing and remanding '[b]ecause the court's analysis that DHS had made reasonable efforts to reunify the family and that mother's progress toward that goal was insufficient was based, at least in part, on an erroneous understanding of the scope of the jurisdictional judgment'); *N. T.*, 247 Or App at 718 (remand required where it was unclear whether the court would have reached the same conclusion in the absence of the improper allegations upon which the court was 'clearly focused').

256 Or App at 663-64.

17. *Dept. Human Services v. A.J.M.*, 256 Or App 547, --- P3d --- (2013) (affirming the juvenile court's "corrected" permanency judgment and holding that the juvenile court did have authority to issue the corrected judgment pursuant to ORS 419B.923(1) for the purpose of including in the judgment a brief description of the reunification services that DHS had provided to mother, as required by ORS 419B.476(5)(a), which the juvenile court had omitted from the original permanency judgment)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment of the juvenile court correcting an earlier permanency judgment changing the permanency plan from reunification to adoption. Mother contends that the juvenile court lacked authority to issue the corrected judgment pursuant to ORS 419B.923(1) to include a brief description of the services that DHS had provided to mother, as required by ORS 419B.476(5)(a), because the hearing record does not reflect that the juvenile court actually relied on those services in making its findings. Held: In issuing the corrected judgment to include the brief description required by ORS 419B.476(5)(a), the juvenile court stated that the failure to include the description in the original judgment was an omission, because the record was replete with, and the juvenile court actually relied on, DHS's provision of services in making its ruling but omitted them from the judgment. There is no reason to doubt the juvenile court's explanation. The juvenile court had authority, pursuant to ORS 419B.923(1), to correct the permanency judgment to include the findings required by ORS 419B.476(5)(a) while an appeal of the judgment was pending. Affirmed.

18. *Dept. Human Services v. J. R. L.*, 256 Or App 437, 300 P3d 291 (2013) (reversing a permanency judgment changing the case plan from reunification to adoption and denying the mother's motion to dismiss wardship because, in making both determinations, the juvenile court had considered facts extrinsic to the bases of jurisdiction)

THE COURT OF APPEALS' SUMMARY:

A was a ward of the court based on mother's admissions relating to exposure of A to risks of sexual abuse by A's father, a lack of suitable housing, and a failure to meet A's

educational needs. Mother contends that the wardship should have been dismissed because she had adequately addressed those bases for jurisdiction and because the juvenile court improperly relied on a different basis for continuing jurisdiction--mother's mental health--as to which mother had not received required notice. In part, mother challenges the permanency judgment on the same basis, arguing that the [DHS] failed to establish the insufficiency of mother's progress toward ameliorating bases for jurisdiction that had been pleaded and proved. Held: Mother was not given adequate notice from the jurisdictional judgment, or from the Services Requested form incorporated in the judgment, that her failure to address her mental health issues could be a basis for the court to continue jurisdiction over A. The juvenile court erred in relying on mother's mental health, a fact extrinsic to the jurisdictional judgment, in denying mother's motion to dismiss and in its determination of the permanency plan. The juvenile court's error was not harmless because it is unclear whether the court would have reached the same conclusion without considering mother's mental health issues. Reversed and remanded.

19. Dept. Human Services v. K.H., 256 Or App 242, 301 P3d 427 (2013) (affirming the juvenile's court's order establishing a guardianship under ORS 419B.366 and rejecting the mother's argument that the juvenile court violated her right to due process by limiting her submission of evidence to an offer of proof, and then deciding -- based on that evidence -- that further evidentiary hearings were unnecessary)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment that established a guardianship over her child under ORS 419B.366. She contends that the hearing held by the juvenile court under ORS 419B.366 was legally insufficient and violated her due process rights. She also contends that the juvenile court erred when it relied upon only the affidavit of counsel for Department of Human Services (DHS) to determine that her child could not safely be returned to mother within a reasonable time. The juvenile court had changed the permanency plan for child from reunification to guardianship after a permanency hearing in February and March 2012. Four months later, DHS filed a motion under ORS 419B.366 to establish child's maternal grandmother as guardian. Mother objected and requested a "full evidentiary hearing" to challenge DHS's motion. The court, at a hearing on July 19, 2012, heard testimony from the proposed guardian and considered mother's argument that she wanted to present evidence that child could be returned to her in a reasonable time. ORS 419B.366(5). Ultimately, the court ordered mother to submit an offer of proof that contained the substance of mother's evidence regarding the return of child within a reasonable time. Thereafter, the court issued an order denying mother's request for a "full evidentiary hearing" and concluding that, after considering the permanency record, the evidence presented at the guardianship hearing, mother's offer of proof, and representations of the parties' counsel at hearing, guardianship was in the best interests of child. The court entered a judgment establishing a guardianship, and mother appealed. Held: The court's July 19 hearing, at which the court took evidence regarding the establishment of a guardianship and gave mother an opportunity to present evidence through an offer of proof to counter the establishment of a guardianship, was not insufficient as a matter of law under ORS 419B.366. Further, in the narrow circumstances of this case, the court did not violate due process by limiting mother's submission of evidence to an offer of proof, and then deciding based on that evidence that further evidentiary hearings were unnecessary. Finally, the court did not rely

solely on the affidavit of counsel for DHS to determine that child could not be safely returned to mother within a reasonable time. Affirmed.

**20. Dept. Human Services v. A.D., 255 Or App 567, 300 P3d 185 (2013)
(affirming the juvenile court's permanency judgment changing the plan for the child from reunification to adoption)**

THE COURT OF APPEALS' SUMMARY:

In this dependency case, mother and father separately appeal from a judgment of the juvenile court changing the permanency plan for their child, C, from reunification to adoption. ORS 419B.476. On appeal, parents assert that the trial court erred in concluding that the Department of Human Services (DHS) had made reasonable efforts. Parents also assert that the trial court erred in concluding that parents had not made sufficient progress to make it possible for C to safely return home and would not do so within a reasonable time. Held: There is adequate support in the record for the findings made by the juvenile court, and those findings provide a basis for its determinations as a matter of law. The juvenile court did not err in determining that DHS made reasonable efforts, that mother and father did not make sufficient progress, and that, in view of their cognitive limitations, parents would not make sufficient progress "within a reasonable time" in order for C to safely return home. Affirmed.

COMMENTS:

The parents' final argument on appeal in this case was that, even if DHS's reunification efforts were reasonable and their progress was insufficient to permit the safe return of the child at the time of the permanency hearing, "their progress was nevertheless sufficient to allow for such a return within a reasonable time following the provision of additional services." (Slip opinion at 13). The Court of Appeals – citing as authority ORS 419B.476(2)(a) – responded that "[t]he juvenile court was not required to make a finding on that point *before* changing the permanency plan from reunification to adoption." (Slip opinion at 13) (emphasis in original). Unfortunately, that response misstates the law. Later in its discussion of the issue, the Court of Appeals corrected that misstatement, but only in part:

Under ORS 419B.476(5)(d), if the court determines that the permanency plan should be adoption, the court's order "shall include" a "determination of whether one of the circumstances in ORS 419B.498(2) is applicable." That statute, in turn, provides that DHS shall file a petition for termination unless, among other reasons, "[t]here is a compelling reason * * * for determining that filing such a petition would not be in the best interests of the child," including the fact that the parent "is successfully participating in services that will make it possible for the child * * * to safely return home within a reasonable time * * *." Accordingly, the juvenile court's evaluation of whether reunification may be possible within a reasonable time is relevant to the *timing* for filing a petition for termination.

255 Or App at 580.

It is true, as the Court of Appeals apparently concluded in this case, that **ORS 419B.476(2)(a)** requires that the juvenile court determine whether DHS has made the required reunification efforts and whether the parents' progress is sufficient to permit the safe return of the child and does not require (when the answer to the latter question is "no") that the juvenile court then

consider whether further efforts will permit the child's safe return within a reasonable time. However, **ORS 419B.476(2)(a)** does not include all of the findings that the juvenile court must make to support a determination that the permanent plan in a case should be changed from reunification to adoption. For example, **ORS 419B.476 (5)(d)** provides that, if the court determines that "the permanency plan for the [child] should be adoption," the permanency judgment "shall include" "the court's determination whether one of the circumstances in **ORS 419B.498(2)** is applicable." Although somewhat awkwardly worded, the necessary implication of that requirement is that, if one or more of those circumstances is "applicable," adoption is not (or, at least, may not be) an appropriate plan. In any event, the juvenile court "shall" determine whether one of the "circumstances" specified "in ORS 419B.498(2) is applicable," and one of those "circumstances" is described in ORS 419B.498(2)(b)(A), as follows:

"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).*"

(Emphasis added). **ORS 419B.476 (5)(c)**, in turn, provides that, "[i]f the court determines that the permanency plan for the ward should be to return home because further efforts will make it possible for the ward to safely return home within a reasonable time," the permanency judgment must include "the court's determination of the services in which the parents are required to participate, the progress the parents are required to make and the period of time within which the specified progress must be made." ***In other words, under ORS 419B.476(5)(d), 419B.498(2)(b)(A) and 419B.476(5)(c), even if the juvenile court finds that DHS has made the requisite reunification efforts and that, despite those efforts, the child cannot be safely returned home at the time of the hearing, BEFORE the juvenile court can enter a judgment ordering a change of plan from reunification to adoption, the court must consider/determine whether further reunification efforts will permit the child's safe return home "within a reasonable time."***

Even assuming that the "further efforts" inquiry discussed above is not required by ORS 419B.476(5)(d), 419B.498(2)(b)(A) and 419B.476(5)(c), other statutory provisions in the juvenile dependency code make that inquiry a practical necessity in such cases. For example:

- ORS 419B.343(2)(a) requires that the initial DHS case plan include "[a]ppropriate services to allow the parent the opportunity to adjust the parent's circumstances, or conditions to make it possible for the [child] to safely return home within a reasonable time." "'Reasonable time' means a period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments." ORS 419A.004(20). The ***within-a-reasonable-time*** "inquiry is child-specific" and "calls for testimony in psychological and developmental terms regarding the particular child's requirements." *State ex rel SOSCF v. Stillman*, 333 Or 135, 146, 35 P3d 490 (2001). Therefore, depending on the circumstances of a particular case, the "reasonable time" for the child to be reunified with a parent may extend beyond the date of the initial permanency hearing, and, in such a case, if the record at the permanency hearing shows that further reunification efforts would permit the child to reunite safely with the parent within that reasonable period of time, there is no basis for changing, or seeking to change, the case plan to adoption.
- Most TPR petitions seek termination of parental rights based on unfitness under ORS 419B.504. To establish that a parent is unfit under ORS 419B.504, the petitioner must prove that the parent's conduct and/or condition is "seriously

detrimental to the child * * * and reintegration of the child * * * into the home of the parent * * * is improbable ***within a reasonable time***" because the conduct and/or condition is "not likely to change." No termination petition can be filed until the juvenile court has determined, after a permanency hearing, "that the permanency plan for the child * * * should be adoption." ORS 419B.498(3). It follows that (at least in cases where the TPR petition would be based on ORS 419B.504), if further reunification efforts ***will*** permit the child to return home ***within a reasonable time***, the juvenile court should not order that the plan be changed from reunification to adoption.

21. Dept. of Human Services v. T.H., 254 Or App 394, 294 P3d 531 (2012) (reversing permanency judgment *continuing* the APPLA plan that was in effect when the hearing began because the judgment did not include a brief description of the DHS efforts to implement the APPLA plan, as required by ORS 419B.476(5)(a), and also did not include the "predicate" findings for an APPLA plan required by ORS 419B.476(5)(f))

THE COURT OF APPEALS' SUMMARY:

Father appeals from a judgment of the juvenile court continuing the permanency plan of APPLA, or "another planned permanent living arrangement," for his two children. He argues that the Court of Appeals must reverse and remand the judgment because the juvenile court failed to make certain statutorily mandated written findings. The Department of Human Services responds that, at the permanency hearing, father failed to object to the lack of findings, thereby waiving his right to assign error on appeal to that lack, and that, in any event, omitting the findings was harmless error. Held: Where the first opportunity to know that the juvenile court's failure to include the required written findings does not occur until after the permanency hearing, a party has no obligation at the hearing to preserve a claim of error by objecting to that failure. On the merits, the juvenile court's omission of findings was not harmless error. Reversed and remanded.

EXCERPT FROM OPINION:

Father's argument on appeal is that the document failed to meet the requirements for permanency judgments specified in ORS 419B.476(5):

"The court shall enter an order within 20 days after the permanency hearing. * * * [T]he order shall include:

"(a) * * * [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;

" * * * * *

"(f) If the court determines that the permanency plan for the ward should be a planned permanent living arrangement, the court's determination of a compelling reason, that must be documented by the department, why it would not be in the best interests of

the ward to be returned home, placed for adoption, placed with a legal guardian or placed with a fit and willing relative."

Within the form judgment, the court checked a box indicating that "[t]he case plan in effect at the time of the hearing is: * * * [a] planned permanent living arrangement (APPLA), which is: PFC [permanent foster care]." The court also checked a box indicating that "DHS has made reasonable efforts to place the child in a timely manner (including, if applicable, in an interstate placement) in accordance with the plan and to finalize the child's permanent placement." **Immediately following that determination, the form includes a line stating: "The DHS efforts include the following: _____." The court left that line blank.**

On a subsequent page of the form is a check-box with the heading, "Planned permanent living arrangement (APPLA)." Under that heading are a series of check-boxes where the court would have been able to indicate "[1] There are compelling reasons, which DHS has documented, why it would not be in the child's best interests to be returned home, placed for adoption, placed with a legal guardian, or placed in the custody of a fit and willing relative * * *; "[2] Placement of the child with a parent is not appropriate, because * * *; "[3] Adoption is not appropriate, because * * *; "[4] Guardianship or a relative placement is not appropriate, because * * *; "[5] The child has needs that require a therapeutic or other specialized placement * * *; "[6] Additional related findings[.]"

The court left all of those boxes unchecked. To the extent that the court attempted to meet the statutory requirements, it did so by checking a box by the statement, "The Court considered the following evidence in making the Findings and Orders in this Judgment: The following information/materials of which the Court has taken judicial notice[.]" In a space after the statement, the court wrote, "Court report from Agency filed 5/10/12." No report is attached to the judgment.

Father argues that the judgment fails to meet the statutory requirements. DHS, in response, acknowledges that the court did not make the requisite findings, and we agree. In *State ex rel DHS v. M. A.*, 227 Or App 172, 183, 205 P3d 36 (2009), under circumstances similar to those in the present case, we held:

"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."

(Footnote omitted.) It is true that, in *Dept. of Human Services v. H. R.*, 241 Or App 370, 374-75, 250 P3d 427 (2011), we subsequently held that the judgment adequately met the requirement that it include a list of services by expressly incorporating into its written judgment an agency report. We noted that the court "adopted DHS's court report dated May 26, 2010, 'as the Court's written findings' * * *. The report contains a request for a finding of reasonable efforts, followed by a summary description of those efforts. On this record, there is no ambiguity about which report the court adopted as its written findings, nor is the report so lengthy or unclear as to preclude its use as a 'brief description.' Here, the juvenile court's adoption of DHS's court report as its written findings concerning reasonable efforts was sufficient to comply with the requirement of ORS 419B.476(5)(a) that the judgment include '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.'" *Id.* at 375. The judgment in the present case falls far short of the judgment in *H. R.* Here, as in *M. A.*, the court did not incorporate the agency report; it merely noted that it had taken judicial notice of it. Nor can we discern from the judgment the court's reasoning or the basis of its ultimate decision.

DHS advances two arguments. The first is that, because father failed to preserve his claim of error at trial and he does not argue that the error is "plain," we therefore cannot review it on appeal. ORAP 5.45. DHS recognizes that, in *M. A.*, 227 Or at 181-82, we held that, because ORS 419B.476(5) requires only that the juvenile court provide the specified findings in a written judgment within 20 days of the end of the permanency hearing, parties ordinarily do not have the opportunity to lodge objections at the hearing itself. ***DHS appears to argue, however, that, because this case involves the continuation of a permanency plan, as opposed to a change in a permanency plan as was the case in M. A., preservation is required. We are unable to perceive why the difference that DHS identifies should have any bearing on a party's ability to lodge an objection to the lack of findings at the hearing itself. For that reason, we hold that where, as here, the first opportunity to know that the juvenile court's failure to include the required written findings does not occur until after the permanency hearing, a party has no obligation at the hearing to preserve a claim of error by objecting to that failure.*** Nor, of course, does a party have an obligation to file a motion for reconsideration. * * *. DHS's second argument is that the omission of findings, although error, was harmless. Again, DHS recognizes that *M. A.* imposes something of an impediment to that argument. In that case, after holding that the omission of findings was error, we explained: "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." *M. A.*, 227 Or App at 183; see also *Dept. of Human Services v. L. B.*, 246 Or App 169, 175, 265 P3d 42 (2011) (court must "expressly connect all of the dots along the way to a change in the permanency plan"). ***DHS contends, however, that the present case is distinguishable, because, again, it does not involve the change of a permanency plan, but the continuation of one that the court has previously approved and determined is in the best interest of the child.***

We disagree. The consequence of a decision to maintain a permanency plan implicates the same calculation of what may lead to a positive outcome for the child as a decision to impose a plan in the first instance. In either case, the court must decide between competing options: maintain the status quo or change it. The need to "carefully evaluate" the situation is the same. The court erred in not including the findings required under ORS 419B.476(5). That error did not have to be preserved under the circumstances of this case, and it was not harmless. We therefore reverse and remand.

254 Or App at 397-401 (emphasis in bold italics added; footnotes omitted).

22. Dept. of Human Services v. C.L., 254 Or App 203, 295 P3d 72 (2012), rev den 353 Or 445 (2013) (affirming a permanency judgment changing the current permanency plan from APPLA to adoption and explaining that, when the case plan in effect at the time a permanency hearing begins is a plan *other than reunification* and the parent requests that it be changed to reunification, the juvenile court is *not* required to assess DHS's reunification efforts and the sufficiency of a parent's progress toward reunification under ORS 419B.476(2)(a) and *may* consider evidence outside the scope of the bases for jurisdiction in determining whether the child can be placed with the parent)

THE COURT OF APPEALS' SUMMARY:

Mother appeals from a judgment of the juvenile court after a permanency hearing changing the permanency plan for mother's daughter B from "another planned permanent living arrangement" (APPLA) to adoption pursuant to ORS 419B.476(5)(d). Mother contends that, in rejecting mother's request to change the plan to reunification, the juvenile court erroneously considered evidence, presented for the first time at the hearing, that mother had physically abused B. Citing numerous appellate decisions, mother asserts that it was error for the juvenile court to consider facts that were not a part of the dependency petition or the jurisdictional judgment, because the assessment of the agency's "reasonable efforts" and the parent's "sufficient progress" under ORS 419B.476(2)(a) must be made in relation to the bases for jurisdiction, and consideration of such evidence impermissibly affects a substantial right of the parent. Held: When the permanency plan at the time of hearing is APPLA, in changing the permanency plan to adoption, the court could consider evidence of mother's physical abuse of the child presented for the first time at the hearing, even though that was not a basis for jurisdiction. At that point in the proceeding, the juvenile court has previously determined that there was a compelling reason why reunification was not in the child's best interests. The goal is no longer reunification, and the agency's reasonable efforts and the parent's sufficient progress are not a part of the inquiry. The focus is on the best interests of the child and requires a determination whether it is in the child's best interests not to file a petition for termination because the child can be returned home within a reasonable time. In such circumstance, the court's consideration of evidence extrinsic to the jurisdictional judgment does not affect a substantial right of the parent, as long as there are procedural safeguards that allow the parent a reasonable opportunity to respond to the evidence offered at the hearing. There is no indication that those procedural safeguards were not present here. Affirmed."

COMMENTS:

The Court of Appeals decision in this case should not be read to mean that, once the permanency plan for a child has been changed to a plan other than reunification, the juvenile court cannot (or should not) consider at a subsequent permanency hearing whether the plan should be changed to reunification. To the contrary, at every permanency hearing, the juvenile court must determine what the permanent plan should be going forward, and that determination -- even it means "continuing" the current permanent plan -- must be supported by the predicate findings required for each plan under ORS 419B.476(5)(c) through (f), which include a finding whether, under circumstances existing at the time of the hearing, the child can be placed safely with a parent. In this case, based on the evidence presented at the permanency hearing, the juvenile court: (a) considered and rejected the mother's request to change the APPLA plan to

reunification and (b) determined that the APPLA plan should be changed to adoption. The juvenile court judge in this case used a JCIP Model Permanency Judgment Form to enter a judgment that included all of the required predicate findings.

23. *Dept. of Human Services v. W.H.F.*, 254 Or App 298, 295 P3d 78 (2012), rev den 353 Or 428 (2013) (affirming a permanency judgment continuing in effect the permanency plan of adoption and explaining that, in a permanency hearing, "the requirement for active efforts under the ICWA [and ORS 419B.476(2)(a)] applies only when the case plan [in effect] at the time of the hearing is to reunify the family")

THE COURT OF APPEALS' SUMMARY:

Father, the biological parent of an Indian child, appeals from a judgment of the juvenile court continuing a permanency plan of adoption. He contends that the court erred in failing to require DHS to show "active efforts" to provide remedial services and rehabilitative programs designed to prevent breakup of the Indian family, as required by ORS 419B.476(2)(a). He also makes a number of procedural arguments, including the unpreserved contention that the juvenile court's failure to issue an order within 20 days after the permanency hearing, as required by ORS 419B.476(5) requires reversal. Held: In the context of the permanency phase of a dependency proceeding, where the permanency plan at the time of the hearing is not reunification but adoption, the "active efforts" requirement of ORS 419B.476(2)(a) does not apply. The juvenile court's failure to issue an order within 20 days of the hearing, although error, is harmless on this record. Affirmed.

COMMENTS:

In addition to rejecting father's "active efforts" argument, the Court of Appeals also rejected his contention that the permanency judgment must be reversed because it was not entered within 20 days of the permanency hearing as required by ORS 419B.476(5). As the Court of Appeals explained:

ORS 419B.476(5) requires that the juvenile court enter an order "within 20 days after the permanency hearing." In this case, the juvenile court entered its order 27 days after the permanency hearing. Citing *Dept. of Human Services v. E. L.*, 237 Or App 206, 238 P3d 438 (2010) (permanency judgment reversed on state's concession of error as result of four-month delay in entry of permanency judgment), father asserts that the error requires reversal. The state responds that the issue of the timeliness of the order was not preserved and that, assuming the court nonetheless may address the issue, the error does not require reversal."

It is undisputed on appeal that the permanency hearing record closed on December 21, 2011. The court sent an opinion letter to the parties on December 23, 2011. The letter included the essential elements of a permanency order, including the court's findings and determinations that DHS had complied with the statutes governing S's placement and had made reasonable efforts to finalize the permanency plan of adoption. The court entered its order on January 17, 2012, seven days late. The court's failure to enter the order within 20 days of the close of the hearing record was not a contention that father had an opportunity to preserve. Thus, we conclude that the constraints of preservation and plain error review are inapplicable. See *State ex rel DHS v. M. A.* (A139693), 227 Or App 172, 182, 205 P3d 36 (2009). However, although we

conclude that the juvenile court's failure to enter the order within 20 days was error, see *E. L.*, 237 Or App at 208, we decline to reverse this case on that ground. Father has not claimed any prejudice as a result of the seven-day delay, nor could he on this record. The error was harmless. See *State ex rel Juv. Dept. v. Kuhn*, 137 Or App 275, 276, 904 P2d 177 (1995) (even assuming the existence of a remedy for the court's failure to comply with the statute, parents did not show prejudice from the court's failure to enter the order within 20 days).

254 Or App at 305.

24. Dept. of Human Services v. I.J.R., 253 Or App 603, 292 P3d 566 (2012)
(reversing juvenile court's permanency judgment appointing the child's grandparents as guardians because the juvenile court failed to follow the procedures required by ORS 419B.366(1) through (4), failed to issue letters of guardianship, and erred in failing to provide for visitation with the child's half-sibling)

THE COURT OF APPEALS' PER CURIAM OPINION:

In this unusual juvenile dependency case, child I. J. R. appeals in the wake of her parents' relinquishment of their parental rights; the juvenile court's dismissal of child's commitment to DHS custody; and the court's appointment of child's grandparents, her long-term caregivers and intervenors in the case, as her guardians under ORS 419B.366. DHS was going to remove child from grandparents and place her with the foster family that cared for her half-brother, with the intention that the family would adopt both children, but the court concluded that a durable guardianship with grandparents was in child's best interests.

Child appeals (1) a permanency judgment dismissing her commitment to DHS custody and appointing grandparents as guardians, and (2) the juvenile court's order denying child's motion to hold a hearing and to enter findings of fact as to grandparents' guardianship. Child's court appointed special advocate (CASA) disagreed with child's initial position on appeal, contending that the juvenile court correctly concluded that guardianship with grandparents was best for child. Since oral argument, child has changed her position and now agrees that it is in her best interest to remain with grandparents. She has withdrawn her first four assignments of error concerning DHS's custody and her eighth assignment concerning a hearing and findings as to the guardianship. The CASA has no objection. Thus, we address child's three remaining assignments concerning the guardianship and visitation with her half-brother.

In her fifth assignment, child contends that the juvenile court's appointment of grandparents as guardians is defective because the court failed to follow the necessary statutory procedures to establish a guardianship, as required by ORS 419B.366. The CASA concedes that the juvenile court did not follow the necessary statutory procedures in ORS 419B.366(1) through (4) and that the matter should be remanded so that the juvenile court can properly establish and, as noted below, formalize the guardianship. We agree that the court erred and accept the CASA's concession.

In her sixth assignment, child contends that the trial court erred in failing to issue letters of guardianship pursuant to ORS 419B.367. In her answering brief, the CASA contended that issuance of letters of guardianship pursuant to ORS 419B.367 should be left to the discretion of

the juvenile court, but she now concedes that we should remand to allow the juvenile court to issue letters of guardianship. We agree with child's and the CASA's positions that the court should issue letters of guardianship to grandparents. See ORS 419B.367(1) ("Upon granting a motion for guardianship under ORS 419B.366 * * * the court shall issue letters of guardianship to the guardian.").

In her seventh assignment, child contends that the juvenile court erred in refusing to order visitation with her half-brother and that preservation of that relationship is important. The CASA now concedes that the juvenile court's denial of child's request for visitation was in error and requests that we remand for entry of an order for visitation between child and her half-brother. We agree and accept the CASA's concession. Reversed and remanded.

25. Dept. of Human Services v. J.N., 253 Or App 494, 291 P3d 765 (2012) (reversing permanency judgment changing the permanency plan for the child from reunification to guardianship because the evidence in the record did not support the juvenile court's finding that the child's "placement with father within a reasonable period of time would likely cause [her] 'severe mental and emotional harm'")

THE COURT OF APPEALS' SUMMARY:

Father appeals from a juvenile court order denying his motion to dismiss jurisdiction over child and a permanency judgment that changed child's permanency plan to guardianship. Father entered child's life when she was eight years old and had been in foster care for two years in a placement with her half-siblings. Initially, the court established jurisdiction as to father based on father's admission that he did not have a relationship with child that would allow him to act protectively towards her and that he lacked a custody order. After father had visited with child twice for a period of several days over the course of a year, father moved to dismiss jurisdiction, asserting that the factual basis for jurisdiction no longer existed. He argued that he had established a relationship with child and that the mere lack of a custody order was not an appropriate basis to continue jurisdiction. The juvenile court denied his motion and held a permanency hearing at which it changed the permanency plan to guardianship against the wishes of father and the recommendation of the Department of Human Services (DHS). The court found that child could not be reunified with father within a reasonable time, and thus a change of plan to reunification was not appropriate, because placement with father would cause child "severe mental and emotional harm." On appeal, father reprises his arguments before the juvenile court as to jurisdiction and contends that the court erred by not changing the plan to reunification. DHS argues that jurisdiction was proper, but the court erred by not changing the plan to reunification. Child contends that jurisdiction was proper and the change of plan to guardianship was appropriate. Held: The court did not err in denying father's motion to dismiss jurisdiction given that the combination of child's particular emotional needs, her background, and the lack of a parent-child relationship between child and father created a reasonable likelihood of harm to child's welfare. However, the court erred by changing the permanency plan to guardianship because there was not evidence in the record to support the basis of that decision--that child could not be reunified with father within a reasonable time because

reunification would cause "severe mental and emotional harm" to child. Order denying motion to dismiss jurisdiction affirmed; permanency judgment reversed and remanded.

COMMENTS:

The juvenile court's decision to change the permanency plan in the case from reunification to guardianship was based on that court's conclusions -- pursuant to ORS 419B.476(2)(a) -- that the father had made insufficient progress and the child "cannot be reunited with her father at this time **or within a reasonable period of time** because to do so would very likely cause her **severe mental or emotional harm.**" (Slip opinion at 12) (emphasis added). The Court of Appeals explained, as follows, why it reversed the permanency judgment:

[T]he record does not support the juvenile court's determination that **placement with father within a reasonable time would cause [the child] severe mental and emotional harm.** Although there was evidence that any transition would be very difficult and would require services for [the child] and father, that prospect is not unlike the circumstances in most dependency cases where a change of placement will be difficult for the child. Nothing in this record shows a reasonable likelihood that placement with the father within a reasonable time would cause [the child] to suffer effects that rise to the level of 'severe mental and emotional harm.' Strickland's assessment, particularly when viewed in light of the father's psychological evaluation, does not support [the] juvenile court's findings of 'severe mental and emotional harm.' Because that finding is the basis of the court's determination that guardianship was the appropriate permanency plan and that return to the father was not appropriate, we reverse the permanency judgment.

253 Or App at 509-10 (emphasis added).

Notably absent from the Court of Appeals' analysis (and, apparently, from that of the juvenile court judge as well) is any discussion of what a "reasonable time" is for this child, or whether there is sufficient evidence in the record to permit a reasonable-time determination. "Reasonable time" has a specific meaning and application in juvenile dependency proceedings. ORS 419A.004(20) defines "[r]easonable time" to mean "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," and, in *State ex rel SOSCF v. Stillman*, 333 Or 135, 146, 35 P3d 490 (2001), the Supreme Court explained that the reasonable-time "inquiry is child-specific" and "calls for testimony in psychological and developmental terms regarding the particular child's requirements." A determination of what a "reasonable time" is for a child is a necessary prerequisite for deciding what the permanent plan should be in a case like this one, where: (a) the current plan is reunification; (b) DHS has made the required reasonable/active reunification efforts; and (c) the parent has not made sufficient progress to make it possible for the child to safely return home. In such a case, the juvenile court cannot order the plan changed from reunification to another plan, *unless* the court first addresses the question whether "further [reunification] efforts will make it possible for the [child] to safely return home *within a reasonable time*," and determines that the answer to that question is "no," see ORS 419B.476(4)(c) and (5)(c); ORS 419B.476(5)(d), (e) and (f) (setting out the predicate findings required to support determination of a permanent plan other than reunification), and, the juvenile court cannot answer the question without knowing what a "reasonable time" is for the child in the case.

26. Dept. of Human Services v. M.M.B., 253 Or App 431, 290 P3d 891 (2012), rev den 353 Or 280 (2013) (affirming permanency judgment changing the permanent plan from reunification to guardianship and rejecting mother's argument that the juvenile court erred in denying her motion to dismiss wardship)

THE COURT OF APPEALS' SUMMARY:

Mother appeals the juvenile court's order denying dismissal of jurisdiction and wardship over her son, A, and the court's permanency judgment, changing the permanency plan from reunification to guardianship. First, mother contends that the wardship had to be dismissed because she adequately addressed the two bases for the court's jurisdiction; otherwise, she lacked notice as to what she must do to prevent the state from continuing wardship. Second, mother challenges the legal grounds for the permanency judgment, arguing that, contrary to the juvenile court's conclusions, the evidence showed she had made sufficient progress towards reunification and A could safely return home. Third, mother contends that the judgment is defective under ORS 419B.476 for lack of one finding and insufficient specificity in another. Held: Based on the allegations of the amended petition, the findings in the jurisdictional judgment, and the Action Agreement, mother was on notice that she needed to address her alcohol abuse as well as her assaultive behavior and anger management problem, and the juvenile court did not err in determining that mother's anger problem continued to be a basis for jurisdiction and wardship. And the record supports the juvenile court's implicit finding that mother's problem was significant enough to affect A's psychological adjustment and to prevent his return home within a reasonable time; thus, the court did not err in changing the permanency plan from reunification to a durable guardianship. Finally, as to the permanency judgment, the juvenile court did make the necessary findings under ORS 419B.476 as to why continued care of A was necessary, and the permanency judgment was not defective for lack of specificity. Affirmed.

EXCERPT FROM OPINION:

An examination of the judgment indicates that the court did make the necessary findings as to why continued care of A was necessary. Among other things, the juvenile court was required to state findings specified in ORS 419B.476(2) in the permanency judgment. ORS 419B.476(5)(a). In part, ORS 419B.476(2) 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.'

The court found that DHS had made reasonable efforts to reunify the family, as specified in ORS 419B.476(2)(a), and provided [in check-box findings] a brief description of DHS's efforts towards reunification, ORS 419B.476(5)(a), namely, housing assistance, parent training, family counseling, individual counseling, and supervised visitation with the child. The court also found that mother had not made 'sufficient progress towards meeting the expectations

set forth in the * * * case plan, and the child cannot be safely returned to mother's care,' as required by ORS 419B.476(2)(a) and (5)(a).

The juvenile court found that the reason continued care was necessary was because A could not be safely returned home to mother within a reasonable time. In the court's judgment, the court checked a box stating:

'The case plan of reunification should be changed to a different permanent plan, because: notwithstanding the reasonable reunification efforts of DHS, the child cannot be safely returned to mother's [and] father's care at the time of the hearing, and the evidence does not support a determination under ORS 419B.476(4)(c) and (5)(c) that further efforts by the agency will make it possible for the child to safely return home within a reasonable time.'

(Emphasis added.) The court also checked the box stating that the new permanent plan is changed to guardianship and that '[p]lacement of the child with a parent is not appropriate, because * * * despite the reasonable reunification efforts of DHS, the child cannot be safely returned to a parent within a reasonable time.' And with regard to whether adoption would be appropriate, the court checked the box stating, 'Adoption is not appropriate, because the child's age[,] health and safety needs[,] sibling attachment(s) [, and] attachment to a parent make adoption unlikely and/or inappropriate.' Thus, contrary to mother's argument, the court's findings addressed 'why neither placement with parents nor adoption is appropriate,' as required by ORS 419B.476(5)(e).

253 Or App at 444-45.

27. Dept. of Human Services v. H.P., 252 Or App 346, 287 P3d 1175 (2012) (reversing a permanency judgment changing the permanent plan for three children from reunification to adoption because the juvenile court's judgment failed to include "at least one of the required statutory determinations under ORS 419B.476(5)")

THE COURT OF APPEALS' SUMMARY:

In this juvenile dependency case, father appeals a judgment changing the permanency plan for three of his children from reunification to adoption. He also appeals a subsequent judgment continuing the permanency plan. Father argues that, as to both judgments, the juvenile court erred in failing to include required statutory determinations under ORS 419B.476(5). He also contends that the court erred in determining that no compelling reason existed to defer filing a termination petition, ORS 419B.498(2), and that the court erred in changing the plan from reunification to adoption. Father concedes that, with respect to the court's failure to include the statutory determinations, he did not raise these issues below, and the Department of Human Services contends that the judgments should be affirmed for that reason. Held: The judgment changing the permanency plan from reunification to adoption fails to include at least one of the required statutory determinations under ORS 419B.476(5). The January 11, 2012, and January 25, 2012, judgments reversed and remanded.

COMMENTS:

1. The permanency judgment did not include a "brief description" of DHS's reunification "efforts." ORS 419B.476(5)(a) requires that a permanency judgment include,

among other things, "a brief description of the efforts the department has made with regard to the case plan in effect at the time of the permanency hearing," which, in the *H.P.* case, was reunification. The judgment form used by the juvenile court in *H.P.* appears to be a fairly recent version of the JCIP Model Form JF5, with some modifications. Like the current JCIP Model Form JF5, the judgment form in *H.P.* includes (on page 4) a number of "check box" findings options for the required "brief description" of the DHS reunification "efforts" for each parent, BUT, none of those boxes was checked. Instead, as the Court of Appeals explains in its opinion, after making a finding in the judgment that DHS had made reasonable efforts to reunify the family during the period under review,

[t]he [juvenile] court "then checked another box stating, '*Fact Findings attached and incorporated herein.*' No such document was attached to the judgment; however, the [juvenile] court admitted a DHS exhibit at the hearing containing two copies of a one-page document titled "Fact Findings" that lists the services and assistance that DHS provided to the family.

The Court of Appeals concluded that the DHS exhibit did not satisfy the requirement that the judgment include findings describing DHS's reunification efforts because: (1) the juvenile court's judgment stated that those findings were "attached" to the judgment, but they were not; and (2) the juvenile court's judgment did not state that the court "adopt[ed]" the contents of the DHS exhibit as the court's findings. Accordingly, the permanency judgment did not include the "brief description" of DHS efforts required by ORS 419B.476(5)(a), and that deficiency constituted reversible error, notwithstanding that the appellant father had not made that objection in the juvenile court.

By using the "check box" findings options on the JF5 Model Form for the required "brief description" of the DHS reunification "efforts" -- instead of relying on findings that are "attached," "adopted," or "incorporated by reference" -- juvenile courts can ensure that the required findings are in the judgment. If juvenile courts choose to incorporate attached findings, the courts must be sure that the documents are attached, and, if courts choose to adopt the contents of other documents as the court's findings, they should be aware of the following distinctions explained by the Court of Appeals in its opinion in *H.P.*:

We held in *Dept. of Human Services v. H. R.*, 241 Or App 370, 373-75, 250, 21 P3d 427 (2011), that a permanency judgment adopting an unattached DHS court report as its written findings was sufficient to comply with ORS 419B.476(5)(a). The juvenile court found that DHS had made reasonable efforts regarding the reunification plan under ORS 419B.476(5)(a); the court stated that it was adopting the "agency's report/petition/probable cause statement dated 5-26-10 as to the Court's written findings for this section." *Id.* at 372 (internal quotation marks omitted). Although the DHS report was not attached to the judgment, it had been admitted as an exhibit at the permanency hearing and was contained in the trial court file. *Id.* We concluded that the judgment was adequate because "there [was] no ambiguity about which report the court adopted as its written findings." *Id.* at 375.

Conversely, we have held that a permanency judgment did *not* comport with the requirements of ORS 419B.476(5) when it incorporated by reference "attached report(s)," no reports were attached to the judgment, and it was impossible to determine which reports the court intended to incorporate. *State ex rel Dept. of Human Services v. T. N.*, 230 Or App 575, 577, 216 P3d 341 (2009).

Three final observations on this first issue: (1) the juvenile court -- not the "attached" or "adopted" document -- must make the required findings. (2) DHS's "reasonable/active efforts" lists often include efforts that do not constitute reunification efforts -- e.g., "phone call to father's

attorney.” (3) In the *H.P.* case, an AAG represented DHS at the permanency hearing, and (according to the Court of Appeals’ opinion) at the conclusion of the permanency hearing, the juvenile court “ordered DHS to prepare the permanency judgment.” No matter who prepares the judgment, the juvenile court can and should make sure that it says and does what the court found and ordered.

2. The permanency judgment did not include the juvenile court’s determination whether any of the circumstances in ORS 419B.498(2) is applicable. ORS 419B.476(5)(d) provides that, if the juvenile court determines that “the permanency plan for the [child] should be adoption,” the permanency judgment “shall include” “the court’s determination whether one of the circumstances in ORS 419B.498(2) is applicable.” There are THREE different “circumstances” identified in ORS 419B.498(2) – *i.e.*, those described in 419B.498(2)(a), those described in 419B.498(2)(b), and those described in 419B.498(2)(c). In order to determine whether “one” of the three applies, the juvenile court must consider each of them. If the court determines that one of them applies in a case, adoption is not an appropriate plan. If the court determines that none of them applies, the court is authorized to make adoption the plan. Either way, as several Court of Appeals opinions have confirmed in the past two years, the judgment must show that the court actually made the required determination(s). Many juvenile courts, AAG’s, and appellate lawyers mistakenly assume that the only “circumstances in ORS 419B.498(2)” are the “compelling reasons” circumstances described in subsection (2)(b). That appears to be what happened in the *H.P.* case.

The relevant section of the permanency judgment form used by the juvenile court in the *H.P.* case made these findings, which did not include all of the findings required by ORS 419B.476(5)(d):

[X] ADOPTION

None of the circumstances described in ORS 419B.498(2) applies, because: the child is not currently being cared for by relative in a placement that is intended to be permanent, as provided in ORS 419B.498(2)(a), there is not a “compelling reason” within the meaning of that term in ORS 419B.498(2)(b) for determining that filing a petition to terminate the parent’s/parents’ parental rights would not be in the child’s best interests, and the circumstances described in ORS 419B.498(2)(c) are not present. Additional related findings: _____

In other words, although the judgment states that “None of the circumstances described in ORS 419B.498(2) applies,” it appears that the court considered and excluded only the “compelling reason” circumstances of subsection (2). For that reason, the judgment does not include the findings required by ORS 419B.476(5)(d).

28. Dept. of Human Services v. D.L.H., 251 Or App 787, 284 P3d 1233, disposition on appeal modified on reconsideration 253 Or App 600, 292 P3d 565 (2012), rev den 353 Or 445 (2013) (affirming in part and reversing in part the "disposition/permanency" judgment changing the permanent plan for the two children from reunification to adoption because DHS failed to make the "active" reunification efforts required in ICWA cases)

THE COURT OF APPEALS' SUMMARY:

This is a dependency case in which mother and father separately appeal the combined disposition and permanency judgment of the juvenile court changing the permanency plan of the children J and A, from reunification to adoption. In those disposition/permanency judgments, the juvenile court determined that the Department of Human Services (DHS) had made reasonable efforts to reunify J with mother and active efforts to reunify A, an Indian child, with mother and father. On appeal, mother first argues that the trial court erred in ordering the initial permanency plan for the children to be adoption without first ordering reunification. Additionally, mother argues that it was error for the juvenile court to conclude that the children could not be returned to her custody within a reasonable time because her prison release date was within four months of the entry of judgment. Finally, mother and father both argue that the juvenile court erred in concluding that DHS had made "active efforts" to reunify A with the family, as the Indian Child Welfare Act (ICWA) requires, and mother also argues that DHS failed to make "reasonable efforts" to return J to her home, as Oregon law requires. Held: The record does not support mother's contention that there was never a case plan for reunification, and the juvenile court followed the statutory requirements for making findings following a dispositional hearing as to mother. The record supports the trial court's conclusions that mother and her children could not be reunified within a reasonable time. DHS made reasonable efforts to reunify J with mother and active efforts, as required by ICWA, to reunify A with mother. However, DHS failed to make active efforts to reunify A with father.

EXCERPT FROM OPINION:

[T]he record does not show that DHS made any effort to help father act appropriately as a parent, *i.e.*, offer father parenting programs while in prison. Indeed, the Comanche Nation requested that father complete parent training, if available, and DHS reiterated that request to the court. To the extent that DHS contends that father's opposition to that request was a sufficient basis for the juvenile court to conclude that DHS had made active efforts to reunify A with him, we reject that contention. *Cf. Woodruff*, 108 Or App at 357 (DHS satisfied the active efforts requirement under ICWA for an incarcerated father who refused to participate in treatment programs DHS offered because he did not believe he had a problem that required treatment). DHS misconstrues the record. Father did not refuse to attend parenting training, as did the father in *Woodruff*. Rather, he objected to the court ordering him to attend. His attorney told the court that "if there is parent training available to him certainly he could choose to take advantage of that." The record is silent concerning DHS's efforts to provide parent training services and whether those services were available to father. DHS's disposition report notes that DHS spoke to father's prison counselor but, unlike DHS's discussion with mother's prison counselor, there is no evidence regarding the topic of discussion. There was no testimony during the permanency hearing or in the record explaining whether DHS and father's DOC prison counselor discussed the availability of parenting programs. The only notes concerning father state "it is unknown at this time how much progress [father] is making as he is currently incarcerated at Snake River Correctional Institution.

We cannot ascertain from the juvenile court's letter opinion or from the record whether DHS or DOC has offered father any parental-training classes, or any other rehabilitative treatment programs to help father learn parenting skills. Accordingly, we conclude that DHS failed to make active efforts to reunify father with [the child].

251 Or App at 804.

DEPENDENCY

Termination-of-Parental-Rights Proceedings

29. Dept. of Human Services v. F.L.B., 255 Or App 709, 298 P3d 626 (2013) (affirming the juvenile court's judgment terminating the father's and mother's parental rights and discussing in detail the "reasonable time" considerations for the children)

THE COURT OF APPEALS' SUMMARY:

Mother and father appeal judgments terminating their parental rights to two children. The juvenile court first took jurisdiction over those children after father was accused of sexually abusing his 13-year-old stepdaughter, who is mother's daughter and the half sister of the children involved in this case. Father was convicted of multiple charges related to the sexual abuse and is scheduled to be released from prison in 2050. Mother was convicted of criminal mistreatment and of violating an official's duty to report child abuse, both related to her failure to immediately report father's abuse. In addition, mother was later convicted of two counts of perjury associated with her testimony at a hearing related to the charges against father. Mother has been diagnosed with several mental conditions, including a personality disorder with dependent and antisocial features. Evidence at the termination trial showed that mother had suspected for months that father had been abusing her daughter and did nothing to stop it. When her daughter eventually confirmed the abuse, mother placed part of the blame for the abuse on the child and failed to take steps to help her deal with the long-term effects of the abuse. Mother disclosed the abuse to a coworker but begged her not to tell anyone because she feared that her children would be taken away from her. Mother later told a police officer that she had not reported the abuse because she did not want to lose her children and did not want father to get in trouble. A psychologist who examined mother testified that mother will always put her own dependency needs above the needs of her children, that she will be attracted to controlling and manipulative people, that she is unlikely to recognize when other people present a danger to her children, and that her personality disorder is not amenable to treatment. Held: The Court of Appeals affirmed the termination of father's parental rights without discussion. The court also affirmed the termination of mother's rights based on her persistent inability or unwillingness to accept any responsibility for having failed to protect her daughter and her

inability to recognize risks that other people pose to her children. The court concluded that mother's inability to protect her children is seriously detrimental to the children involved in this case, even though those children have not themselves been abused. Affirmed.

30. Dept. of Human Services v. K.L.W., 253 Or App 219, 288 P3d 1030 (2012), rev allowed 353 Or 208 (2013) (construing and applying for the first time the statutes governing the appointment of guardians *ad litem* in dependency proceedings and affirming a TPR judgment to which the father's guardian *ad litem* had stipulated)

THE COURT OF APPEALS' SUMMARY:

Father appeals the juvenile court's corrected order appointing a guardian ad litem to represent him, ORS 419B.231, and stipulated judgment terminating his parental rights as to his daughter on the grounds of unfitness, ORS 419B.504. Father advances two assignments of error. First, father contends that the juvenile court erred in appointing the guardian ad litem because he was able to properly give direction and assistance to his attorney on decisions related to his termination proceeding. Second, father contends that, because the appointment of a guardian ad litem was unnecessary, the juvenile court erred in allowing the guardian ad litem to stipulate to the judgment terminating his parental rights; father also argues that in doing so, the court violated his due process right to fundamental fairness. Held: The court did not err in appointing a guardian ad litem for father. Sufficient evidence supports the court's finding that father's disability rendered him unable to adequately direct and assist his counsel. Given that holding, and because father does not dispute that, once appointed, the guardian ad litem had the authority to stipulate to the termination, the Court of Appeals affirmed the termination judgment. And, father's due process argument cannot be reviewed on appeal because he does not further develop how he was denied due process once the guardian ad litem was properly appointed. Affirmed.

THE SUPREME COURT'S SUMMARY OF THE ISSUES ON REVIEW:

On review, the issues are:

(1) Did the trial court err in determining that father needed a guardian *ad litem* in the termination of parental rights proceeding involving his daughter, when the court and his attorney determined that he understood the mechanics of the trial process and his attorney argued that she could adequately direct her efforts in preparing for and conducting the termination trial?

(2) If so, did the trial court err in allowing the guardian *ad litem* to stipulate to termination of father's parental rights when a guardian allegedly was not necessary according to the appropriate legal standards, and did that violate father's right to due process under the Fourteenth Amendment to the United States Constitution?

DELINQUENCY Proceedings

**31. State of Oregon v. A. J. C., 254 Or App 717, 295 P3d 1157 (2013)
(affirming judgment of jurisdiction and concluding that the juvenile court correctly denied the youth's motion to suppress)**

THE COURT OF APPEALS' SUMMARY:

In this juvenile delinquency proceeding, youth appeals from a judgment finding him within the jurisdiction of the juvenile court for conduct that, if committed by an adult, would constitute possession of a gun in a public building, ORS 166.370, unlawful possession of a gun, ORS 166.250, unlawful use of a weapon, ORS 166.220, and menacing, ORS 163.190. Youth asserts that the juvenile court erred by denying his motion to suppress a handgun and ammunition found during a search of his backpack by the school principal, because that search violated youth's rights under Article I, section 9, of the Oregon Constitution. Held: The school principal had reasonable suspicion, based on specific, articulable facts, to believe that youth possessed a firearm on school grounds. Accordingly, the principal's search of youth's backpack did not violate youth's rights under Article I, section 9. Affirmed

EXCERPT FROM OPINION:

Warrantless searches of students without probable cause or some other exception to the warrant requirement, such as consent, are permissible when a school official reasonably suspects, based on specific and articulable facts, that the student is in possession of something that poses an immediate threat to the student or others. *M. A. D.*, 348 Or at 392-93; *State v. B. A. H.*, 245 Or App 203, 210, 263 P3d 1046 (2011). In developing reasonable suspicion, "a school official may not rely on generalizations about [a student's activity] or on information that is not specific or current." *M. A. D.*, 348 Or at 393. In this case, youth did not consent to the search of the backpack, and the trial court did not conclude that Smith had probable cause to believe that youth had a gun inside his backpack so as to support the issuance of a warrant to search the backpack. Thus, the dispositive question is whether, before searching the backpack, Smith reasonably suspected, based on specific and articulable facts, that the backpack contained a weapon that posed an immediate threat of harm to V or others at the school.

Applying the Supreme Court's analysis in *M. A. D.*, we answer that question affirmatively. V told Glader that youth had threatened her on the evening of September 22. On the morning of September 23, Glader told Smith that youth had threatened V and had also specified the manner in which he would harm V; that is, by bringing a gun to the school to shoot her. Although Smith testified that youth's threat was "something that was outside the realm of what [he] thought could happen," he testified that, it was "not an option in [his] job to disbelieve [the threat] until it's--till [he found] out the information." Moreover, although Smith did not personally know V, he had worked closely with Glader, from whom he learned of youth's threat. In its totality, that information was sufficient for Smith to reasonably suspect that youth had brought a gun to the school for the purpose of harming V or others.

254 Or App at 722-23.

**32. State of Oregon v. D.M.T., 254 Or App 631, 295 P3d 175 (2013)
(reversing the jurisdictional judgment because the juvenile court erred in concluding that it lacked authority to amend the allegations of the delinquency petition after entry of an order accepting the youth's admissions)**

THE COURT OF APPEALS' PER CURIAM OPINION:

In this juvenile delinquency case, youth appeals a judgment finding him to be within the jurisdiction of the juvenile court based on his admissions, pursuant to a plea agreement, to two counts of attempted sexual abuse in the first degree. Under the plea agreement, other counts in the petition were dismissed. After the order accepting youth's admissions was entered, but before final disposition of the petition, youth filed a motion to amend both the petition and the order accepting his jurisdictional admissions "to replace [the] Attempted Sex Abuse I charges in Counts IV and V with charges of Attempted Sex Abuse III, a Class B misdemeanor." The juvenile court ultimately denied the motion, concluding that the court "d[id] not have the authority" to amend the petition and jurisdictional admissions.

Youth assigns error to that ruling on appeal, arguing that the juvenile court has discretion under the juvenile code to dismiss or amend a petition and to set aside or modify its orders even after a youth has admitted to allegations in the petition and the court has accepted those admissions. The state concedes that the juvenile court erred in concluding that it lacked authority to consider youth's motion. We agree and accept the state's concession. See ORS 419C.261(1) (providing that "[t]he court, on motion of an interested party or on its own motion, may at any time direct that the petition be amended"); ORS 419C.610(1) (providing, subject to specified exceptions, that "the court may modify or set aside any order made by it upon such notice and with such hearing as the court may direct"). Accordingly, we reverse and remand for the juvenile court to consider youth's motion on the merits. Reversed and remanded.